

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
E. Roy Hawkens
Nicholas Tsoulfanidis

In the Matter of

MATTINGLY TESTING SERVICES, INC.

(Molt and Billings, Montana)

Docket No. 30-20836-EA

ASLBP No. 10-905-02-EA-BD01

February 22, 2011

MEMORANDUM AND ORDER

(Accepting Proposed Settlement and Dismissing Proceeding)

1. On September 2, 2010, the NRC Staff issued an Order Revoking License (Effective Immediately) to Mattingly Testing Services, Inc. ("MTS").¹ On the same day, the NRC Staff issued an Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) for a period of seven years to Mr. Mark Ficek, president and owner of MTS.²

2. On September 22, 2010, Mr. Ficek requested a hearing on both orders,³ while Ms. Dayna Thompson requested a hearing on the order issued to MTS and also requested that

¹ Order Revoking License (Effective Immediately) EA-10-100 (Sept. 2, 2010) (ADAMS Accession No. ML102440234) [hereinafter MTS Order]; In the Matter of Mattingly Testing Services, Inc. Molt, MT; Order Revoking License (Effective Immediately), 75 Fed. Reg. 55,360 (Sept. 10, 2010).

² Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-10-028 (Sept. 2, 2010) (ADAMS Accession No. ML102440353) [hereinafter Ficek Order]; In the Matter of Mark M. Ficek; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 75 Fed. Reg. 55,366, 55,366, 55,369 (Sept. 10, 2010).

³ Emails from Mark Ficek to Vivian Campbell (Sept. 22, 2010) (ADAMS Accession Nos. ML102670716 and ML102670711).

the immediate effectiveness of that order be set aside.⁴

3. On October 6, 2010, this Atomic Safety and Licensing Board (“Board”), established to preside over MTS’s and Mr. Ficek’s enforcement proceedings,⁵ denied Ms. Thompson’s request to set aside the immediate effectiveness of the MTS Order,⁶ but granted Mr. Ficek’s hearing requests.⁷ On October 21, 2010, the Board granted Ms. Thompson’s hearing request and consolidated the proceedings.⁸

4. On November 4, 2010, the parties jointly moved to hold the proceeding in abeyance while they engaged in settlement negotiations in an attempt to resolve both of the Orders without a hearing.⁹

5. On November 9, 2010, the Board issued an Order holding the proceeding in abeyance until such time as the parties reached settlement or informed the Board that settlement was not possible.¹⁰

6. On December 8, 2010, the parties informed the Board that negotiations were ongoing, and stated that a settlement agreement would be filed with the Board before the end of

⁴ Letter from Dayna C. Thompson (Sept. 22, 2010) (ADAMS Accession No. ML102650636).

⁵ Establishment of Atomic Safety and Licensing Board (Sept. 27, 2010) (unpublished).

⁶ Licensing Board Order (Denying Dayna Thompson’s Request To Set Aside the Immediate Effectiveness of the Order Revoking License) (Oct. 6, 2010) at 3-4 (unpublished).

⁷ Licensing Board Order (Granting Hearing Requests, and Scheduling Telephone Prehearing Conference) (Oct. 6, 2010) at 2 (unpublished).

⁸ Licensing Board Order (Granting Dayna Thompson’s Request to Participate in the License-Revocation Phase of the Proceeding as a Party, and Directing Parties to Negotiate a Schedule for Further Proceedings, as Discussed at Prehearing Telephone Conference) (Oct. 12, 2010) at 1-2 (unpublished).

⁹ Joint Motion To Postpone Discovery and Hold Proceedings in Abeyance (Nov. 5, 2010).

¹⁰ Licensing Board Order (Holding the Proceeding in Abeyance) (Nov. 9, 2010) at 3 (unpublished).

