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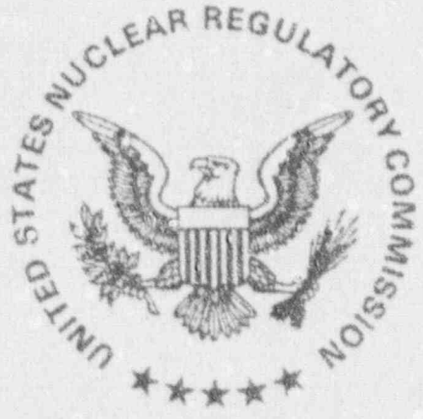
Pages 1-46

NUCLEAR REGULATORY COMMISSION ISSUANCES

January 1992



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NUREG-0750
Vol. 35 No. 1
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NUCLEAR REGULATORY COMMISSION ISSUANCES

January 1992

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301/492-8925)

COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

B. Paul Cotter, Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 50-445-OL & CPA
50-446-OL

TEXAS UTILITIES ELECTRIC
COMPANY
(Comanche Peak Steam Electric
Station, Units 1 and 2)

January 17, 1992

The Commission denies a motion to reopen the record because Petitioners were not parties to the proceeding, and their motion did not address the five factors necessary for late intervention. Even if they had addressed and satisfied the late intervention standards, they failed to satisfy the reopening requirements.

RULES OF PRACTICE: MOTIONS TO REOPEN RECORD; REOPENING OF RECORD (STANDARD FOR APPLICANT); STANDING TO INTERVENE; NONPARTY PARTICIPATION

Petitioners are barred from seeking a reopening of the record because they were not parties to the proceeding itself.

RULES OF PRACTICE: INTERVENTION (STANDING); INTERVENTION PETITION (PLEADING REQUIREMENTS); MOTIONS TO REOPEN RECORD; STANDING TO INTERVENE; NONPARTY PARTICIPATION

Petitioners have never been parties to the Comanche Peak proceeding; at this time they may only become parties by filing a petition for late intervention under 10 C.F.R. § 2.714(a)(1) and satisfactorily addressing the five factors contained therein. Unless and until Petitioners petition for, and are granted, intervention in the proceeding, they cannot move to reopen the record.

RULES OF PRACTICE: LICENSING PROCEEDING; NOTICE OF HEARING

Because the NRC has not yet issued the license for Unit 2, there remains in existence an operating license "proceeding" that was initiated for Comanche Peak by the 1979 *Federal Register* notice.

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); NONTIMELY INTERVENTION PETITIONS

The petition before us clearly does not satisfy NRC requirements for consideration of a late-filed petition for leave to intervene. Quite simply, Petitioners have not even addressed the five factors contained in 10 C.F.R. § 2.714(a)(1)(i)-(v).

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); REOPENING OF RECORD (TIMELINESS)

Even if Petitioners could satisfy the requirements for late intervention, their present petition clearly fails to satisfy the requirements of section 2.734 for reopening the record.

AEA: ENFORCEMENT ACTION (HEARING RIGHT)

RULES OF PRACTICE: JURISDICTION (10 C.F.R. § 2.206 PETITIONS)

Because the license for Comanche Peak Unit 1 has already issued, Petitioners may seek enforcement action under Section 2.206. Therefore, the pleading is referred to Staff for consideration under section 2.206 inasmuch as the pleading relates to Unit 1.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a request by Sandra Long Dow and Richard L. ("R. Micky") Dow ("Petitioners") to reopen the Comanche Peak operating license proceedings.[1] The Texas Utilities Electric Company ("TU Electric"), the Licensee, and the NRC Staff have responded in opposition to the request. For the reasons stated below, we deny the request to reopen the proceedings.[2]

II. FACTUAL BACKGROUND

The NRC initiated the Comanche Peak operating license ("OL") proceedings in 1979. *See* 44 Fed. Reg. 6995 (Feb. 5, 1979). At that time, three parties were admitted into the proceeding. Neither the Dows nor the "Disposable Workers of Comanche Peak," the organization they represent, were among those parties. Subsequently, two of the three original intervenors voluntarily withdrew from the proceedings. A second proceeding dealing with a construction permit amendment ("CPA") for Comanche Peak Unit 1 was added in 1986 and consolidated with the OL proceeding. Again, neither the Dows nor the "Disposable Workers" sought intervention. In July 1988, the NRC's Atomic Safety and Licensing Board issued an order dismissing the Comanche Peak proceedings pursuant to a settlement agreement between the parties: TU Electric, the Staff, and the Citizens Association for Sound Energy ("CASE"), the lone remaining intervenor. *See* LBP-88-18A, 28 NRC 101 (1988); LBP-88-18B, 28 NRC 103 (1988).[3]

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[1] Sandra Dow represents an organization named "Disposable Workers of Comanche Peak Steam Electric Station."

[2] Petitioners styled their pleading as "before the Atomic Safety and Licensing Board." However, there is no Board currently constituted in the Comanche Peak operating license proceedings because all activity in the adjudicatory portion of that proceeding ended several years ago. Indeed, were it not for the fact that the license for Unit 2 has yet to be issued, there would be no operating license proceeding to "reopen." Accordingly, this matter is before the Commission for disposition.

The pleading also contains statements that might be construed as allegations of misconduct by NRC employees. For that reason, it has been referred to the Office of Inspector General for appropriate action.

[3] We subsequently denied a request for "re-intervention" by a former intervenor who had previously withdrawn from the proceedings. CLI-88-12, 28 NRC 605 (1988), *as modified*, CLI-89-5, 29 NRC 348 (1989), *aff'd Citizens Association for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1989), *cert. denied* 111 S. Ct. 246 (1990).

III. ARGUMENTS OF PARTIES

A. Petitioners' Request

On November 20, 1991, the Petitioners filed the pleading now before us. Petitioners labeled the pleading a "motion to reopen the record," but asked the Commission to both "reopen the record . . . and thereafter grant the petitioners leave to file their motion for intervention." *See* Motion to Reopen ("Motion") at 1. Petitioners stated their intention to "file, within 45 days, all necessary affidavits and other documentation . . . ." Motion at 8. Petitioners claimed authority for their submission under 10 C.F.R. § 2.734, which governs motions to reopen a record, and addressed the three factors required by that section.[4]

A request to reopen the record must be (1) timely, (2) address "a significant safety or environmental issue," and (3) "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.734(a). Briefly, Petitioners allege that they satisfy the first prong of the test "because some of the evidence, of the greatest material value to [the NRC], has only come to light within the last thirty (30) days." Motion at 2-3. Petitioners allege that this

> [n]ew evidence regarding the payment of "hush" money to whistleblowers, not to testify before this Board surfaced for the first time after the record was closed; and, new evidence concerning the payment of "hush" money to the intervenor C.A.S.E., has only, now, surfaced.

Id. at 3.

Petitioners allege that they satisfy the second prong of the test because they have provided evidence of (1) money paid to potential witnesses not to testify before the Licensing Board, and another witness coerced into accepting money in exchange for not testifying before the Licensing Board (*id.* at 3-4); (2) false and misleading evidence submitted by TU Electric, which was the basis for a Licensing Board decision in December 1983 (*id.* at 4-5); and (3) false testimony by the management of TU Electric and Brown & Root, its principal contractor, in a Department of Labor ("DOL") proceeding arising from actions at Comanche Peak (*id.* at 5-6).

Finally, Petitioners allege that they satisfy the third prong of the "reopening" test because they believe that they would have been granted leave to intervene in the proceedings had they known about this information at that time and

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[4] Petitioners also cite "29 C.F.R. Part 18" as authority for their submission. However, Title 29 of the *Code of Federal Regulations* contains regulations applicable to the Department of Labor ("DOL"), not the NRC. We presume Petitioners have confused DOL regulations with NRC regulations, found at Title 10 of the *Code of Federal Regulations*.

been able to bring it to the Board's attention. *Id.* at 6. Petitioners also allege that various representatives of TU Electric, CASE, and the NRC Staff either "knowingly remained silent" and deliberately failed to notify the Board of relevant information or actively perjured themselves before the Licensing Board during these proceedings. *Id.* at 6-8.

However, the Petitioners do not submit any affidavits by themselves or anyone else in support of these allegations in this particular motion. *See* 10 C.F.R. § 2.734(b). Instead, they submit selections from various prior pleadings before either the NRC or the DOL.

B. The Licensee's Response

The Licensee argues that Petitioners cannot seek to "reopen" the record because they were never a "party" to the proceeding when it was an active, ongoing proceeding. *See* Texas Utilities Response ("TU Resp.") at 20-21. The Licensee then argues that Petitioners have failed to demonstrate any right to intervene in the proceedings because they failed to address the requirements for a late-filed petition. TU Resp. at 21-25. Finally, the Licensee argues that, assuming *arguendo* that Petitioners can seek reopening of the record, Petitioners' pleading does not satisfy the requirements of section 2.734. *Id.* at 25-41. The Licensee urges, among other things, that the allegedly "new" material is not new and that all of the concerns raised by Petitioners have been reviewed and addressed by the NRC.

