

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of

HIGH MOUNTAIN INSPECTION SERVICES, INC. }
Mills, Wyoming }

Docket No. 30-29019
License No. 49-26808-01
EA 90-104

ORDER IMPOSING CIVIL MONETARY PENALTY

I

High Mountain Inspection Service, Inc. (HMIS or Licensee) is the holder of Materials License No. 49-26808-01 issued by the Nuclear Regulatory Commission (NRC or Commission) on May 25, 1988, and scheduled to expire on January 31, 1991. The license authorizes the Licensee to use NRC-licensed radioactive materials to conduct industrial radiography activities.

II

An inspection of the Licensee's activities was conducted April 18, 1990, and May 9-10, 1990. The results of this inspection indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated July 23, 1990. The Notice stated the nature of the violations, the provisions of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violations. The Licensee responded to the Notice in a Reply and Answer both dated August 22, 1990. In its response, the Licensee admitted the three violations that formed the basis for the proposed civil penalty, denied one violation among those that were not assessed a civil penalty, and requested that the NRC withdraw the proposed civil penalty.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the violations occurred as stated and that the penalty proposed for the violations designated in the Notice should be imposed by Order.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, IT IS HEREBY ORDERED THAT:

The Licensee pay a civil penalty in the amount of \$2,500 within 30 days of the date of this Order, by check, draft, or money order, payable to the Treasurer of the United States and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, D.C. 20555.

V

The Licensee may request a hearing within 30 days of the date of this Order. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, D.C.


20555. Copies also shall be sent to the Assistant General Counsel for Hearings and Enforcement at the same address and to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, Suite 1000, Arlington, Texas 76011.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issue to be considered at the hearing shall be:

Whether, on the basis of the violations which the Licensee has admitted, this Order should be sustained.

FOR THE NUCLEAR REGULATORY COMMISSION


Hugh L. Thompson, Jr.
Deputy Executive Director for
Nuclear Materials Safety, Safeguards,
and Operations Support

Dated at Rockville, Maryland
this ~~9~~¹ day of October 1990

APPENDIX

EVALUATIONS AND CONCLUSIONS

On July 23, 1990, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during an NRC inspection. High Mountain Inspection Service, Inc. (HMIS) responded to the Notice on August 22, 1990. The NRC's evaluation and conclusion regarding the licensee's response follow:

Restatement of Violations Assessed a Civil Penalty

- A. 10 CFR 34.43(b) states, in part, that the licensee shall ensure that a survey with a calibrated and operable radiation survey instrument is made after each exposure to determine that the sealed source has been returned to its shielded position.

Contrary to the above, on April 18, 1990, at a refinery in Casper, Wyoming, the licensee's radiographer, after each of two exposures, did not perform a survey with a radiation survey instrument to determine that the sealed source had been returned to its shielded position.

- B. 10 CFR 34.44 states, in part, that whenever a radiographer's assistant uses radiographic exposure devices, he shall be under the personal supervision of a radiographer, and that the personal supervision shall include, in part, the radiographer's watching the assistant's performance of the radiographic operations.

Contrary to the above, on April 18, 1990, a radiographer's assistant used a radiographic exposure device and he was not under the personal supervision of a radiographer. The radiographer, although present at the facility at which the radiography was being conducted, did not watch the assistant perform the exposures.

- C. 10 CFR 34.33(a) states, in part, that pocket dosimeters used by radiographers or radiographer's assistants shall be recharged at the start of each shift.

Contrary to the above, on April 18, 1990, pocket dosimeters used by a radiographer and a radiographer's assistant while performing radiography at a refinery in Casper, Wyoming, had not been recharged before the start of the shift.

This is a Severity Level III problem (Supplement IV).
Cumulative Civil Penalty - \$2,500 (assessed equally among the violations).

Restatement of Violations Not Assessed a Civil Penalty

- A. 10 CFR 34.31(c) states, in part, that records of training required by 10 CFR 34.31 for radiographers and radiographer's assistants, including copies of written tests and dates of oral tests and field examinations, shall be maintained for 3 years.

Contrary to the above, as of May 10, 1990, records of training required by 10 CFR 34.31 for radiographer's assistants, including copies of written tests and dates of oral tests and field examinations, were not being maintained for three individuals who were trained and worked as radiographer's assistants from November 1989 to March 1990.

This is a Severity Level V violation (Supplement VI).

- B. 10 CFR 71.5(a) requires, in part, that each licensee who transports licensed material outside of the confines of its plant or other place of use, or who delivers licensed material to a carrier for transport comply with the applicable requirements of the regulations appropriate to the mode of transport of the Department of Transportation (DOT) in 49 CFR Parts 170-189.
1. 49 CFR 172.203(d) requires, in part, that the description on shipping papers for a shipment of radioactive material must include the category of label applied to each package in the shipment and the transport index assigned to each package in the shipment bearing RADIOACTIVE YELLOW-II labels.