February 2011.¹¹

7. On December 9, 2010, the Board issued an Order continuing to hold the proceeding in abeyance, and providing the parties a deadline of noon on February 7, 2011, to reach a settlement.¹²

8. On February 4, 2011, the parties submitted a Joint Motion to Approve the Settlement Agreement and Terminate the Proceeding, to which they attached their Settlement Agreement and proposed Board order.¹³ In the Joint Motion, the parties stated that their Settlement Agreement will achieve the purposes of the NRC enforcement program—to deter noncompliance with regulatory requirements and to encourage prompt, comprehensive corrective actions—without the likely risks and resource costs to both parties in litigating the NRC Staff’s enforcement orders, and that it is in the public interest for the Board to approve the Settlement Agreement and dismiss this proceeding.¹⁴

9. Upon review of the Settlement Agreement, the Board is satisfied that its terms reflect a fair and reasonable settlement of these matters, in keeping with the objectives of the NRC’s Enforcement Policy, and satisfy the requirements of 10 C.F.R. § 2.338(g) and (h). Accordingly, the Settlement Agreement is approved pursuant to 10 C.F.R. § 2.338(i).

10. The September 2, 2010 enforcement orders to MTS and Mr. Ficek are superseded by this Order approving and incorporating the Settlement Agreement.

11. The Settlement Agreement, attached hereto, is incorporated into this Order.

12. Further, in accordance with 10 C.F.R. § 2.203, the public interest does not

¹¹ Letter from Molly Barkman Marsh, Counsel for NRC Staff, to Licensing Board (Dec. 8, 2010).

¹² Licensing Board Order (Continuing To Hold Proceeding in Abeyance) (Dec. 9, 2010) at 3 (unpublished).

¹³ Joint Motion To Approve Settlement Agreement and Terminate Proceedings (Feb. 4, 2011).

¹⁴ Id. at 2.

require additional adjudication of this matter, and, given that all matters required to be adjudicated as part of this proceeding have been resolved, this proceeding is dismissed.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Nicholas Tsoulfanidis
ADMINISTRATIVE JUDGE

Rockville, MD
February 22, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.)	
(Molt and Billings, Montana))	ASLBP No. 10-905-02-EA-BD01

SETTLEMENT AGREEMENT

1. On September 2, 2010, the staff of the U.S. Nuclear Regulatory Commission ("NRC") ("NRC Staff") issued an Order Revoking License (Effective Immediately) to Mattingly Testing Services, Inc. ("MTS").¹
2. As detailed in the MTS Order issued on September 2, 2010, the NRC Staff found that MTS violated several NRC regulations, a Confirmatory Order issued to MTS on March 6, 2009,² and a Security Order.³ Specifically, the NRC Staff found that:
 - a. MTS deliberately violated the MTS Confirmatory Order by knowingly allowing the deadlines in the MTS Confirmatory Order to lapse.
 - b. MTS deliberately violated the IC Order from May 13, 2006, through September 9, 2009, by failing to establish and maintain a prearranged plan with the local law enforcement agency ("LLEA") to respond to any attempt to gain unauthorized access to radioactive materials, as required by the IC Order.

¹ Order Revoking License (Effective Immediately) EA-10-100 (Sept. 2, 2010) (ML102440234) ("MTS Order"); In the Matter of Mattingly Testing Services, Inc. Molt, MT; Order Revoking License (Effective Immediately), 75 Fed. Reg. 55,360 (Sept. 10, 2010).

² Confirmatory Order Modifying License (Effective Immediately) EA-08-271 (Mar. 6, 2009) (ML090700077) ("MTS Confirmatory Order").

³ Order Imposing Increased Controls (Effective Immediately) EA-05-090 (Nov. 14, 2005) (ML053130218) ("IC Order"); In the Matter of All Licensees Authorized To Possess Radioactive Material Quantities of Concern, Order Imposing Increased Controls (Effective Immediately), 70 Fed. Reg. 72,128 (Dec. 1, 2005).

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- c. On March 6, 2007 and October 22, 2009, MTS deliberately provided false information to an NRC inspector and investigator, in violation of 10 C.F.R. § 30.9, by stating that it had established a prearranged plan with the LLEA in accordance with the IC Order.
 - d. On July 4 and 16, 2009, and August 29-30, 2009, MTS failed to implement the IC Order, Appendix B, Section IC-2(c) requirement to have a dependable means to transmit information between and among the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder at all times.
 - e. On June 22, 2009, MTS failed to properly secure a radiographic exposure device for transport, contrary to 10 C.F.R. §§ 20.1802, 34.35(d), and 71.5. As a result, the device fell off the vehicle on a road in Moll, Montana, and it was temporarily lost and recovered by a member of the public.
 - f. On June 22, 2009, MTS willfully violated the immediate reporting requirement for lost radioactive materials, 10 C.F.R. § 20.2201, for the lost radiographic exposure device.
3. Also on September 2, 2010, the NRC Staff issued an order to Mark Ficek, president and owner of MTS, prohibiting him from any involvement in NRC-licensed activities, effective immediately, for a period of seven years from the date of the order.⁴
 4. The Ficek Order contained the NRC Staff's conclusion that Mr. Ficek had violated 10 C.F.R. § 30.10. The Ficek Order also stated that the NRC Staff had determined that