C. The NRC Staff's Response

The Staff supports the Licensee's argument that only a party to a proceeding can seek to reopen that proceeding. NRC Staff Response ("Staff Resp.") at 5-6. The Staff then argues that Petitioners have failed to demonstrate that they have standing to intervene (Staff Resp. at 6-9), and that Petitioners have failed to address the requirements for a late-filed petition to intervene (*id.* at 9). Finally, the Staff argues that Petitioners have failed to satisfy the requirements for a motion to reopen. *Id.* at 10-18. In the process, the Staff points out that, with perhaps two exceptions, the pleadings submitted as "new evidence" by the Petitioners have been submitted to the NRC on previous occasions by other potential intervenors.

IV. ANALYSIS

A. Petitioners' Request to Reopen the Record

We find that Petitioners are barred from seeking a reopening of the record because they were not parties to the proceeding itself. As the Staff correctly points out, the regulation itself does not — by its words — limit motions to reopen to *parties*. However, we believe that such is the proper interpretation.

The purpose of Part 2, Subpart G, is to set out the procedures whereby a person or organization petitions for and then exercises the right to participate in formal NRC adjudications. *See generally* 10 C.F.R. §§ 2.700. A brief review of our regulations clearly demonstrates that the word "motion" is used when describing a pleading filed by those who have become parties to a proceeding and are attempting to exercise rights gained as a result of that status. On the other hand, our regulations use the word "petition" to describe a pleading filed by one who has not yet been admitted to "party" status, i.e., one who has not yet established a legal right to participate in a proceeding. *Cf.* 10 C.F.R. § 2.714.

Here, Petitioners have never been parties to the Comanche Peak proceeding; at this time they may only become parties by filing a petition for late intervention under 10 C.F.R. § 2.714(a)(1) and satisfactorily addressing the five factors contained therein. Unless and until Petitioners petition for, and are granted, intervention in the proceeding, they cannot move to reopen the record.[5]

Petitioners also cite Rule 60(b) of the Federal Rules of Civil Procedure ("FRCP") in support of their position that a closed proceeding may be reopened and reexamined. *See* Motion at 1-2 (a "court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . ."). However, consistent with the language in that rule, all the judicial decisions we have found addressing the issue have held that only a "party" or one in privity with a party may request relief under Rule 60(b). *Western Steel Erection Co. v. United States*, 424 F.2d 737, 739 (10th Cir. 1970); *Ratner v. Bakery & Confectionery Workers*, 394 F.2d 780, 782 (D.C. Cir. 1968); *Screven v. United States*, 207 F.2d 740, 741 (5th Cir. 1953); *United States v. 140.80 Acres of Land, Etc.*, 32 F.R.D. 11, 14 (E.D. La. 1963). *See generally* 7 J. Moore, *Moore's Federal Practice* ¶ 60.19 (2d ed. 1985); 11 Wright and Miller, *Federal Practice and Procedure* § 2865 (1973). Thus, Rule 60(b) does not support Petitioners' argument for reopening the Comanche Peak proceeding at their insistence.

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[5] Because the NRC has not yet issued the license for Unit 2, there remains in existence an operating license "proceeding" that was initiated for Comanche Peak by the *Federal Register* Notice that was published in 1979. *See* 44 Fed. Reg. 6995 (Feb. 5, 1979). Accordingly, we reject the Licensee's argument that Petitioners have no right to seek reopening of the record because the Commission has approved the settlement agreement dismissing proceedings below. TU Resp. at 19-20.

B. Petitioners' Request for Late Intervention

Petitioners' pleading asks that we "both re-open the record of the [Comanche Peak] proceedings, and thereafter grant Petitioners leave to file their motion for intervention." Motion at 1. However, we find that the pleading before us clearly does not satisfy our requirements for consideration of a late-filed petition for leave to intervene. Quite simply, Petitioners have not even addressed the five factors contained in 10 C.F.R. § 2.714(a)(1)(i)-(v). Accordingly, we do not grant Petitioners late intervention and, therefore, we deny their request for reopening.

C. The Merits of Petitioners' Reopening Request

While we hold today that Petitioners are not entitled to seek to reopen the record of the Comanche Peak operating license proceeding, we have reviewed their submission in an effort to determine if their arguments have any merit. We conclude that even if Petitioners could satisfy the requirements for late intervention, their present petition clearly fails to satisfy the requirements of section 2.734 for reopening the record.

As we noted above, Petitioners must first demonstrate that their request is timely. 10 C.F.R. § 2.734(a)(1). However, while Petitioners allege that their "new" information has only come to light "within the last thirty (30) days," we find that the information supporting their motion has been before us on previous occasions. As the Staff notes, Exhibits A and B were formally submitted to the Commission either by the Citizens for Fair Utility Regulation ("CFUR"), Mr. Joseph J. Macktal, or Mr. Lon Burnam in their attempts for late intervention several years ago. Thus, this material is hardly "new" or "recently discovered" material supporting reopening of the Comanche Peak record.[6]

Exhibit C is an initial decision by the Department of Labor in an employment discrimination case dated May 12, 1989, almost 3 years ago. This decision is a public document and is hardly "new" evidence. Exhibit D appears to be a hand-written note critical of an attorney for CASE but without any date or authentication. Moreover, even if it were dated and authenticated as being an evaluation of this attorney by a DOL Administrative Judge — as alleged by Petitioners — we find that it hardly constitutes "new evidence" warranting reopening the record of an unrelated NRC proceeding. Exhibit E is a portion of a published opinion by the NRC's Atomic Safety and Licensing Board, dated December 28, 1983. Again, this is hardly "new" evidence discovered "within the last 30 days."

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[6] The Commission denied both the CFUR and Macktal requests. *See* CLI-88-12 and CLI-89-9, *supra*. Mr. Burnam withdrew his request voluntarily. Petitioners allege that this withdrawal was under "suspicious circumstances." Motion at 2. However, they provide absolutely no support for that allegation.

Exhibits F and G are briefs filed with the DOL in support of an employment discrimination case filed by a Mr. Hasan, a former worker at Comanche Peak. However, those briefs are dated February 16, 1988, and April 18, 1988. Again, these materials are public documents that are almost 4 years old. Moreover, both the Commission and the NRC Staff have long been aware of the general thrust of the arguments in Mr. Hasan's case, if not in actual possession of these documents themselves. In fact, Petitioners allege that the Staff had these documents in 1988. *See* Motion at 6. Thus, these materials hardly constitute "new" evidence. Likewise, Exhibit I is dated July 8, 1987, and is addressed to the Licensing Board itself. We can see no reason to conclude that this document, which was filed before the Licensing Board over 4 years ago, can be termed "new" evidence.

Finally, Exhibit J contains two parts. The first part is a settlement agreement between CASE, Mrs. Juanita Ellis, and TU Electric. The agreement is published in full as Exhibit B to the settlement agreement. *See* LBP-88-18B, *supra*, 28 NRC at 126-35. The second part is an affidavit by Barbara N. Boltz, a former member of CASE, reciting disagreements with the decision to settle the Comanche Peak proceeding. This document is over a year old and there is no allegation that this document contains "new" evidence. Furthermore, as the Staff correctly notes, the NRC was well aware that some CASE members disagreed with the decision to settle the proceedings. *See* CLI-88-12, 28 NRC at 610 n.6. Accordingly, we conclude that Petitioners have failed to satisfy the first prong of the reopening test because their "new" information is simply not timely in any sense of the word.[7]

The second prong of the reopening test requires that Petitioners demonstrate that the "new" evidence concerns "a significant safety or environmental issue." 10 C.F.R. § 2.734(a)(2). However, Petitioners point to no such issue. Instead, they raise numerous allegations regarding other Comanche Peak-related matters.

For example, Petitioners allege attorney misconduct by CASE attorneys in DOL proceedings. However, as we noted before when faced with the very *same* allegations, "the proper forum for these complaints is likely not the NRC." CLI-88-12, 28 NRC at 612 n.8. Instead, the affected persons should seek sanctions against those attorneys before the DOL or before the appropriate state bar associations. Likewise, Petitioners allege that unnamed TU Electric employees perjured themselves in the Hasan case before the DOL. However, there is no

---

[7] On December 2nd, 1991, the Commission received a pleading from the Citizens Association for Sound Energy ("CASE"), seeking leave to file a response to Petitioners' Motion to Reopen the Record. CASE's response is an effort to refute the allegations contained in the Boltz Affidavit and does not address the legal issues upon which we have resolved Petitioners' request. We grant CASE's motion and accept the tendered response. However, because we have resolved the question of reopening the record on other grounds, we do not reach the question of the accuracy of the allegations contained in either the Boltz Affidavit or the CASE response. The Staff should review both documents to determine if anything in either document affects its review of activities at Comanche Peak.

allegation — much less a showing — that the Licensing Board may have relied upon testimony by these employees. Again, this matter appears to be a concern for the DOL, not the NRC.

