

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of)
BRIAN A. CLARK) Docket No. 030-29025
Dunmore, Pennsylvania) License No. 37-20935-01 (expired)
EA 94-093

ORDER TO TRANSFER LICENSED MATERIALS
(EFFECTIVE IMMEDIATELY)
AND
DEMAND FOR INFORMATION

I

Brian A. Clark was the President and Owner of August Corporation (Licensee), the holder of expired Byproduct Materials License No. 37-20935-01 (License) issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 30 on November 15, 1985. The License authorized the possession and use of an americium-241 sealed source, not to exceed 44 millicuries, in a Troxler Electronics Labs gauge, in accordance with the conditions specified therein. The License expired on November 30, 1990, and the NRC has been informed by Mr. Clark that August Corporation is now defunct. Since the expiration of the License, the byproduct material has remained in the possession of Mr. Clark at his residence at 1608 Adams Avenue, Dunmore, Pennsylvania, 18509.

II

The Licensee did not submit an application for renewal of the License under 10 CFR 30.37 prior to its expiration, nor did the Licensee notify the Commission, in writing under 10 CFR 30.36, of a decision not to renew the License. Although Mr. Clark stated his intentions, in a telephone conversation he initiated with Mr. William Oliveira, Health Physicist, NRC, Region I, on December 27, 1991, to obtain a license in his name, as of this

date, Mr. Clark has not applied for, nor obtained, an NRC license.

On February 24, 1992, the NRC, Region I, issued a Notice of Violation (NOV) to the August Corporation for failure to request renewal, or to file a notice of non-renewal or transfer of the byproduct material, prior to expiration of the License. The letter forwarding the NOV directed the Licensee to place the gauge in secure storage and not to use the material until the Licensee obtained a new NRC license. Neither the Licensee nor Mr. Clark responded to the Notice of Violation, even though Mr. Clark was again telephonically contacted by Mr. Charles Amato, Health Physics Inspector, NRC, Region I, on December 29, 1992, and informed that he was illegally possessing radioactive material, had not responded to the Notice of Violation, and enforcement action could be taken. Although Mr. Clark again stated that he wanted to obtain a license in his name, he has not applied for an NRC license.

In addition, in a July 1, 1993 letter, the NRC again reminded Mr. Clark of the need to respond to the NRC Notice of Violation. Further, Ms. Sharon Johnson, Administrative Assistant, NRC, Region I, in a telephone conversation that Mr. Clark initiated on February 25, 1994, and telephone conversations that Ms. Johnson initiated on March 15, 1994, and March 28, 1994, reminded Mr. Clark of his possession of NRC-licensed material without a license. Mr. Herbert Kaplan, Senior Reactor Engineer, NRC, Region I, discussed the same issue in a subsequent telephone conversation that he initiated on April 28, 1994. To date, Mr. Clark still possesses the gauge without an NRC license and without applying for such a license.

III

Mr. Clark remains in possession of NRC-licensed radioactive material without a license. This is prohibited by Section 81 of the Atomic Energy Act of 1954, as amended, and by 10 CFR 30.3, which state that, except for persons exempt as provided in 10 CFR Parts 30 and 150, no person shall possess or use byproduct material except as authorized in a specific or general NRC license.

Furthermore, based on the above, Mr. Clark has deliberately violated NRC requirements by possessing the gauge without a license. This conclusion is based on the facts that Mr. Clark never filed a renewal application before the License issued to August Corporation expired on November 30, 1990, as required by 10 CFR 30.37; Mr. Clark has not responded to an Inquiry Letter (No. 90-001) dated November 28, 1990, sent by the NRC before the License expired; Mr. Clark has not responded to the NRC Notice of Violation issued on February 24, 1992; Mr. Clark has not responded to an NRC letter, via "CERTIFIED MAIL" dated July 1, 1993, addressing his previous failure to respond to the Notice of Violation; Mr. Clark has refused to dispose of the radioactive material; Mr. Clark possesses the radioactive material contrary to 10 CFR 30.3, without a valid NRC specific license; and Mr. Clark has stated to the NRC on numerous occasions that he wants an NRC license (in his own name), but has not applied for such a license.

Improper handling of the gauge can result in an unnecessary exposure to radiation. The Atomic Energy Act and the Commission's regulations require that material possessed by the Licensee be under a regulated system of licensing and inspection. Mr. Clark's possession of NRC-licensed material

without a valid NRC license, as documented in the February 24, 1992 Notice of Violation, and his unwillingness to respond to numerous NRC written and verbal communications to apply for an NRC license, demonstrate a deliberate disregard for NRC requirements. Mr. Clark, by continuing to possess material after being notified of the expiration of the License, has demonstrated that he is not willing to comply with Commission requirements.