⁴ Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-10-028 (Sept. 2, 2010) (ML102440353) ("Ficek Order"); In the Matter of Mark M. Ficek; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 75 Fed. Reg. 55,366 (Sept. 10, 2010).

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Mr. Ficek violated a Confirmatory Order issued to him on March 6, 2009,⁵ by engaging in NRC-licensed activities while he was prohibited from such activities.

5. The MTS Order provided that all radiographic operations authorized under MTS's license involving the use of NRC-licensed material were suspended, including the use of the license to conduct radiographic operations under reciprocity in an Agreement State. The MTS Order required MTS to transfer possession of all NRC-licensed material within 30 days of the date of the MTS Order.⁶
6. On November 5, 2010, the RSO of MTS informed the NRC Region IV that all of its licensed material had been transferred to the manufacturers of the radiographic exposure devices on November 1, 2010. NRC Region IV inspectors confirmed that all of the devices had been transferred by contacting the manufacturers and by conducting a physical inspection of MTS on November 9, 2010.
7. On September 22, 2010, Mr. Ficek requested a hearing on both Orders.
8. On September 22, 2010, Ms. Dayna Thompson requested a hearing on the MTS Order and also requested that the immediate effectiveness of the MTS Order be set aside.
9. On October 6, 2010, the Atomic Safety and Licensing Board ("Board") denied Ms. Thompson's request to set aside the immediate effectiveness of the MTS Order, but granted Mr. Ficek's hearing requests.
10. On October 21, 2010, the Board granted Ms. Thompson's hearing request and consolidated the proceedings.

⁵ Confirmatory Order (Effective Immediately) IA-08-055 (Mar. 6, 2009) (ML090700068) ("Ficek Confirmatory Order"); In the Matter of Mark M. Ficek; Confirmatory Order (Effective Immediately), 74 Fed. Reg. 11,772 (Mar. 19, 2009).

⁶ On September 23, 2010, by e-mail to Art Howell, Charles Cain, Vivian Campbell, and Elmo Collins, Danny Schroeder, MTS Operations Manager and Radiation Safety Officer ("RSO"), requested relaxation of this requirement in the MTS Order. Mr. Schroeder requested to extend the amount of time allowed for the licensee to remove from its possession all NRC-licensed material acquired or possessed under the license, from 30 days to 60 days (ML102700374). On September 24, 2010, the NRC responded, granting the requested relaxation based upon a determination that there are no immediate safety concerns regarding the storage of the licensed material at the Billings, Montana facility (ML102700226).

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11. On November 5, 2010, the parties moved the Board to hold the proceeding in abeyance while they engaged in settlement negotiations in an attempt to resolve both of the Orders without a hearing. On November 9, 2010, the Board issued an Order holding the proceeding in abeyance until such time as the parties reached settlement or informed the Board that settlement was not possible.
12. On December 8, 2010, the parties informed the Board that negotiations were ongoing, and stated that a settlement agreement would be filed with the Board before the end of February 2011. On December 9, 2010, the Board issued an Order continuing to hold the proceeding in abeyance, and giving the parties a deadline of noon on February 7, 2011, to file a settlement agreement.
13. The NRC Staff, Mr. Ficek, and Ms. Thompson have engaged in negotiations and agree that it is in the public interest to terminate this proceeding without further litigation subject to the following stipulations.