Finally, Petitioners allege that TU Electric employees committed perjury before the Licensing Board prior to the Board's Order of December 28, 1983. Motion at 4-5. However, in their motion, Petitioners cite absolutely no documentation for that allegation. Petitioners do not even support the allegation with their own affidavit; instead, we have only their own *ipse dixit* in the motion. The only document cited in the motion in relation to this matter is a copy of the Licensing Board's opinion. But that opinion does not contain any verification of Petitioners' allegation. This unsupported allegation simply cannot support reopening the record. Accordingly, we find that Petitioners have failed to meet the second prong of the reopening test.[8]

The third prong of the reopening test requires that Petitioners "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.734(a)(3). In this situation, Petitioners needed to show that the Licensing Board — and the Commission — might well have refused to accept the proposed settlement agreement between CASE, TU Electric, and the NRC Staff and instead would have continued the proceedings with the same or new intervenors. Instead, Petitioners simply aver that they would have been allowed to intervene in the proceeding. Motion at 6.

As the NRC Staff and TU Electric have noted, many of these same arguments were made both at the public hearing to discuss the proposed settlement agreement and in various motions for late intervention. *See, e.g.*, Transcript of Hearing (July 5, 1988); CLI-88-12; CLI-89-6. We concluded then that those arguments — based on allegations similar to these and on these and similar documents — were insufficient to support either challenges to the agreement or petitions for late intervention. Three years have not changed our opinion that these allegations are insubstantial and unsupported and do not constitute a basis for voiding the settlement agreement or reopening the proceedings.

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[8] The Petitioners' allegations appear to be addressed to the question of pipe support design at Comanche Peak. Motion at 4-5. The NRC has issued the operating license for Unit 1 of Comanche Peak and the Staff may take enforcement action against that license should circumstances warrant. Accordingly, we hereby refer the Petitioners' motion to the Staff under 10 C.F.R. § 2.206 for review of these allegations to the extent that they may apply to Unit 1. We also expect that the Staff will incorporate any evidence uncovered in this process into their review of activities at Unit 2.

V. CONCLUSION

Because Petitioners were not parties to the Comanche Peak proceeding, they cannot seek to reopen the record unless they first become parties by filing a successful petition for late intervention. Their "motion to reopen" does not address the five factors required to be satisfied in order to achieve this status. Therefore, we do not grant them late intervention. Even if Petitioners had addressed and satisfied the late intervention standards, the motion to reopen would have been denied, because Petitioners have failed to satisfy the reopening standards.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of January 1992.

Atomic Safety and Licensing Boards Issuances

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Peter S. Lam, Ph.D.
Harry Rein, M.D.

In the Matter of

Docket No. 50-333-OM
(ASLBP No. 91-645-02-OM)
(Facility Operating
License No. DPR-59)
(EA 91-053)

NEW YORK POWER AUTHORITY
(James A. FitzPatrick Nuclear
Power Plant)

In the Matter of

Docket No. 55-3615-SC
(ASLBP No. 91-646-02-SC)
(Senior Reactor Operator
License No. SOP-10561-1)
(EA 91-054)

DAVID M. MANNING
(Senior Reactor Operator)

January 21, 1992

MEMORANDUM AND ORDER
(Terminating FitzPatrick Proceeding)

SYNOPSIS

The Board terminates the *FitzPatrick* proceeding by granting the joint motion by the NRC Staff and the New York Power Authority (NYPA) to approve a settlement agreement. Mr. David M. Manning, a party to the related *Manning* proceeding, objects to the settlement agreement because, he states, his hearing rights may be adversely affected by it. Because Mr. Manning failed to state grounds upon which his objection can be sustained, the *FitzPatrick* proceeding is terminated. The resolution of factual issues by the *FitzPatrick* settlement agreement is not *res judicata* respecting any of those issues in the *Manning* proceeding.

BACKGROUND

David M. Manning is an NRC-licensed senior reactor operator (SRO) employed by the licensee, NYPA, at its FitzPatrick Nuclear Power Plant. Mr. Manning admits that he has used unlawful drugs in violation of the policies of the Nuclear Regulatory Commission and that, on October 9, 1990, he tried to thwart a random drug test administered in accordance with NRC regulations and NYPA's related drug-use screening program. Mr. Manning also admits that he had previously been referred to the NYPA Employee Assistance Program as a result of a cocaine-positive test in August 1988. Manning Affidavit at 2 (attached to Answer).

On May 2, 1991, the NRC Staff issued an "Order Modifying License (Effective Immediately)" to NYPA with respect to the FitzPatrick license. The order was founded upon the drug-testing and use episodes. It stated that the episodes raised concerns about Mr. Manning's integrity and trustworthiness. The order modified the FitzPatrick license to prohibit NYPA from employing Mr. Manning in Part 50 activities without prior NRC approval. 56 Fed. Reg. 22,022 (May 13, 1991). On May 31, 1991, NYPA answered the order requesting that it be rescinded or, if it is not, that NYPA be afforded a hearing on the order.

Also on May 2, 1991, the NRC Staff issued an "Order Suspending License (Effective Immediately) and Order to Show Cause Why License Should Not Be Revoked" respecting Mr. Manning's Part 55 SRO license — an action also based upon the drug-testing and use episodes. 56 Fed. Reg. 22,020 (May 13, 1991). On June 6, 1991, Mr. Manning, by his attorney, requested a hearing on the orders against his license. However, Mr. Manning did not request a hearing

on the order modifying the FitzPatrick license even though the *Federal Register* notice announced his right to do so. 56 Fed. Reg. at 22,023.

On August 9, 1991, in consideration of the respective answers, the NRC Staff modified both the FitzPatrick and Manning orders. The Modified FitzPatrick Order permits NYPA to allow Mr. Manning to return to Part 50 duties provided, among other things, that he follows a specified 3-year drug-testing program. 56 Fed. Reg. 41,378 (Aug. 20, 1991).

Mr. Manning's suspension and show-cause orders were modified to suspend his Part 55 SRO license for a minimum of 3 years, rather than to pursue an outright revocation. The Modified Manning Order would require Mr. Manning to participate in extensive 3-year drug-testing and rehabilitation programs. After completion of the programs, he may apply to have his license reinstated. 56 Fed. Reg. 41,590 (Aug. 21, 1991).

On August 28, 1991, Mr. Manning returned to Part 50 duties, but not to licensed reactor-operator duties, as permitted by the modifications. However, neither NYPA, at first, nor Mr. Manning accepted the modified orders as a resolution of the issues each wish to be heard by this Board. Later, on October 7, 1991, the NRC Staff and NYPA filed their joint motion for approval of a settlement agreement.

SETTLEMENT AGREEMENT

Under the settlement agreement, the NRC Staff withdraws both orders issued to NYPA, and NYPA withdraws its request for a hearing. NYPA agrees not to deviate from a followup drug-testing program it established for Mr. Manning in accordance with section 2.4(f) of Appendix A to 10 C.F.R. Part 26 (integrity of urine specimens) for 3 years from the date Mr. Manning returns to Part 50 duties. The period between drug tests will not exceed 90 days. There are provisions for testing after absences from work.

The settlement agreement and the Modified FitzPatrick Order require Mr. Manning to be tested far less frequently than does the Modified Manning Order. Under the latter, Mr. Manning would be subject to weekly, then semimonthly, then monthly testing during the 3-year program, compared to the 90-day minimum interval under the Modified FitzPatrick Order and the settlement agreement.

REGULATORY FRAMEWORK

NYPA notes that:

> Mr. Manning . . . is subject to at least two separate sources of regulation: (1) by the NRC under Part 55, and (2) by his employer, NYPA, which has independent responsibilities under its Part 50 license, generally, and pursuant to federal regulation (i.e., 10 C.F.R. Part 26), specifically.

NYPA Response at 2.

NYPA is correct. Part 50 permits licensees of nuclear power units to employ only reactor and senior reactor operators licensed under Part 55 to manipulate or to supervise the manipulation of reactivity-related controls. 10 C.F.R. § 50.54(i)-(m). There is no specific regulation in Part 50 covering the employment of nonlicensed personnel for activities under that part. But consistent with Part 50, the Commission has, by a statement of policy, adopted Industry Guidelines for Nuclear Power Plant Access Authorizations. The Guidelines are designed to assure that personnel granted unescorted access to protected and vital areas of nuclear facilities are trustworthy and reliable.[1] Final responsibility under the Guidelines rests upon the utility. There is no aspect of Part 50 that would prevent facility licensees from establishing their own, higher reliability standards for its Part 50 personnel.

