

DCS

December 10, 1990

Docket No. 030-08130
License No. 19-00915-03
EA 90-211

U.S. Department of Agriculture
ATTN: Dean Plowman, Administrator
Agricultural Research Service
Administration Building
14th and Independence S.W.
Washington, D.C. 20250

Gentlemen:

Subject: EXERCISE OF ENFORCEMENT DISCRETION

This refers to the telephone conversation between Mr. Frank Costello, NRC, Region I and Ms. Lori Thomas of your staff on October 17, 1990, and your subsequent letter, dated November 13, 1990, concerning the improper transfer in June 1989 of two nuclear gauges (containing 110 and 80 millicuries of americium-241, respectively) from your facility in Olustee, Florida, to an individual who was not authorized to receive the gauges. Until these gauges were recovered by a member of your staff in October 1990 and returned to an authorized storage location in Cary, North Carolina, the gauges were apparently stored either in the basement of the individual's residence in Raleigh, North Carolina, or in an unlocked shed in the individual's backyard. Based on our review of your November letter, the NRC finds that this transfer of licensed material to an unlicensed individual constitutes a violation of the NRC regulatory requirement set forth in 10 CFR 30.41.

The NRC is concerned that this unauthorized transfer could have been prevented or identified sooner by your staff if proper management attention had been given to the radiation safety program. For example, if your staff had been performing the six-month leak tests of these gauges, as required, they would have recognized sooner that the gauges were missing. This violation demonstrates the importance of strict adherence to regulatory requirements to ensure that such violations in the future are prevented or promptly identified.

In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," 10 CFR Part 2, Appendix C (Enforcement Policy) (1988), this violation would normally be classified at Severity Level III, and an enforcement conference on this matter would normally be conducted. In addition, a Notice of Violation as well as a civil penalty is normally issued for a Severity Level III violation, unless there are appropriate factors to mitigate the penalty in its entirety.

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However, in accordance with Section V.G.5 of the Enforcement Policy, I have decided, after consultation with the Director, Office of Enforcement, to exercise enforcement discretion and not issue a Notice of Violation nor a civil penalty in this case because: (1) the NRC issued a \$5,000 civil penalty to the USDA on August 16, 1990 for, in part, the failure on the part of many USDA facilities to comply with several requirements, including the leak test requirements for gauge and other sealed sources, and the unauthorized gauge transfer that is the subject of this letter actually occurred prior to the issuance of that penalty (as well as prior to several of the violations that formed the basis for that penalty), (2) the discovery that the gauge was missing resulted from your comprehensive corrective actions taken in response to the issues that formed the basis for the civil penalty (including actions to ensure all of your facilities were performing leak tests at the required frequency), and (3) this violation of 10 CFR 30.41 does not substantially change the safety significance or character of the regulatory concern arising out of the violations that formed the basis of the civil penalty.

Notwithstanding the NRC decision on this matter, you are reminded that an unauthorized transfer of licensed material to unauthorized recipients is a significant violation, and any recurrence of the violation in the future may result in significant enforcement action.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," Part 2, Title 10, Code of Federal Regulations, a copy of this letter will be placed in the NRC's Public Document Room.

Sincerely,

Thomas T. Martin
Regional Administrator

cc:
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State of Florida
State of North Carolina

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