Given the circumstances surrounding Mr. Clark's possession of the byproduct material and his lack of communications with the NRC, I lack the requisite reasonable assurance that the health and safety of the public will be protected while Mr. Clark remains in possession of the radioactive material. Consequently, the public health, safety, and interest require the imposition of the requirements set forth in Section IV below. Furthermore, pursuant to 10 CFR 2.202, I have determined that the significance of Mr. Clark's actions described above, (specifically, the deliberate possession of licensed material without a License, after repeated NRC notification of the need to either obtain a license or transfer the material to an authorized recipient) is such that the public health, safety, and interest require that this Order be immediately effective.

IV

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 at 10 CFR 2.202 and 10 CFR Part 30, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT:

- A. The americium-241 source in Mr. Clark's possession shall be transferred to a person authorized to receive and possess the source within 45 days of the date of this Order. If Mr. Clark believes he does not have sufficient funds to complete the transfer, he must provide, within 30 days of this Order, evidence supporting such a claim by submitting to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, (1) an estimate of the cost of the transfer and the basis for the estimate, including the license number and identity of the person who would perform the transfer, (2) written statements from at least two banks stating that Mr. Clark could not qualify for a loan to pay for the transfer, (3) copies of Federal income tax returns for the years ending 1993, 1992, 1991, and 1990, for Mr. Clark, and (4) a signed agreement to allow the NRC to receive Mr. Clark's credit information from a credit agency. A SUBMITTAL OF EVIDENCE SUPPORTING THE LACK OF SUFFICIENT FUNDS DOES NOT EXCUSE NONCOMPLIANCE WITH THIS ORDER.
- B. The americium-241 source shall be tested for leakage by a person authorized to perform the test prior to transfer of the source to another person, if a leak test has not been performed within the last six months prior to transfer.
- C. Mr. Clark continue to maintain safe control over the gauge containing the source, by keeping the source in locked storage and not allowing any

person access to the source until the source is leak tested and transferred to a person authorized to receive and possess the source in accordance with the provisions of this Order.

- D. Mr. Clark ensure that there is no use of the americium-241 source, except for performance of the pre-transfer leak test and transfer to an authorized recipient.
- E. Unless the source already has been transferred, Mr. Clark shall provide a written update within 30 days of receipt of this Order to the Regional Administrator, Region I, and the Director, Office of Enforcement, on Mr. Clark's progress in finding an authorized person to receive and possess the source.
- F. Mr. Clark shall notify Dr. Ronald Bellamy, Chief, Nuclear Materials Safety Branch, NRC, Region I, by telephone at least two working days prior to the date of the transfer of the source so that the NRC may, if it elects, observe the transfer of the source to the authorized recipient.
- G. Mr. Clark, within seven days following completion of the transfer, shall provide to the Regional Administrator, Region I: (1) confirmation in writing and under oath (NRC Form 314) that the americium-241 has been transferred, (2) a copy of the leak test performed prior to the transfer, and (3) a copy of the certification from the authorized recipient that the source has been received.

The Regional Administrator, NRC Region I, may, in writing, relax or rescind any of the above conditions upon a showing by Mr. Clark of good cause.

V

In accordance with 10 CFR 2.202, Mr. Clark must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order within 20 days of the date of this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically admit or deny each allegation or charge made in this Order and set forth the matters of fact and law on which Mr. Clark or other person adversely affected relies and the reasons why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Chief, Docketing and Service Section, Washington, D.C. 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, PA, 19406, and to Mr. Clark if the answer or hearing request is by a person other than Mr. Clark. If a person other than Mr. Clark requests a hearing, that person shall set forth with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by Mr. Clark or 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 Order should be sustained.

Pursuant to 10 CFR 2.202 (c)(2)(i), Mr. Clark, or any other person adversely affected by this Order may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order without further order or proceedings. AN ANSWER OR REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

VI

In addition to issuance of this Order, the Commission requires further information from Mr. Clark in order to determine whether the Commission can have reasonable assurance that in the future, should Mr. Clark perform licensed activities under any other NRC license, Mr. Clark will conduct any NRC licensed activity in accordance with NRC requirements, and whether enforcement action is warranted against Mr. Clark, individually.

Accordingly, pursuant to sections 161c, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commissions's regulations in 10 CFR 2.204 and 10 CFR 30.32(b), you are hereby required to submit to the Director, Office of Enforcement, U. S. Nuclear Regulatory Commission, Washington, D. C. 20555, within 30 days of the date of this Order and Demand for Information, a statement in writing, under oath or affirmation, of:

1. Why the NRC should have confidence that you will comply with NRC requirements in the event that you perform licensed activities under another NRC license.
2. Why, in light of the facts set forth above, the NRC should not issue an Order to you prohibiting you from engaging in NRC-licensed activities.

This information is needed in light of the deliberate violations of Commission requirements. Copies of the response to this Demand for Information also shall be sent to the Assistant General Counsel for Hearings and Enforcement, U. S. Nuclear Regulatory Commission, Washington, D. C. 20555, and to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, PA 19406.

After reviewing your response, the NRC will determine whether further action is necessary to ensure compliance with regulatory requirements.

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 21 day of June 1994

Brian A. Clark

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