In the proceedings before us, Mr. Manning's objection is that NYPA's settlement action would unfairly affect the reinstatement of his Part 55 SRO license. But Mr. Manning is not an independent actor in his dispute with the NRC Staff. He is an NYPA employee, and he needs his employer's confidence in him to regain his SRO license.

An applicant for an operator's license under Part 55 can be licensed only upon the request from the nuclear power facility licensee where the applicant will be employed. The facility licensee must provide evidence that the applicant is needed and meets the facility's NRC-imposed requirements to be licensed. The regulations impose a clear duty upon nuclear power facility licensees to foster, support, and maintain the licensing of only those reactor operators it believes to be qualified and in good health. *E.g.*, 10 C.F.R. Part 55, Subpart C; § 55.31(a)(3)-(6); § 55.61.

In addition, Part 26 requires nuclear-power reactor facility licensees to implement a fitness-for-duty program for employees such as Mr. Manning. Such programs must:

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[1] Nuclear Power Plant Access Authorization Program, Policy Statement, Appendix A, 53 Fed. Reg. 7534-45 (Mar. 9, 1988).

> Provide reasonable assurance that nuclear power plant personnel will perform their tasks in a reliable and trustworthy manner and are not under the influence of any substance . . . which in any way affects their ability to safely and competently perform their duties . . . .

10 C.F.R. § 26.10(a).

The requirements for the fitness-for-duty programs are detailed and demanding. *E.g.*, Appendix A to Part 26. Particularly relevant to these proceedings is the requirement that covered workers be subject to unannounced random drug testing at a rate equal to at least 100% of the workforce each year.[2] Moreover, facility licensees may take even more stringent fitness-for-duty actions than those required by the rule. 10 C.F.R. § 26.27(b).

THE PARTIES' POSITIONS

A. Mr. Manning's Objections

Mr. Manning, who is not a party to the *FitzPatrick* proceeding, did not join in the settlement agreement or motion. The Board afforded him an opportunity to comment on the agreement.

On October 24, 1991, Mr. Manning, by his counsel, objected to the settlement, stating that such a settlement, "would render a nullity a significant portion of his hearing . . . ." Counsel argues that Mr. Manning would be denied his statutory and constitutional right to a hearing because, even if he were to prevail before the Board, NYPA would be required to impose the conditions "sought by the Staff." Objections at 3.

Mr. Manning seeks a change in the settlement agreement that would subject him to either the testing program imposed by the Board in a future order or that imposed in the Modified Manning Order. *Id.* at 3-4. However, the Board doubts that this proposal has been well thought out. Counsel for Mr. Manning seems not to understand that the testing provisions of the Modified FitzPatrick Order and the settlement agreement are much more lenient than the provisions of the Modified Manning Order. *Id.* at 2-4. Moreover, Counsel's arguments are virtually void of any legal analysis. For example, he does not discuss the fact that the Board has no authority simply to alter the provisions of the agreement between the NRC Staff and NYPA at his request.

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[2] The pertinent regulation is 10 C.F.R. § 26.24(e)(2). That section does not specify the testing cycle period and is, therefore, logically incomplete. However, the Statement of Considerations for Part 26 indicates that the Commission intended to adopt an annual cycle, i.e., a method whereby covered workers "are covered at a rate equal to approximately 100 percent of the workforce, resulting in about two-thirds of the workers being tested during the course of a given year." 54 Fed. Reg. 24,468 (June 7, 1989); 26-SC-7. The Board has been informed that a conforming correction to Part 26 is forthcoming.

B. NRC Staff's Reply

The NRC Staff argues that Mr. Manning was afforded constitutional due process by the *Federal Register* notice and opportunity to request a hearing in the *FitzPatrick* proceeding. The NRC Staff also notes that Mr. Manning did not seek to participate in the settlement negotiations even though he had been notified that the negotiations were under way. Thus, according to the NRC Staff, it is too late for Mr. Manning to raise constitutional objections. NRC Staff Reply at 2-5.

The NRC Staff also repeats a puzzling assertion (with which we disagree) that the proposed agreement would have no effect in the proceeding regarding Mr. Manning's senior reactor operator's license. *Id.* at 5; Joint Motion at 1 n.1.

C. NYPA's Response

NYPA responded that it has the authority, as Mr. Manning's employer, to administer "all applicable FitzPatrick policies and procedures." NYPA notes also that it must meet NRC Part 26 requirements. Pursuant thereto, FitzPatrick has a fitness-for-duty program, which, incidentally, was accepted by Mr. Manning's labor union. NYPA Response at 5.

Further, according to NYPA:

> [T]he conditions of the Settlement Agreement are not simply those sought by the Staff. They are conditions which NYPA has purposefully adopted. NYPA requires compliance with these conditions in order for Mr. Manning to do work pursuant to NYPA's Part 50 license.

Id. at 6.

At the Board's invitation, NYPA provided the affidavit of Radford J. Converse, FitzPatrick's Resident Manager.[3] Mr. Converse explains that the proposed drug testing of Mr. Manning under the settlement agreement is appropriate in the ordinary course of business, given NRC regulations and FitzPatrick policies and procedures. Affidavit at 2. The proposed settlement is also important to NYPA because it will conclude the controversy with the NRC. But, even without that benefit, the testing program is appropriate because it provides reasonable assurance of Mr. Manning's fitness to return to work. *Id.*

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[3] Memorandum and Order, November 25, 1991 (unpublished). The Board also provided an opportunity to Mr. Manning to respond to any NYPA affidavit. *Id.* at 2. He did not respond.

DISCUSSION

A. The FitzPatrick Proceeding

To ensure his standing to object to any settlement or order in the *FitzPatrick* proceeding, Mr. Manning should have intervened there in accordance with the opportunity announced in the *Federal Register* notice. Moreover, as the NRC Staff argues, by waiting until settlement negotiations were completed to object to the result, Mr. Manning may be guilty of laches.

In a neat, traditional civil proceeding, Mr. Manning would be found to have rested on his rights too long, and that would be the end of it. However, this proceeding is neither neat nor traditional. It is a complex, tri-lateral set of related proceedings with parties shifting from one side to another as the issues change.

At bottom, the NRC Staff and NYPA move this Board to find that the settlement is in the public interest. We were unwilling to do so in the presence of a reasonable question of whether NYPA was conveniently and unfairly sacrificing Mr. Manning to settle its dispute with the NRC Staff. If the settlement would unconscionably deny Mr. Manning his opportunity for a fair hearing in his own proceeding, we would attempt to afford some relief.

It is not our purpose in this analysis to decide whether NYPA is imposing the correct testing regimen upon Mr. Manning. Rather, we look to whether the testing regimen falls within NYPA's very broad discretion to assure that its covered employees are reliable and trustworthy. We do this solely to test whether NYPA has been unduly influenced by a desire to settle an annoying litigation.

We are convinced by Mr. Converse's uncontroverted affidavit, the facts admitted by Mr. Manning, and our review of the relevant regulatory framework, that the drug-testing program to be imposed upon Mr. Manning in the settlement agreement has a legitimate business purpose apart from its coincidental value as a settlement factor.

The settlement is consistent with the fitness-for-duty regulations. Equivalent, or possibly more severe, testing would be imposed on Mr. Manning even if there were no dispute to be settled. The frequency of testing under the settlement agreement, 90-day minimum, is not very different from the minimum annual-rate Part 26 requirement for the general workforce. Unlike the general workforce, however, Mr. Manning has been tested once as cocaine-positive, and deemed once to be cocaine-positive by his refusal to provide a specimen. In that light, the 90-day testing cycle appears to be rather lenient. Moreover, after two positive tests, Mr. Manning could have been removed from Part 50 duties for a minimum of 3 years. 10 C.F.R. § 27.27(b)(2). Instead he was permitted to return to Part 50 work within 1 year — another indication of lenient treatment.

There is not the slightest indication that NYPA has acted unreasonably toward Mr. Manning for the purpose of settling the *FitzPatrick* proceeding. Nor is the NRC Staff imposing a testing regimen for Mr. Manning upon NYPA, as he has suggested. The settlement is essentially a recognition between NYPA and the NRC staff that they have nothing to litigate. Neither party seems to yield any significant *quid pro quo* as consideration in the settlement agreement.

There are no grounds upon which this Board can sustain Mr. Manning's objection to the settlement; the matter is beyond the purview of the Board in the *Manning* proceeding. The settlement is in the public interest and is approved.

B. The Manning Proceeding

When Mr. Manning's counsel failed to understand that the *FitzPatrick* settlement agreement would impose a much more lenient testing regimen upon Mr. Manning than that imposed by the Modified Manning Order, his argument that Mr. Manning would be adversely affected by the settlement lost most of its force. Nevertheless, it is still open for Mr. Manning to try to establish that a testing program more lenient than the program imposed by NYPA in the settlement, or no program at all, is appropriate. Since NYPA will still have considerable leeway and concomitant responsibility under Part 26 to impose its testing program upon Mr. Manning, the value of a favorable order of this Board may be diminished.[4] In any event, the *Manning* proceeding shall go forward.