Contrary to the above, on four occasions from August 1989 to April 1990, the licensee delivered licensed material to a carrier for transport with descriptions on shipping papers that did not include the category of label applied to the package or the transport index assigned to each package that was labeled RADIOACTIVE YELLOW-II.

This is a Severity Level V violation (Supplement V).

2. 49 CFR 172.403(g) requires, in part, that the contents, activity, and the transport index be entered in the blank spaces on the RADIOACTIVE label.

Contrary to the above, on April 18, 1990, an overpack that was used to transport a radiographic exposure device containing licensed material was labeled with a RADIOACTIVE YELLOW-II label that did not record the contents, the activity, or the transportation index in the label's blank spaces.

This is a Severity Level V violation (Supplement V).

Summary of Licensee's Response to Notice of Violation

The Licensee admitted the three violations that formed the basis for the civil penalty, denied one violation (Violation II.A) among those not assessed a civil penalty and discussed its view of the significance of one other violation (Violation I.C).

1. In response to Violation I.C, the Licensee admitted that the pocket dosimeters were not recharged; however, the licensee contended that recording the initial readings on the pocket dosimeters had the effect of

recharging them. The Licensee argued that what happened in no way affected the operation of the pocket dosimeters or radiation safety.

2. In response to Violation II.A, the Licensee denied the violation, stating that two of the three individuals identified were used as helpers and not assistant radiographers. The Licensee also stated that the other individual identified was an assistant radiographer and asserted that his training documentation was complete because the inspection report only noted that he lacked the required hours of on-the-job training.

NRC Evaluation of Licensee's Response to Notice of Violation

1. In regard to Violation I.C, the NRC does not dispute the fact that not recharging the dosimeters did not affect the operation of the dosimeters. However, the fact remains that the dosimeters were not recharged before the start of the shift as required by NRC regulations which reflects a lack of attention to matters involving personal safety. Furthermore, the pocket dosimeters in question had readings of 130 mR and 140 mR when radiographic operations began. Since the maximum reading possible on these devices is 200 mR, there was not sufficient leeway before the dosimeter could have gone off scale and erroneously caused concern about possible overexposures. The NRC staff concludes that the violation occurred as stated and that the explanation offered by the licensee does not warrant reducing the severity level of the violation.
2. In regard to Violation II.A, the NRC notes, as stated in the inspection report dated May 21, 1990, that the individuals who were identified as not having complete training records had worked as radiographer's assistants. This was identified by reviewing the licensee's site survey records, which indicated that the three individuals worked as radiographer's assistants, and by discussing the matter with the Assistant Radiation Safety Officer (ARSO). The ARSO stated that these individuals had taken the required examinations before they worked as radiographer's assistants, but records of these exams had been destroyed.

Concerning the third individual's lack of training records, the notation in the inspection report as to this individual not having the required number of hours of on-the-job training as an assistant radiographer before being designated as a radiographer in no way indicates that the individual's training records were complete. To the contrary, the training documents that were supplied by the licensee did not indicate that the individual was administered a practical examination.

The NRC staff concludes that the violation occurred as stated.

Summary of Licensee's Request for Mitigation

The Licensee admitted the violations that formed the basis for the proposed civil penalty. HMIS requested full mitigation of the civil penalty based on contentions that: 1) Violations I.A and I.B were the independent actions of an individual; 2) Violation I.C should not have been classified at Severity Level III; 3) the NRC has not shown that HMIS failed to conduct a satisfactory

radiation safety program, therefore, imposition of a fine cannot cause an improvement in HMIS' program; 4) HMIS took prompt and effective disciplinary action against the individual responsible for two of the violations and did so in a manner that did not shift the problem to other radiography licensees; 5) the NRC did not consider enforcement action against the individuals pursuant to Section V.E. of the Enforcement Policy; and 6) the NRC has not provided an effective regulatory mechanism for controlling violations solely caused by the independent actions of radiography personnel. Moreover, HMIS argued that the violations were committed by individuals who had been properly trained, equipped and instructed by HMIS management and that those individuals' actions were contrary to proper instructions and established procedures provided by HMIS. In short, the licensee argued that absent an indication that it failed in its responsibilities to adequately administer its radiation safety program or failed to take action against employees who violated safety requirements, it should not be fined for violations beyond its reasonable control.

