



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

January 13, 2012

Docket No. 03036569
EA-11-098

License No. 52-30913-01

Jaime Sánchez
President
S&R Engineering S.E.
P.O. Box 29406
65th Infantry Station
San Juan, PR 00929

**SUBJECT: NOTICE OF VIOLATION AND PROPOSED CIVIL PENALTY \$14,000 –
NOTIFICATION OF THE PROPOSED IMPOSITION OF ADDITIONAL DAILY
CIVIL PENALTIES - S&R ENGINEERING S.E.**

Dear Mr. Sánchez:

This refers to the continued failure by S&R Engineering S.E. (S&R) to properly transfer its licensed nuclear material (one portable moisture density gauge containing a cesium-137 sealed source and an americium-241 sealed source), as required by the NRC Order issued to S&R on October 29, 2009, due to non-payment of the NRC fee for maintaining an NRC license. Since the time the Order was issued, the NRC has attempted to communicate with you on numerous occasions through letters, electronic mail, telephone calls, site visits, and the use of a process server, as described more fully in this letter. However, you and other S&R staff have repeatedly avoided and/or failed to respond to these communications. Additionally, to date, S&R continues to possess the portable gauge without NRC authorization.

On June 21, 2004, the NRC issued byproduct material License No. 52-30913-01 to S&R, authorizing the possession, use, and storage of nuclear material in portable moisture density gauges, pursuant to Title 10 of the Code of Federal Regulations (CFR) Part 30. NRC regulations specified in 10 CFR 171.16(a) require that each person authorized to conduct activities under 10 CFR Part 30 shall pay the applicable annual fee for each license the person holds during the fiscal year (FY). However, S&R failed to pay the required fee for FY 2009.

Due to the nonpayment of the fee, the NRC issued the October 29, 2009, Order prohibiting S&R from using its portable gauge. The Order indicated that if S&R failed to pay the fee within 30 days of the date of the Order, its license would be revoked and S&R would be required to transfer the gauge to an authorized recipient or dispose of the gauge (by transferring it to an authorized waste recipient) within 60 days of the date of revocation (by January 29, 2010) and to notify the NRC in writing of the disposition of the gauge. S&R did not pay the fee and, as of the date of this letter, has failed to transfer the gauge, as required.

On December 15, 2009, NRC staff inspected the S&R facility and discussed the Order with your staff, who indicated the gauge was being stored at a temporary jobsite. At that time, your staff provided no commitment or plan for transfer of the gauge. NRC staff again visited S&R's facility on February 10, 2010, and verified the gauge was at that time being stored at S&R's facility,

however neither you nor the S&R radiation safety officer (RSO) were available to meet with the NRC. In an electronic mail message dated February 24, 2010, you described how the gauge was being stored, and confirmed that S&R was not using the gauge. NRC staff subsequently placed several telephone calls to you and left messages with your office and on your personal cellular telephone, but were unable to contact you with regard to your plans for final disposition of the gauge. NRC staff again visited S&R on April 12, 2010, and discussed with you and the S&R RSO the requirement that S&R immediately transfer its gauge. However, subsequent to that visit, the NRC received no communication from S&R regarding transfer of the gauge. On July 9, 2010, the NRC issued a certified letter to S&R that informed S&R of its continued violation of the NRC Order and again requested S&R immediately transfer the gauge and respond to the NRC within 10 days of receiving the letter. The NRC received postal confirmation that S&R signed for the letter, but received no response from S&R.

On August 3, 2010, NRC staff conducted a telephonic inspection exit with you. During that discussion, you stated that S&R had transferred the gauge to an authorized recipient (another NRC licensee) over a month prior to that conversation. However, when the NRC contacted the purported recipient of the gauge, that company informed the NRC that it had not received the gauge and that it could not do so without requesting that its NRC license be amended to increase the amount of radioactive material it could possess. On October 3, 2010, NRC staff inspected the S&R facility and identified that S&R, in fact, still possessed the gauge and was storing it in an unlocked closet, contrary to your statements during that August 2010 discussion. Neither you nor the S&R RSO were onsite, and the available S&R staff could provide no information about S&R's continued possession of the gauge. Subsequently, the NRC attempted on multiple occasions to communicate with you and with the S&R RSO by telephone, electronic mail, and a letter sent via registered mail (sent on December 20, 2010 and confirmed to have been delivered on January 3, 2011), to ascertain the status of the gauge. However, neither you nor any other S&R representative responded to these communications.