The NRC Staff and Mr. Manning are directed:

1. To enter into negotiations toward possible settlement in light of this opinion within 15 days following its service. The NRC Staff shall initiate such negotiations.

2. If no settlement agreement is reached within 30 days following the service of this order, the parties shall begin discovery and prepare for hearing in accordance with the schedule following page 54 of the prehearing conference transcript. The issue to be heard is: "Should the Modified Manning Order be sustained?" Mr. Manning's proposal for additional issues is unacceptably vague and is rejected.

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[4] However, NYPA states that the evidence that may be developed at Mr. Manning's hearing "could well constitute information which brings about a reconsideration of the terms of the NYPA-mandated follow-up drug testing program." NYPA Response at 9.

ORDER

IT IS THEREFORE ORDERED that the *FitzPatrick* proceeding be terminated. The parties to the *Manning* proceeding shall comply as directed.

THE ATOMIC SAFETY AND
LICENSING BOARD

Peter S. Lam, Ph.D.
ADMINISTRATIVE JUDGE

Harry Rein, M.D. (by I.W.S.)
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland
January 21, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Cadet H. Hand, Jr.
Elizabeth B. Johnson

In the Matter of

Docket No. 030-12145-CivP
(ASLBP No. 91-622-01-CivP)
(Materials License
No. 29-14150-01)
(EA 89-079)

CERTIFIED TESTING
LABORATORIES, INC.

January 29, 1992

The Licensing Board, in an Initial Decision, determines that a civil monetary penalty sought to be imposed by the NRC Staff against a Licensee involved in industrial radiography should be reduced from $8000 to $5000. The Board ruled that various reports and statements by the Licensee were not intentionally false, as claimed by the Staff, but that the Licensee's system of records was inappropriate and inadequate for complying with the recordkeeping requirements of the license. As a result, the Board reduced the penalty from Severity Level II to Severity Level III.

LICENSE CONDITIONS: REPORTS

Accurate reports are material to the NRC's licensing scheme for industrial radiography. Inaccurate reports are thus material whether or not the NRC would be led to take action on the basis of the erroneous information.

RULES OF PRACTICE: CIVIL PENALTIES

In reviewing a civil penalty sought to be assessed by the Staff, a licensing board may determine whether the proposed severity level and penalty are appropriate or, alternatively, whether the proceeding should be dismissed or the penalty imposed, mitigated, or remitted. A board may not increase the penalty sought by the Staff.

CIVIL PENALTIES: ASSESSMENT (BREAKDOWN IN CONTROL OF LICENSED ACTIVITIES)

Because of the demonstrated potential dangers of radiographic operations to the public health and safety and the importance of audit reports to NRC's system of regulation, a failure to prepare correct reports can be of safety significance. In this case, the preparation of inaccurate audit reports some time after the audit had taken place was inappropriate for complying with the license requirement and amounted to a breakdown in control of licensed activities.

CIVIL PENALTIES: ASSESSMENT (MITIGATION)

The promptness and extent to which a licensee takes corrective action is a factor that a licensing board may consider in determining the amount of a civil penalty.

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: Industrial radiography.

APPEARANCES

Mark C. Trentacoste, Esq., Moorestown, New Jersey, for Certified Testing Laboratories, Inc., Licensee.

Bernard M. Bordenick, Esq., and **Marian L. Zobler, Esq.**, for the United States Nuclear Regulatory Commission Staff.

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INITIAL DECISION

(Order Imposing a Civil Monetary Penalty)

Opinion (Including Findings of Fact)

This proceeding involves an Order Imposing a Civil Monetary Penalty, dated August 29, 1990,[1] in the amount of $8000, against Certified Testing Laboratories, Inc., Bordentown, New Jersey (hereinafter, CTL or Licensee). CTL is the holder of License 29-14150-01, which authorizes the use of byproduct material for the

[1] The Order was published at 55 Fed. Reg. 36,729 (Sept. 6, 1990).

conduct of industrial radiography and related activities.[2] The license requires, *inter alia*, field audits of radiographers to be performed at intervals not to exceed 3 months, during periods when radiographic work is being performed.[3]

The Order was preceded by a written Notice of Violation and Proposed Imposition of Civil Penalty, dated March 9, 1990, which proposed the $8000 civil penalty.[4] On the same day, the Staff issued an Order to Show Cause why the Licensee's license should not be modified to prohibit Mr. Joseph Cuozzo, Radiation Safety Officer (RSO) at the Bordentown facility, from serving as RSO or in any other position involving performance or supervision of licensed activities for the Licensee.[5] The show-cause proceeding was later settled, permitting Mr. Cuozzo to resume his duties as RSO but subject to additional corporate supervision.[6]

For reasons set forth below, we conclude that the violations proved by the Staff to have occurred are of a lower severity than those for which a penalty was sought and, accordingly, that the civil penalty should be reduced from $8000 to $5000.

I. VIOLATIONS ALLEGED

As set forth in the Appendix to the Order Imposing a Civil Monetary Penalty, the alleged violations for which a civil penalty is sought to be imposed are as follows:[7]

> I.A. Condition 16 of License No. 29-14150-01 requires, in part, that licensed material be possessed and used in accordance with statements, representations and procedures contained in a letter dated January 7, 1985. Item No. 5 of this letter requires the Radiation Safety Officer or his designated representative to perform unannounced field audit inspections of each radiographer at intervals not to exceed three months.
>
> Contrary to the above,
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> 1. Field audit inspection reports, dated July 20, 1987 and July 21, 1987, documenting quarterly field audits of two radiographers, were created by the

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[2] Order Imposing a Civil Monetary Penalty, dated August 29, 1990.

[3] Licensee Admission of Fact No. 2, dated February 28, 1991; NRC Staff Testimony of Geoffrey Cant, Richard Matakas, John Miller, and John White (hereinafter, Staff Testimony), ff. Tr. 77, Attach. 6 (OI Report), Exhs. 2 and 3; Tr. 209-11 (Miller); Tr. 538-39, 549-50 (Cuozzo). Hereinafter, references to the prepared testimony of particular Staff witnesses will be cited by the name of the witness and page in the prepared testimony — e.g., "Cant, ff. Tr. 77, at (page)."

[4] Cant, ff. Tr. 77, at 22.

[5] *Id.*

[6] Memorandum and Order (Approving Settlement Agreement and Terminating Proceeding), dated June 28, 1990 (unpublished). *See* Cant, ff. Tr. 77, at 22, 25-26; Tr. 220-21 (Cant).

[7] 55 Fed. Reg. at 36,730. The Notice of Violation also included other violations for which no civil penalty has been sought. Cant, ff. Tr. 77, at 23.

Vice President/Radiation Safety Officer (VP/RSO); however, field audits of the indicated radiographers were not performed on the recorded dates, as admitted by the VP/RSO in an interview with an NRC investigator on February 8, 1989.

2. Between July 1987 and January 6, 1988, no field audits for one specific radiographer were performed.

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

Contrary to the above, information provided by the VP/RSO during a telephone conversation with three NRC representatives on April 25, 1988, was inaccurate in that the Vice President/Radiation Safety Officer (VP/RSO), in response to questions regarding the field audit inspection report dated July 21, 1987, stated that he personally performed the field audit inspection. This statement by the VP/RSO was not accurate in all material respects in that the VP/RSO subsequently admitted to an NRC investigator on February 8, 1989 that he had not audited the radiographer on July 21, 1987, but had "made up" the audit report to give the appearance of compliance with the quarterly audit requirement. The statement was material because it had the potential to affect an ongoing NRC review of the matter.

The Order categorized the two violations in the aggregate as Severity Level II and sought to assess a civil penalty of $8000. The penalty was stated to be divided equally between the two violations.

The Licensee admitted Part I.A.2 of Violation I.A and denied Part I.A.1 of Violation I.A and Violation I.B.[8] The Licensee also filed a timely request for a hearing, dated September 25, 1990. This Licensing Board was established on October 30, 1990.[9] In our Memorandum and Order (Schedules for Proceeding), dated November 5, 1990 (unpublished), we granted the hearing request and issued a Notice of Hearing.[10]

The issues to be considered at the hearing, as prescribed by the Civil Penalty Order, were (a) whether the Licensee committed Violations I.A.1 and I.B, as set forth in the Notice of Violation (and as quoted above), and (b) whether, on the basis of these violations and Violation I.A.2 as set forth in the Notice of Violation (also quoted above) that the Licensee admitted, the Civil Penalty Order (in the amount of $8000) should be sustained. At a prehearing conference held in Bordentown, New Jersey, on December 10, 1990, the following subissues (to be considered under the aegis of the two broad issues spelled out above) were also approved by the Board for litigation purposes:[11]

1. Whether the RSO promptly advised the NRC that the audit report dated July 21, 1987 was incorrect.

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[8] Cam, ff. Tr. 77, at 26.