NRC Evaluation of Licensee's Request for Mitigation

The NRC's "General Statement of Policy and Procedure for NRC Enforcement Actions," 10 CFR Part 2, Appendix C (1990), (Enforcement Policy) states in Section V.A. that licensees are not ordinarily cited for violations resulting from matters not within their control. However, the Policy states explicitly that licensees are held responsible for the acts of their employees and that the policy should not be construed to excuse personnel errors. In Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980) the Commission explicitly rejected a position virtually identical to the Licensee's:

The effect of the [decision below] is that where no specific conduct by a licensee contributed to the commission of a violation, ... the licensee is necessarily free from any culpability and the imposition of any civil penalties. Under that approach, the responsibility for infractions of license provisions or Commission regulations would be divided between the licensee's management and its employees. We believe that this would be an unsound enforcement policy because management's freedom from culpability could be interpreted as freedom from responsibility... . We find that such a division of responsibility between a licensee and its employees has no place in the NRC regulatory regime which is designed to implement our obligation to provide adequate protection to the health and safety of the public in the commercial nuclear field. Id. at 421-2 (citation omitted).

The Commission has left no doubt that licensees are responsible for violations of NRC regulatory requirements, even if committed by licensees' employees or other agents. Accordingly, mitigation of the civil penalty on the basis proposed by HMIS is not warranted.

In response to the licensee's six specific arguments set out above, NRC notes:

1. As described above, the Enforcement Policy provides that licensees are responsible for the acts of their employees. As stated in Section V.B of the Enforcement Policy, published at 10 CFR Part 2, Appendix C, while management involvement in a violation may lead to an increase in a civil

penalty, lack of that involvement may not be used to mitigate a civil penalty, because allowance of mitigation could encourage lack of management involvement in licensed activities and decrease protection of the public health and safety. The Commission has previously considered and resolved the question of whether responsibility for violations should be divided between licensees' management and its employees. Atlantic Research Corporation, 11 NRC 413 (1980). More recently, in publishing the proposed rule on Willful Misconduct by Unlicensed Persons on April 3, 1990, 55 Fed Reg 12374, the Commission concluded that a strong enforcement policy dictates that a licensee be held accountable for violations committed by its employees in the conduct of licensed activities.

2. The NRC considers the failure to conduct a radiation survey following a radiographic exposure a significant violation of radiation safety requirements; these surveys are fundamental to ensuring the health and safety of both radiographic personnel and others in the vicinity of such work. Failure to survey has resulted in most radiographer overexposures, some of which have been serious. The NRC believes that it is well within the bounds of the Enforcement Policy in classifying this violation, as well as the associated violations, at Severity Level III as an indication of a significant regulatory concern.
3. The NRC does not have to show that the licensee failed to conduct a satisfactory radiation safety program in order to propose a civil penalty for what NRC considers to be a specific significant violation of its radiation safety requirements. If the licensee did not have at least a satisfactory program, an order would have been considered to suspend licensed activities.
4. HMIS disciplined the individual responsible for the failure to survey by reducing his pay and requiring requalification. The fact that HMIS did discipline the responsible individual was taken into consideration by NRC in determining the proposed civil penalty amount. However, HMIS's corrective action in total was no more prompt and extensive than NRC would expect of any licensee following a violation of this nature. The responsibility to develop an effective mechanism for precluding violations of this nature in the future rests with the licensee, not with the NRC, as the licensee suggests. It is the licensee who is in a position to retrain, counsel, or discipline including but not limited to docking pay, demotion, suspension, or dismissal, and then providing a candid reference about an employee.
5. A decision by the NRC whether to take enforcement action against a particular individual who has violated NRC requirements while engaging in licensed activities is independent of any action taken against the licensee. Section V.E. of the Enforcement Policy states that enforcement actions against individuals are significant personnel actions which will be closely controlled and judiciously applied. It also provides that most transgressions of individuals at the level of Severity Level III, IV or V violations will be handled by citing only the facility licensee. NRC has not conducted an investigation to determine whether the assistant radiographer's acts were deliberate violations justifying an order removing him from licensed activity. In that regard, it is noted that the licensee has not removed the individual from licensed activities since it has confidence in him to comply in the future. Again, even if an order had been issued, a

civil penalty would have been assessed against the licensee. The purpose of the penalty is to emphasize to the licensee's management and employees as well as other licensees that licensees are responsible for the safe use of radioactive material in their possession. A licensee cannot delegate that responsibility to its employees.

6. The NRC is concerned about the above issue and is developing regulations that would provide for taking action against individuals in cases of willful violations of NRC requirements. However, any such revision of the Commission's regulations would not relieve licensees of their responsibility for the acts of their employees. Nor would the changes preclude the NRC from taking action against the licensee for the acts of its employees. Any alleged deficiency in the Commission's enforcement regime does not excuse a specific violation committed during licensed activities. Any alleged deficiencies, even if real, do not change the facts that: (a) a violation occurred, and (b) as described above, licensees are responsible for all violations occurring during licensed operations authorized by their licenses.

NRC Conclusion

The NRC concludes that the Licensee has not provided a sufficient basis for mitigation of the proposed civil penalty. Further, the Licensee admits the violations which formed the basis for the proposed civil penalty. The NRC concludes that a civil penalty of \$2,500 should be imposed by order.

High Mountain Inspection Service, Inc.

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