Separately, the NRC Office of Investigations (OI), Region I Field Office, conducted investigations to determine whether S&R was deliberately continuing to use the portable gauge in violation of the Order and whether you, as the S&R president, willfully provided to the NRC inaccurate information regarding the whereabouts of the gauge during the August 3, 2010, telephone call. Based on the results of these investigations, the NRC concluded that S&R had not deliberately violated the portion of the NRC Order prohibiting the use of the portable gauge. However the NRC determined that you did deliberately provide inaccurate information to the NRC regarding S&R's continued possession of the gauge.

In a letter dated August 1, 2011, the NRC documented the results of its inspections and investigations conducted up to that point. In that letter, the NRC identified the following apparent violations of NRC requirements by S&R: (1) failing to comply with or respond to an NRC Order, as required by 10 CFR 2.202(b), regarding either payment of the licensing fee or properly transferring the gauge; (2) providing information to the NRC that was not complete and accurate in all material respects as required by 10 CFR 30.9(a); (3) failing to afford the NRC the opportunity to inspect materials, activities, and records under the regulations as required by 10 CFR 19.14(a); and, (4) failing to use a minimum of two independent controls that form tangible barriers to secure S&R's portable gauge from unauthorized removal, when the portable gauge was not under S&R's direct control and constant surveillance as required by 10 CFR 30.34(i). The NRC inspection report and a factual summary of the substantiated OI

investigation were provided to S&R as enclosures to the NRC letter.

In the August 1, 2011, letter, the NRC also informed you that all of the apparent violations were being considered for escalated enforcement action in accordance with the NRC Enforcement Policy and that the NRC required additional information from S&R to make its enforcement decision. Accordingly, the NRC directed that S&R participate in a pre-decisional enforcement conference (PEC) with the NRC to discuss the status of the gauge, S&R's plan for transferring the gauge, and the apparent violations. In lieu of a PEC, the NRC also afforded S&R the opportunity to request Alternative Dispute Resolution (ADR) to resolve this matter with the aid of a neutral third party. In the letter, the NRC informed you that if S&R did not contact the NRC within 10 days of the date of the letter (i.e., by August 11, 2011) regarding its participation in either a PEC or ADR within ten days of the date of the letter, the NRC would make an enforcement decision based on available information.

The NRC issued the August 1, 2011, letter via certified mail and also sent an electronic copy to you and to the S&R RSO. The NRC received confirmation that S&R staff signed for the letter on August 10, 2011, however, S&R did not respond to the letter or otherwise contact the NRC. Accordingly, on August 29, 2011, the NRC hired a process server to hand-deliver the letter directly to you. However, the process server's numerous delivery attempts were unsuccessful. An NRC inspector again visited the S&R facility on October 3, 2011, and verified that S&R still possessed the gauge. S&R staff informed the inspector that you were not in the office and were unavailable to speak with him, and you failed to respond to his telephone calls. The inspector also learned that the RSO is no longer employed by S&R. On December 15, 2011, an NRC branch chief visited the S&R facility, and was informed that you were unavailable. However, on December 20, 2011, NRC staff successfully contacted Mr. Filipe Lopez of your organization. Mr. Lopez stated that he was actively working with a contract radiation program specialist to identify an authorized recipient to whom S&R could transfer the gauge. The NRC verified that the contractor is working with S&R to transfer the gauge but to date, S&R has not completed the transfer.

Based on the above, the NRC has concluded that the above-listed violations of NRC requirements occurred, and the NRC is proceeding with appropriate enforcement actions. The violations are cited in the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice), and the circumstances surrounding them are described in detail in the subject inspection report and investigation summary.

The first violation, involving the failure by S&R to comply with the October 29, 2009, NRC Order requiring proper transfer of the gauge after S&R failed to pay the licensing fee has existed since January 29, 2010 (the date by which S&R was required to transfer the gauge). In assessing the significance of this violation, the NRC considered that S&R has failed to comply with the NRC Order for more than two years and remains in possession of nuclear material without NRC authorization, in violation of the Order. The second violation, involving the failure by S&R to provide complete and accurate information regarding continued possession of the gauge, occurred on August 3, 2010. In assessing the significance of this violation, the NRC considered that this impeded the NRC from carrying out its regulatory mission of protecting public health and safety and the environment. The NRC also considered that the violation was deliberate. The NRC relies on the integrity of its licensees to comply with regulatory requirements. Because one of these violations involves S&R's continued, unauthorized possession of its