[9] 55 Fed. Reg. 46,593 (Nov. 5, 1990).

[10] The Notice of Hearing, dated November 5, 1990, was published at 55 Fed. Reg. 47,160 (Nov. 9, 1990).

[11] Prehearing Conference Order (Issues and Schedules), dated December 19, 1990 (unpublished), at 3-4.

2. Whether, in stating that the July 21, 1987 audit report was "made up," the RSO admitted that he intended to mislead the NRC or, alternatively, that the report was merely incorrect and not intended to mislead the NRC.

3. The scope and extent of NRC reliance on the July 21, 1987 audit report, as referenced in the Appendix to the Order Imposing a Civil Monetary Penalty (at p. 4) and as contemplated by 10 C.F.R. Part 2, Appendix C (VI).

4. Whether the NRC Staff properly applied the 7 standards in 10 C.F.R. Part 2, Appendix C (VI), relating to the consideration of oral information. In particular, whether the RSO was provided a copy of the notes or transcript of his remarks for review and correction.

5. Whether the NRC Staff gave appropriate consideration to mitigation based on the Licensee's corrective action in requiring hand-prepared and countersigned audit reports (as 10 C.F.R. Part 2, Appendix C (V), B.2 appears to require).

6. The adequacy, accuracy and validity of the report of the audit dated July 20, 1987.[12]

In its Prehearing Conference Order (Issues and Schedules), dated December 19, 1990 (unpublished), the Board established schedules for discovery, the filing of direct testimony, and for the evidentiary hearing. Both parties engaged in discovery, which terminated on March 6, 1991. The Staff filed written direct testimony on March 25, 1991. The Licensee elected to present its witnesses' testimony orally, as it has a right to do in a proceeding of this type (*see* 10 C.F.R. § 2.743(b)(3)).[13] The Board conducted a second prehearing conference on April 16, 1991, immediately preceding the evidentiary hearing, which took place on April 16, 17, and 18, 1991.[14]

At the hearing, the Staff presented the testimony of a panel of four witnesses: Mr. Geoffrey D. Cant, an Enforcement Specialist with NRC's Office of Enforcement; Mr. Richard A. Matakas, a Senior Investigator with NRC's Region I Office of Investigations; Mr. John J. Miller, formerly Senior Health Physicist in Nuclear Materials Safety Section C, Region I; and Mr. John R. White, formerly Chief, Nuclear Materials Safety Section C, Region I.[15] It also relied on certain documentary evidence. The Licensee presented two witnesses — Messrs. Joseph Cuozzo, the RSO,[16] and Peter M. Sideras, a former radiographer and nondestructive technician for CTL[17] — and also relied on documentary

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[12] As amended through Memorandum and Order (Telephone Conference Call, 12/28/90), dated December 28, 1990 (unpublished), at 2.

[13] *See also Tulc. Gamma Ray, Inc.*, LBP-91-25, 33 NRC 535 (June 13, 1991).

[14] *See* Notice of Prehearing Conference and Evidentiary Hearing, dated February 19, 1991, published at 56 Fed. Reg. 7733 (Feb. 25, 1991).

[15] Staff Testimony, ff. Tr. 77, Attachs. 1-4 (Statements of Professional Qualifications).

[16] Tr. 325 (Cuozzo).

[17] Tr. 244 (Sideras).

evidence. We find each of these witnesses technically qualified to present the testimony that each sponsored.

The NRC Staff filed its proposed findings of fact and conclusions of law on May 17, 1991. The Licensee filed its proposed findings of fact and conclusions of law on June 7, 1991. The Staff filed reply findings on June 21, 1991.[18]

II. POSITIONS OF THE PARTIES

The Staff founded its case on the questioned accuracy of two of the Licensee's audit reports — one, dated July 21, 1987, concerning a radiographer named Peter Sideras; the other, dated July 20, 1987, concerning a radiographer named Milton Ramero — together with statements made by the Licensee's RSO to NRC representatives concerning the two audits. The NRC stressed the importance of such reports to the regulatory scheme employed by NRC. It maintains in essence that these reports and statements were deliberately falsified to convince the NRC that the Licensee was abiding by the requirements of its license concerning audit reports (noted earlier in this Decision). Based on these assertedly fraudulent reports and statements, the Staff sought its $8000 civil penalty.

On the other hand, the Licensee concedes the inaccuracy of at least one of the reports and certain of its statements but claims that it acted through confusion or lack of proper care, with no intent to mislead the NRC. The Licensee at the hearing acknowledged the importance of the reports in question but indicated that it had not accorded importance to the reports during the time frame in which the alleged violations were uncovered. As a result, the Licensee claims that the violations should be considered of less severity than asserted by the Staff, leading to a civil penalty of no more than $500.

III. NATURE OF BUSINESS

The Bordentown facility is a satellite of the New York office of CTL. The portion of CTL's business conducted from the Bordentown facility that is relevant to this case concerns sealed radioactive sources containing byproduct material that are used for radiological testing.[19] NRC Materials License 29-

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[18] These documents will hereafter be referenced as "Staff FOF," "Licensee FOF," and "Staff Reply FOF." The Licensee, along with its findings, also filed comments on certain of the Staff findings; these comments will be referenced as "Licensee FOF Comments."

[19] The record of this case does not indicate that CTL's entire business is concerned with the use of radioactive sources. Testimony of Mr. Corrizo at Tr. 417, 420, 428, and 592 implies that other activity persisted at the Bordentown site, at least during the temporary cessation of radiography following discovery of the instant violations.

14150-01 permits CTL to possess[20] and use certain radioactive materials as sealed sources under carefully prescribed conditions, subject to regulations promulgated to protect both the radiographers and the general public.[21]

These regulations govern such matters as the training and certification of radiographers; the required records that must be maintained, including source usage, radiation levels, and personnel exposures; the control and testing of sealed sources; radiation survey instruments; requirements for the various devices associated with radiographic use of sealed sources, including functional criteria, radiation levels on external surfaces and from the storage container, repair, and maintenance; and inventories. Additional requirements or details may be included in the facility license.

Each holder of a license for radiography is inspected at irregular intervals by NRC inspectors, usually from the cognizant field office, who arrive on site unannounced. In the course of the inspection, they may inspect and copy any and all relevant records of the licensee, observe operations, inspect the facility, and interview personnel. The inspectors may later ask the licensee for clarification, confirmation, or additional information; this request may be by letter, in person, or by phone. The product of the inquiry is the NRC inspection report.[22]

The Staff testimony (not contested in this respect by CTL) forcefully demonstrated the importance of the NRC's regulation of radiographic activities. Relative to many operations regulated by the NRC, radiography presents the greatest potential for inadvertent exposure, both for the radiographer and for the general public. Indeed, the record suggests that radiographic sources are responsible for most of the acute-radiation-exposure industrial accidents in the United States.[23]

The staff employed at CTL's Bordentown facility was small at the time of the audit of concern in this case. Those CTL employees playing roles in the events being considered here consisted of a secretary, two radiographers, and the RSO.[24]

The secretary performed such tasks as typing audit reports, logging in work submitted by customers and recording any special requests, transmitting reports of testing, and undoubtedly performing other similar duties. The radiographers had been trained, examined, and certified in accordance with the requirements

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[20] Under its license, CTL can possess sources containing iridium-192, cobalt-60, or cesium-137 of assorted strengths, no one of which can exceed 100 curies. The cesium isotope is used, under this license, for calibration purposes. Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 2.

[21] Regulations directed specifically to the licensing of radiography and radiological operations as practiced by CTL are found in 10 C.F.R. Part 34; regulations of more general applicability are located elsewhere in Title 10, particularly Parts 20 and 30.

[22] *See, e.g.*, Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4 (Inspection Repon 030-12145/88-001).

[23] White, ff. Tr. 77, at 2-3. In the Statement of Considerations to a 1990 revision of 10 C.F.R. Part 34, the Commission provided recent examples of radiography incidents. White, ff. Tr. 77, at 3; Staff Testimony, Attach. 5 (copy of 55 Fed. Reg. 843 (Jan. 10, 1990)).