THE PARTIES AGREE AND STIPULATE AS FOLLOWS:

14. None of the parties to this agreement admit facts or agree to conclusions of law other than those specifically stipulated herein.
15. The parties agree to disagree on the conclusions of fact and law contained in the MTS Order and Ficek Order.
16. MTS was required to comply with the MTS Confirmatory Order.
17. MTS did not comply with all requirements of the MTS Confirmatory Order in a timely manner.
18. Mr. Ficek and Ms. Thompson maintain that all requirements of the Confirmatory Order were met and that procedures implemented exceeded the requirements of the Order.
19. MTS was required to comply with the IC Order.
20. MTS did not have an LLEA plan in place by March 6, 2007, as required by the IC Order.

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21. On July 4 and 16, 2009, and August 29-30, 2009, an MTS radiographer failed to ensure that a radiography truck had a dependable means to transmit information between and among the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder at all times, thus placing MTS in violation of IC Order, Appendix B, Section IC 2(c).
22. MTS was required to provide the NRC information that was complete and accurate in all material respects, in accordance with 10 C.F.R. § 30.9.
23. The NRC Staff maintains that the information Mr. Ficek provided to the NRC on behalf of MTS on March 6, 2007, and October 22, 2009, was not complete and accurate in all material respects.
24. Mr. Ficek and Ms. Thompson maintain that material misstatements were not made, that Mr. Ficek did believe that the appropriate arrangement with the LLEA was in place, and that upon learning that it was not developed a new plan with the appropriate LLEA and notified the NRC of the change.
25. MTS was required to comply with 10 C.F.R. §§ 20.1802, 20.2201, 34.35, and 71.5.
26. On June 22, 2009, MTS failed to properly secure a radiographic exposure device for transport, contrary to 10 C.F.R. §§ 20.1802, 34.35(d), and 71.5.
27. Mr. Ficek and Ms. Thompson maintain that the exposure device was lost on MTS's property and not in the public domain as the Order states.
28. On June 22, 2009, MTS failed to comply with the immediate reporting requirement for lost radioactive materials, 10 C.F.R. § 20.2201, for the lost radiographic exposure device.
29. Mr. Ficek and Ms. Thompson maintain that the RSO caused MTS to violate 10 C.F.R. § 20.2201, and not Mr. Ficek as the Order states.
30. Mr. Ficek and Ms. Thompson maintain that none of these violations were willful or deliberate.

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31. MTS and Mr. Ficek have not had possession of NRC-licensed material since November 1, 2010.

IN CONSIDERATION OF THE ABOVE, THE NRC STAFF, MR. FICEK, AND MS. THOMPSON AGREE TO THE FOLLOWING IN SETTLEMENT OF EA-10-100, AND IA-10-028:

32. During settlement negotiations, the parties agreed that Mr. Ficek, as sole shareholder of MTS, could continue to own MTS's radiographic exposure devices, which are and were stored at the manufacturers' facilities, until settlement was approved or the hearing resumed. The Ficek Order prohibits Mr. Ficek from NRC generally licensed activities, which includes ownership of source and byproduct material pursuant to 10 C.F.R. §§ 31.9 and 40.21.
33. The NRC will not take enforcement action against Mr. Ficek, as sole shareholder of MTS, for owning radiographic exposure devices he does not possess during settlement negotiations.
34. Mr. Ficek, as sole shareholder of MTS, may sell the radiographic exposure devices currently owned by MTS to an NRC licensee in exchange for a non-controlling share of an NRC licensee. Mr. Ficek may not own a controlling share and/or interest of an NRC licensee.
35. The NRC Staff's main concern is with the possession and control of licensed material rather than the ownership of the material. The NRC Staff did not and does not find an imminent threat to the public health and safety if Mr. Ficek owns source and byproduct material as a result of being part owner and/or shareholder of an NRC licensee as long as he does not personally possess or control the material or otherwise use or direct the use of others in licensed activities.
36. With the exception of ownership of NRC-licensed materials outlined in paragraphs 34 and 35, Mr. Ficek will refrain from engaging in NRC-licensed activities until September 2, 2017. NRC-licensed activities include, but are not limited to, the following:

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- a. Conducting radiography or a radiographer's duties, or assisting, directing, or supervising such activities in an NRC jurisdiction under an NRC license or an agreement state license under the authority granted by 10 C.F.R § 150.20, or in an agreement state under a reciprocity agreement issued pursuant to an NRC license.
 - b. Performing, directing, or supervising activities that are the responsibility of an RSO or assistant RSO including making radiation safety determinations, ensuring an NRC licensee's compliance with NRC requirements, making reports or filing documents with the NRC, except as specifically required herein, and recordkeeping.
 - c. Scheduling radiography jobs.
 - d. Securing radiographic exposure devices and/or ensuring compliance with security requirements.
 - e. This list is not exhaustive. If Mr. Ficek is unsure of whether he is prohibited from an activity, he is to contact the NRC Region IV Director of the Division of Nuclear Materials Safety. The NRC will respond to Mr. Ficek's inquiry within 5 days.
37. Mr. Ficek may be part owner, as described in paragraphs 34 and 35, and/or an officer or director of an NRC licensee only if the following conditions are met:
- a. Prior to becoming part owner of an NRC licensee or accepting employment with an NRC licensee as an officer or director, Mr. Ficek will provide that licensee with a copy of the Board Order approving this Settlement Agreement with this Settlement Agreement attached.
 - b. Prior to becoming part owner of an NRC licensee or accepting employment with an NRC licensee as an officer or director, Mr. Ficek will also notify in writing the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, with a copy to the Director, Division of Nuclear

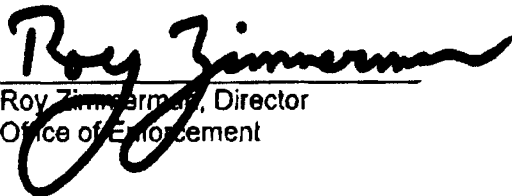
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Materials Safety, U. S. Nuclear Regulatory Commission Region IV Office, Arlington, TX 76011, of the name, location, and telephone number of the NRC-licensed employer, as well as the expected start date of the employment or ownership agreement. In the written notification, Mr. Ficek will confirm that the Board Order and Settlement Agreement have been provided to the NRC licensee.

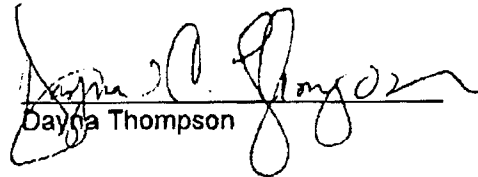
38. For a 3-year period after September 2, 2017, Mr. Ficek shall, at least 10 days prior to beginning employment involving NRC-licensed activities, as defined in paragraph 36 above, provide notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities.
39. MTS's license has been revoked and the parties agree that it will not be reinstated.
40. The parties will submit this Settlement Agreement to the Board for approval with a joint motion requesting approval of the settlement and termination of the proceeding with prejudice based on the resolution of matters in this Settlement Agreement. This Settlement Agreement will become effective upon its execution by all parties; however, the agreement is contingent upon approval by this Board pursuant to 10 C.F.R. § 2.203. Upon approval by this Board, this Settlement Agreement will have the same force and effect as an Order made after a full hearing.
41. The parties agree that all further procedural steps before this Board and any right to challenge or contest the validity of the Order entered into in accordance with this Settlement Agreement, and all the rights to seek judicial review or otherwise to contest the validity of the Order are expressly waived.

IN WITNESS THEREOF Mr. Mark Ficek, on behalf of himself and MTS, Ms. Dayna Thompson, and the NRC Staff have caused this Settlement Agreement to be executed on this 3rd day of February, 2011.

Respectfully submitted,

 **2/4/11**
Roy Zimmerman, Director
Office of Enforcement


Mark Ficek, President
Mattingly Testing Services, Inc.


Dayna Thompson

Dated at Rockville, MD and Billings, MT
this 3rd day of February, 2011.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
MARK M. FICEK, AND) DOCKET NO. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.)
(Molt and Billings, MT))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Board **MEMORANDUM AND ORDER (Accepting Proposed Settlement and Dismissing Proceeding) (LBP-11-03)**, dated February 22, 2011, have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
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Washington, DC 20555-0001

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MARK M. FICEK AND MATTINGLY TESTING SERVICES, INC. – Docket No. 30-20836-EA
MEMORANDUM AND ORDER (Accepting Proposed Settlement and Dismissing Proceeding)
(LBP-11-03)

Dayna Thompson
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dayna@mtsinspection.com

Mark Ficek
12555 West Andrews Lane
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[Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 22nd day of February 2011