portable gauge, and the second violation involved the deliberate failure to be truthful regarding the status of the gauge, the NRC assessed the violations collectively as a Severity Level (SL) III problem, in accordance with the NRC Enforcement Policy.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$3,500 is considered for a SL III violation. Because one of the violations was deliberate, the NRC considered whether credit was warranted for *Identification* and *Corrective Action* in accordance with the civil penalty assessment process in Section 2.3.4 of the Enforcement Policy. Credit for identification is not warranted because the violations were identified by the NRC. Credit for corrective action is also not warranted, because S&R has failed to properly transfer its gauge and has failed to communicate with the NRC. Therefore, to emphasize the importance of compliance with NRC requirements and to provide complete and accurate information to the NRC, I have been authorized, after consultation with the Director, Office of Enforcement, to issue the enclosed Notice and Proposed Imposition of Civil Penalty in the amount of \$7,000 (twice the amount of the base civil penalty) for the first two violations listed in the Notice.

The third violation, involving S&R's continued failure to respond to NRC communications, thereby preventing the NRC from fully inspecting S&R's activities and the status of the gauge, has existed since August 3, 2010, when S&R first provided inaccurate information to the NRC regarding the location of the gauge. In assessing the significance of the violation, the NRC considered that the NRC has attempted communication with S&R on numerous occasions using various media (telephone calls, electronic mail, written correspondence, onsite visits, and a process server). S&R has failed to respond to any of these communication attempts, which has prevented the NRC from carrying out its regulatory function, and, more significantly, has prevented resolution of this matter. Therefore, this violation has been categorized in accordance with the NRC Enforcement Policy at SL III.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$3,500 is considered for a SL III violation. Because S&R has not been the subject of escalated enforcement action within the last two years or two inspections, the NRC considered whether credit was warranted for *Corrective Action* in accordance with the civil penalty assessment process in Section 2.3.4 of the Enforcement Policy. Credit for corrective action is not warranted, because S&R has remained unresponsive to NRC communications. Therefore, I have been authorized, after consultation with the Director, Office of Enforcement, to issue the enclosed Notice and Proposed Imposition of Civil Penalty in the amount of \$3,500 for the third violation listed in the Notice.

The fourth violation, involving the failure to use two independent physical controls to secure the gauge from unauthorized removal, was identified by the NRC on October 3, 2010, when an NRC inspector identified that S&R remained in possession of its gauge and was storing it in its locked shipping case inside of an unlocked closet. The inspector informed the RSO of the security requirements. However, as identified during subsequent onsite visits by the NRC, the gauge continued to be stored inside the closet, while S&R has failed to provide a second independent barrier.

In assessing the significance of this violation, the NRC considered that, although the gauge appears to have remained on S&R property and within a controlled (although unlocked) area, members of the public and other S&R staff could have potentially accessed the radioactive

material and been exposed to radiation if the gauge had been mishandled. Therefore, this violation has been categorized in accordance with the NRC Enforcement Policy at SL III.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$3,500 is considered for a SL III violation. Because S&R has not been the subject of escalated enforcement action within the last two years or two inspections, the NRC considered whether credit was warranted for *Corrective Action* in accordance with the civil penalty assessment process in Section 2.3.4 of the Enforcement Policy. Credit for corrective action is not warranted because S&R has failed to secure the gauge with a second physical control, even after the NRC identified the violation to the RSO. Therefore, to emphasize the importance of proper control of licensed material, and of prompt and comprehensive correction of violations, I have been authorized, after consultation with the Director, Office of Enforcement, to issue the enclosed Notice and Proposed Imposition of Civil Penalty in the amount of \$3,500 for the fourth violation listed in the Notice.

The NRC's primary interest in this matter is to ensure that the gauge is immediately and appropriately transferred to an authorized recipient since S&R is no longer authorized to possess this licensed material. Accordingly, the NRC will provide S&R a grace period of 30 days from the date of this letter to transfer its gauge to an authorized recipient and comply with the other requirements of 10 CFR 30.36, as described below. If S&R completes these actions, the NRC will forgo imposition of the \$14,000 civil penalty, and S&R's license will be terminated by written notice in accordance with 10 CFR 30.36(k) when the NRC determines that the licensed material has been transferred.