[24] Tr. 245, 268, 285-86 (Sideras). CTL also employed a second secretary, a time and attendance clerk, and a bookkeeper at Bordentown (Tr. 286 (Sideras)).

of Appendix A of 10 C.F.R. Part 34.[25] The RSO, Mr. Cuozzo, who was also a trained and certified radiographer and a Vice-President of CTL,[26] had the overall responsibility for the operation of the Bordentown facility and, as its RSO, for the radiological safety of its employees and the public. He was required to be familiar with the governing regulations, with the facility license, and with the work being done by the radiographers.[27]

Of particular importance to this case was Mr. Cuozzo's responsibility to audit the work performance of each radiographer quarterly and to prepare and maintain the report of that audit. 10 C.F.R. § 34.11(d)(1). For this purpose, a printed form had been prepared that contained the name of the radiographer, a checklist of a number of items to be observed, comments of the auditor, the signature of the auditor, and the date of the audit.[28] The purpose of the audit was to determine, by observing him as he worked, whether the radiographer was continuing to follow the procedures established to protect the public and to minimize his own exposure to radiation, as he had been trained.[29] An audit of a radiographer could be conducted, without advance notice, either within the Bordentown facility or at a remote worksite.[30]

The radiographers had the use of an assortment of sealed radioactive sources, each installed in an exposure device that also served as a shield from the radiation; in order to make the necessary exposure, the source could be mechanically driven by remote operation from this device, then retracted into its shield.[31] When not in use, all sources were kept in a locked storage facility;[32] inventory of the contents of the storage facility was maintained by means of a source utilization log, in which the radiographer entered, *inter alia*, his name, the source identification, the date, the job location, and the times he removed and returned the source.[33] Calibrated radiation survey instruments were used to determine radiation levels on the outside of the storage facility, on the outside of the exposure device with the source in its fully shielded position, and around the periphery of the work area, with the source out of its shield and in position to make the exposure.[34] These levels were recorded on radiation reports.[35] The radiation levels at each location were limited to predetermined values.

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[25] Tr. 140-42 (Miller, White); *see* 10 C.F.R. § 34.31(a)(1).
[26] Tr. 591 (Cuozzo); Cam. ff. Tr. 77, at 20.
[27] White, ff. Tr. 77, at 3-4; Tr. 198 (White).
[28] *See, e.g.*, Staff Exh. 1; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 7, at 7-11.
[29] White, ff. Tr. 77, at 4.
[30] Tr. 246-47 (Sideras); Tr. 336, 337, 357 (Cuozzo).
[31] White, ff. Tr. 77, at 3.
[32] Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4, at 3.
[33] Miller, ff. Tr. 77, at 6; Licensee Exh. 1; Tr. 300 (Sideras); Tr. 426-27 (Cuozzo).
[34] Tr. 368 (Cuozzo).
[35] Miller, ff. Tr. 77, at 6; Licensee Exhs. 2A, 2B, 2C, and 2D.

The sources used by CTL contain radioactive material that gives off gamma rays as it decays; the number and energy of the gamma rays emitted depend on the specific activity of the radioactive isotope that has been encapsulated. The source "strength" (a measure of the number of disintegrations occurring per unit time, often expressed in curies) depends primarily on the quantity of the radioactive isotope in the source. The sources are sealed in order to confine the radioactive material, thereby preventing contamination of the surrounding areas. Sources such as these can be used much as are X-rays: to make pictures on film of specific portions of objects[36] in order to determine conditions not otherwise visible (nondestructive testing).

The record of this case contains lengthy discussion, albeit not for technical reasons, of inspections that CTL radiographers made for, e.g., welder certification purposes.[37] Because of their small physical size, these sources are manageable, are easily transported, even in their mandatory shielded containers, and can be used in locations inaccessible to cumbersome X-ray machines.[38] Radiography can be performed "on site" (within the Bordentown facility) or in the field, by transporting the radiographer (and a helper, if needed) and all his equipment to a job site.[39]

With this background, it may be helpful to follow a specimen submitted for radiological testing along its route through the facility. The secretary would log in the specimen and record any specific requirements or instructions from the customer. Mr. Cuozzo would assign the specimen to one of the radiographers, who would proceed to perform the test. The radiographer would likely place it in an open area inside the building appropriate for making the test. He would remove the selected source, in its exposure device, from storage, fill out the utilization log, and position the exposure device so that the source would be appropriately located when driven from the device. He would drive the source out of its shield to its position for making the exposure, but only long enough for him to determine, with the radiation survey instrument, where to place the ropes that would designate the delimited area.[40]

With ropes in place and tagged and the area diagrammed for record purposes (exposed source and specimen location, distances from the exposed source, and radiation levels at the ropes recorded), he would place his film and proceed to

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[36] CTL's radiography business concerns inspection (or testing) of metals. Medical radiography is, obviously, a separate field and is governed by differing regulatory requirements. *See* 10 C.F.R. Part 35, "Medical Use of Byproduct Material."

[37] This testimony had nothing to do with the actual measurements but only with the dating of the inspection reports that were sent to the customer. *See, e.g.*, Tr. 263-69 (Sideras); Tr. 325-35 (Cuozzo). *See also* note 76, *infra*.

[38] *See* White, ff. Tr. 77, at 2.

[39] Tr. 336 (Cuozzo); Tr. 113-14 (Miller).

[40] Tr. 249 (Sideras).

make the exposure.[41] After lapse of the necessary time, he would retract the source, survey the outside of the exposure device to ensure that the source had properly retracted and was thus shielded, retrieve h[illegible] film, and, if that was the last test to be made with that source, return it to s[illegible]ge, again surveying the outside of the storage facility to confirm proper placement of the device in storage. The utilization log would be used to record the return of the device and the radiation levels.[42]

It was during one of these setups and restorations that Mr. Cuozzo would perform his audit. He testified that his office was fairly close to the area in the Bordentown facility in which the radiographers worked and that when he observed one working "back there," he would go back and do an audit on a piece of paper, which he perhaps would give to a secretary for typing at some later time.[43]

It would appear that only a few of the actual field audits ever made it to typing. However, one must ask the reason for the audit and its report. A radiographer must repetitively perform a number of actions, no one of which is, of itself, challenging or complex, but each intended to minimize his exposure to radiation and to prevent exposure of anyone else, all while doing his job efficiently and professionally. In many ways, the type of audit addressed at length on the record of this case is similar to the periodic personnel evaluations used by many employers; in the present context, it is a formal record of a radiographer's performance of his job — does he adhere to the rules (demonstrate good safety practices) or has he become careless. It is appropriate (and required) that these audits be periodic and unannounced.[44] It is commendable that a supervisor does not wait for the mandated date on the calendar to observe (even though not always recording) the work of his co-worker. The NRC depends on accurate records of periodic audits to assist in its determination of whether a licensee is maintaining vigilance in protecting its employees and the public.[45]

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[41] This case is not concerned with the quality of the picture made on film by the exposure, although this quality is, of course, of major importance to the company. Each radiographer must also pass a "practical exam," which determines, *inter alia*, whether he is capable of obtaining the requisite information on a specimen. The "practical exam" also includes a review as to whether the radiographer is adhering to applicable safety requirements, comparable to matters covered by the field audits. *See* p. 38, *infra*.

[42] *See* Licensee Exh. 1. It is not clear from the record, nor is it important for this case, when in this sequence the radiographer might develop his film.

[43] Tr. 356-60 (Cuozzo).

[44] 10 C.F.R. § 34.11(d)(1); White, ff. Tr. 77, at 4; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 3, at 2.

[45] White, ff. Tr. 77, at 4; Cant, ff. Tr. 77, at 24-25, 27.

IV. STAFF DISCOVERY OF ALLEGED VIOLATIONS

On April 22, 1988, Mr. John Miller, then an NRC inspector, conducted a routine, unannounced safety inspection at the CTL facility in Bordentown, New Jersey. Mr. Miller was the senior inspector and was assisted by Mr. Michael Varela, also an NRC inspector. The details of the inspection are documented in NRC Inspection Report No. 030-12145/88-001.[46]

During the inspection, Mr. Miller reviewed records documenting the audits of radiographic personnel performed by the Licensee's RSO, Mr. Joseph Cuozzo. In an effort to validate the veracity of the audits, he cross-checked the audit records against the Licensee's utilization logs and radiation reports. The utilization log contains a record of the exposure device used on a given date and who used it, and the radiation report documents the radiation measurements of the surrounding unrestricted area when a source has been used and also documents the quality assurance check performed on the radiographic equipment.[47] Mr. Miller also explained that if no radiation report and utilization log exist for a given day, one would assume no radiography was performed on that day; and, if no radiography was performed on a given day, no field audit could have been performed on that day.[48]

Mr. Miller inspected the Licensee's utilization log and radiation reports and noticed that the RSO (Mr. Cuozzo) had documented that he performed an audit of Mr. Peter Sideras, one of CTL's radiographic personnel, on July 21, 1987. He found there was no entry in the source utilization log indicating use of a source on that day or radiation report documenting that radiography had been performed on that date. At that point, he became suspicious of the audit record.[49]

Mr. Cuozzo was not present at the Bordentown CTL office on the day of the inspection, and Mr. Miller asked Mr. Sideras and one of the CTL secretaries to assist him in locating the records needed. He asked Mr. Sideras and the secretary if they could produce any paperwork, such as a bill to a client, to verify that radiography had been performed on July 21, 1987. They searched the files but could find nothing to verify that radiography had been performed on that date.[50]