If S&R transfers the gauge as described above within 30 days of the date of this letter, it must provide us the following information:

1. At least two business days prior to the date of transfer of the gauge, notify Blake Welling, Chief, Materials Security and Industrial Branch, NRC Region I, by telephone (610-337-5205).
2. Within five business days following completion of the transfer or disposal, provide to the Regional Administrator, NRC Region I, in writing: a) confirmation, using NRC Form 314, that the gauge has been transferred or disposed; b) the last date the gauge was used; c) a copy of the radiation survey performed in accordance with 10 CFR 30.36(j)(2); and, d) a copy of the certification from the authorized recipient that the gauge has been received.

If S&R does not transfer the gauge within 30 days of the date of this letter, in addition to the \$14,000 civil penalty proposed for the violations in the attached Notice, you are hereby notified that the NRC intends to consider additional daily civil penalties of \$100 per day. Daily civil penalties are justified because S&R is aware that it is in violation of NRC requirements, yet has failed to take effective corrective action. If assessed, the daily civil penalty will continue until the portable gauge is properly transferred, and will be imposed for each 30-day period at \$3,000 per 30-day period, with the first such period beginning 30 days after the date of this letter. If S&R properly transfers or disposes the gauge within 60 days of this letter, daily civil penalties will not be assessed.

You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. If you have additional information that you believe the NRC should consider, you may provide it in your response to the Notice. The NRC review of your response to the Notice will also determine whether further enforcement action is necessary to ensure compliance with regulatory requirements.

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response will be made available electronically for public inspection in the NRC Public Document Room and from the NRC's Agency-wide Documents Access and Management System (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. The NRC also includes significant enforcement actions on its Web site at (<http://www.nrc.gov/reading-rm/doc-collections/enforcement/actions/>).

You may contact Blake Welling at 610-337-5205 with any questions.

Sincerely,

/RA/

William M. Dean
Regional Administrator

Docket No. 03036569
License No. 52-30913-01

Enclosures:

1. Notice of Violation and Proposed Imposition of Civil Penalties
2. NUREG/BR-0254 Payment Methods

cc:

Commonwealth of Puerto Rico

You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. If you have additional information that you believe the NRC should consider, you may provide it in your response to the Notice. The NRC review of your response to the Notice will also determine whether further enforcement action is necessary to ensure compliance with regulatory requirements.

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You may contact Blake Welling at 610-337-5205 with any questions.

Sincerely,

/RA/

William M. Dean
Regional Administrator

Docket No. 03036569
License No. 52-30913-01

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1. Notice of Violation and Proposed Imposition of Civil Penalties
2. NUREG/BR-0254 Payment Methods

cc:

Commonwealth of Puerto Rico

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Region I OE Files (with concurrences)

NOTICE OF VIOLATION
AND
PROPOSED IMPOSITION OF CIVIL PENALTIES

S&R Engineering, S.E.
San Juan, Puerto Rico

Docket No. 03036569
License No. 52-30913-01
EA-11-098

During an NRC inspection conducted from December 15, 2009, through October 3, 2011, and an investigation conducted by the NRC Office of Investigations (OI) that was initiated on August 18, 2010, and completed on April 19, 2011, violations of NRC requirements were identified. In accordance with the NRC Enforcement Policy, the NRC proposes to impose civil penalties pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205. The particular violations and associated civil penalties are set forth below:

- A. 10 CFR 2.202 (b) requires, in part, that a licensee to whom the NRC has issued an order must respond to the order by filing a written answer under oath or affirmation in which the licensee specifically admits or denies each allegation or charge made in the order.

NRC "Order Revoking License Within 30 Days," dated October 29, 2009, required, in part, that S&R Engineering, S.E. (S&R) submit an answer to the order within 30 days of its issuance and that, unless full payment of license fees was made within 30 days, S&R must arrange for disposal or transfer to an authorized recipient of any licensed nuclear material acquired or possessed under the authority of License No. 52-30913-01. The Order required such disposal or transfer to take place within 60 days of the date of the revocation of the License which occurred on November 30, 2009.

Contrary to the above, as of the date of this Notice, S&R has not submitted an answer to the order (which was required by November 28, 2009), has not paid the license fee (which was required by November 28, 2009), and has not disposed of or transferred its licensed nuclear material to an authorized recipient (which was required by January 29, 2010).

- B. 10 CFR 30.9 requires, in part, that information provided to the Commission by a licensee shall be complete and accurate in all material respects.

Contrary to the above, on August 3, 2010, the S&R president informed the NRC that S&R had transferred its licensed nuclear material (a portable moisture density gauge containing sealed radioactive sources) to another NRC licensee when, in fact, S&R still possessed the gauge.

Violations A and B are assessed collectively as a Severity Level III problem (Example 6.9).
Civil Penalty - \$ 7,000

- C. 10 CFR 19.14(a) requires, in part, that each licensee shall afford to the Commission at all reasonable times opportunity to inspect materials, activities, and records under the regulations.

Contrary to the above, S&R did not afford to the Commission at all reasonable times opportunity to inspect materials, activities, and records under the regulations. Specifically, on August 3, 2010, S&R provided the NRC inaccurate information about the location of its licensed material, thereby preventing inspection of S&R's licensed activities. Additionally, between the period of September 2010, and October 3, 2011, the NRC attempted to contact S&R by telephone, electronic mail, written correspondence, on-site visits, and through a process server to discuss the status of its licensed material, including S&R's use of and plans for its gauge and records pertaining to its gauge program, but S&R failed to respond to these communications and to provide the requested information.

This is a Severity Level III violation (Example 6.9)
Civil Penalty - \$3,500

- D. 10 CFR 30.34(i) requires, in part, that each portable gauge licensee use a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever portable gauges are not under the control and constant surveillance of the licensee.

Contrary to the above, since October 3, 2010, S&R used only one independent physical control to secure its portable gauge from unauthorized removal when it was not under the licensee's constant surveillance and control. Specifically, the gauge has been stored inside of its shipping case, which was located in an unlocked closet of the locked S&R office (providing one barrier).

This is a Severity Level III violation (Example 6.3).
Civil Penalty - \$ 3,500

Pursuant to the provisions of 10 CFR 2.201, S&R Engineering, S.E. (Licensee) is hereby required to submit a written statement or explanation to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, within 30 days of the date of this Notice of Violation and Proposed Imposition of Civil Penalties (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation; (EA-11-098)" and should include for each alleged violation: (1) admission or denial of the alleged violation; (2) the reasons for the violation if admitted, and if denied, the basis for denying the validity of the violation; (3) the corrective steps that have been taken and the results achieved; (4) the corrective steps that will be taken; and (5) the date when full compliance will be achieved.

Within the same time provided for the response required under 10 CFR 2.201, the Licensee may pay the civil penalties proposed above in accordance with NUREG/BR-0254 and by submitting to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, a statement indicating when and by what method payment was made, or may protest imposition of the civil penalties in whole or in part, by a written answer addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission. Should the Licensee fail to answer within

30 days of the date of this Notice, the NRC will issue an order imposing the civil penalties. Should the Licensee elect to file an answer in accordance with 10 CFR 2.205 protesting the civil penalties, in whole or in part, such answer should be clearly marked as an "Answer to a Notice of Violation" and may: (1) deny the violation(s) listed in this Notice, in whole or in part; (2) demonstrate extenuating circumstances; (3) show error in this Notice; or (4) show other reasons why the penalties should not be imposed. In addition to protesting the civil penalties in whole or in part, such answer may request remission or mitigation of the penalties.

In requesting mitigation of the proposed penalties, the response should address the factors addressed in Section 2.3.4 of the Enforcement Policy. Any written answer addressing these factors pursuant to 10 CFR 2.205, should be set forth separately from the statement or explanation provided pursuant to 10 CFR 2.201, but may incorporate parts of the 10 CFR 2.201 reply by specific reference (e.g., citing page and paragraph numbers) to avoid repetition. The attention of the Licensee is directed to the other provisions of 10 CFR 2.205, regarding the procedure for imposing (a) civil penalties.

Upon failure to pay any civil penalties which subsequently have been determined in accordance with the applicable provisions of 10 CFR 2.205 to be due, this matter may be referred to the Attorney General, and the penalties, unless compromised, remitted, or mitigated, may be collected by civil action pursuant to Section 234c of the Act, 42 U.S.C. 2282c.

The responses noted above, i.e., Reply to Notice of Violation, Statement as to payment of civil penalties, and Answer to a Notice of Violation, should be addressed to: Roy Zimmerman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738, with a copy to the Regional Administrator, U.S. Nuclear Regulatory Commission, Region I.

Because your response will be made available electronically for public inspection in the NRC Public Document Room and from the NRC's Agency-wide Documents Access and Management System (ADAMS), to the extent possible, it should not include any personal privacy or proprietary information. ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. If personal privacy or proprietary information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request that such material is withheld from public disclosure, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

In accordance with 10 CFR 19.11, you may be required to post this Notice within two working days of receipt.

Dated this 13th day of January, 2012.