Mr. Miller asked Mr. Sideras if he could remember if he had been audited on July 21, 1987, but Mr. Sideras' response to Mr. Miller was that he could not remember if he had or had not been audited on that date. Mr. Miller further

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[46] Miller, ff. Tr. 77, at 5; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4.
[47] Miller, ff. Tr. 77, at 5-6. *See also* notes 33 and 35, and accompanying text, *supra*.
[48] Miller, ff. Tr. 77, at 6.
[49] *Id.*; *see also* Staff Testimony, Attach. 6, Exh. 4, at 3.
[50] Miller, ff. Tr. 77, at 7.

testified that the secretary stated that she thought Mr. Sideras might have been on vacation during that time of the year and that the time and attendance clerk, Ms. Lea Machulskis, would have the information. Upon checking, Ms. Machulskis found that Mr. Sideras had been on vacation on July 21, 1987.[51]

Mr. Miller checked a representative sample of the other audit reports in the file to see if they corresponded to the utilization logs and radiation reports. He found no other inconsistencies at that time other than the audit report dated July 21, 1987. The secretary made a copy of that audit report and Mr. Miller took that photocopy of the July 21, 1987 report back to the NRC Region I office.[52]

Because the RSO, Mr. Cuozzo, was not present at the April 22, 1988 inspection, Mr. Miller interviewed him on the phone on April 25, 1988. (This interview constituted the exit interview for the particular inspection.)[53] The telephone call was made from Mr. John White's office (Mr. White was Mr. Miller's supervisor) on the speaker phone, and Mr. White, Mr. Miller, and Mr. Varela were present for the whole conversation.

Mr. Miller stated that Mr. Cuozzo said he could remember personally performing an audit of Mr. Peter Sideras on July 21, 1987. Mr. Miller told him that they were unable to locate a radiation report for July 21, 1987, during their inspection. Mr. Miller further reported that Mr. Cuozzo said he would look for that report and forward it to Mr. Miller, and that Mr. Cuozzo did not inform him, either at that time or at any other time, that the July 21, 1987 audit report was incorrect.[54]

Mr. Miller testified that NRC Region I received a letter from Mr. Cuozzo on May 3, 1988, that included radiation reports for May 6, 1987, July 20, 1987, October 22, 1987, and January 6, 1988, none of which had been requested. No radiation report for July 21, 1987, the date of the Sideras audit report, was included. However, also enclosed were two audit reports for Mr. Milton Ramero, dated July 20, 1987, and October 22, 1987.[55]

Upon inspection, Mr. Miller noticed that the audit report dated July 20, 1987, for Mr. Milton Ramero and the July 21, 1987 audit report for Mr. Peter Sideras, which had been copied during the April 22, 1988 inspection, were identical except for the names and dates. The signature on the July 21, 1987 report was a photocopy, as were the checks associated with the various items. Mr. Miller stated that he became suspicious that the July 21, 1987 audit report was fraudulent, and subsequently the matter was referred to the NRC Office of Investigations (OI).[56] (At that time, Mr. Miller was not suspicious of the July 20,

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[51] *Id. See also* Staff Exh. 2.
[52] Miller, ff. Tr. 77, at 7-8.
[53] Tr. 96 (Miller).
[54] Miller, ff. Tr. 77, at 8.
[55] *Id.* at 9.
[56] *Id.* at 8-9.

1987 audit report on Mr. Ramero.)[57] The basis for involving OI is documented in the May 9, 1988 referral to OI.[58]

The Region I Administrator requested OI Region I to determine whether the RSO at CTL had falsified a field audit report in an effort to mislead NRC inspectors into believing that field audits of radiographic personnel were being performed in accordance with the requirements of CTL's license. Additionally, OI was requested to determine if the RSO had made false statements to NRC inspectors concerning this matter. The investigation was originally assigned to investigator Jerome A. Cullings but was reassigned to Richard A. Matakas, Senior Investigator, OI Field Office, Region I, on or about January 31, 1989.[59]

V. INVESTIGATION OF ALLEGED VIOLATIONS

Following referral of the matter to OI, the Staff investigator, Mr. Richard Matakas, interviewed Mr. Cuozzo at the Licensee's facility on February 8, 1989.[60] Mr. Cuozzo first indicated his awareness of the license requirement for preparing quarterly field audit reports. Mr. Matakas showed Mr. Cuozzo copies of the reports dated July 20, 1987 (for Mr. Ramero) and July 21, 1987 (for Mr. Sideras), and advised Mr. Cuozzo that both copies appeared to be photocopies of the other and that NRC suspected that both were fraudulent.[61]

Following a search of CTL files, the original of the July 20, 1987 (Ramero) audit report was located, but the original of the July 21, 1987 (Sideras) report could not be found.[62] According to Mr. Matakas, the July 20 report "appeared to be a photocopy with white-out on it and Mr. Ramero's name and the date July 20, 1987 typed on it. Mr. Cuozzo acknowledged his signature on the document."[63] Mr. Matakas further testified that Mr. Cuozzo "readily admitted" [to Mr. Matakas] that he had "made up" both documents and that he had not performed the indicated audits on the days in question.[64] At the hearing, however, it became clear that, by his use of the term "made up," Mr. Cuozzo meant that he had "prepared" the formal reports on a date subsequent to the date set forth on the audit form, not that he had "fabricated" such reports.[65]

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[57] Tr. 99 (Miller).

[58] Miller, ff. Tr. 77, at 9-10. The referral appears in Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 1.

[59] Matakas, ff. Tr. 77, at 10.

[60] Matakas, ff. Tr. 77, at 12. The interview had been scheduled by a telephone call from Mr. Matakas to Mr. Cuozzo on January 31, 1989. *Id.*; Tr. 167-68 (Matakas).

[61] Matakas, ff. Tr. 77, at 13; Tr. 170, 173 (Matakas).

[62] Matakas, ff. Tr. 77, at 13-14; Tr. 107, 173 (Matakas).

[63] Matakas, ff. Tr. 77, at 13. The original of this document has been entered into evidence as Staff Exh. 1.

[64] *Id.* at 14.

[65] Tr. 358-59, 604-05 (Cuozzo).

During the interview, Mr. Matakas asked Mr. Cuozzo to sign a statement regarding the two audit reports. Mr. Matakas first offered to write up a statement and return the next day for Mr. Cuozzo's review and signature, but Mr. Cuozzo stated that he would have his secretary type up a short statement. Mr. Cuozzo left the room and returned with a short, typed signed statement, which he thereafter corrected in longhand.[66] The corrected statement, in letter form and dated February 8, 1989, reads as follows [crossouts as indicated; longhand corrections underlined]:[67]

> Dear Sir,
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> The following forms of qualification for General Electric dated July 21, 1987 were made up by one ~~Pete Sideras and Milton Ramero~~ Joseph Cuozzo J.C. However audits were never actually performed. On 7.20-87 and 7-21-87 qualification were for Milton Ramero and Pete Sideras. J.C.
>
> Respectfully Yours,
> (signed and typed)
> Joseph Cuozzo

At the hearing, Mr. Cuozzo was questioned extensively about what he meant by this statement. Although he conceded that he had not audited Mr. Sideras on July 21, 1987,[68] he claims that he did audit Mr. Ramero on July 20, 1987, but did not prepare the audit form on that day.[69] With respect to his statement about the Ramero audit not being performed, Mr. Cuozzo stated that "[t]hat just means those particular audit sheets I was shown were not done on those days."[70]

Subsequent to the February 8, 1989 interview, Mr. Cuozzo was questioned by the Staff at an enforcement conference in December 1989 as well as at a deposition in January 1991. On both occasions, Mr. Cuozzo emphasized that he had performed audits on both Mr. Sideras and Mr. Ramero in July 1987 but that, when he made up the audit reports after the fact, he must have gotten the dates confused.[71] Among other matters, he indicated at the enforcement conference that the February 8, 1989 statement appearing above had been obtained by "duress."[72] (The Staff denies any such duress.)[73] Mr. Cuozzo continued to assert that he never intended to mislead the NRC by the audit reports in question, but

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[66] Matakas, ff. Tr. 77, at 15; Tr. 118-20, 188-90 (Matakas).

[67] Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 12, at 3.

[68] Tr. 381, 411 (Cuozzo).

[69] There is no explicit regulatory requirement for an audit report to be prepared the same day as the audit is performed. Tr. 90 (Miller).

[70] Tr. 576 (Cuozzo). To the same effect, *see* Tr. 578, 600-01 (Cuozzo).

[71] Tr. 215 (Matakas, Miller); Staff Exh. 5 (Deposition Transcript at 170-72). The Staff indicated that the enforcement conference was the first occasion that Mr. Cuozzo had mentioned a possible mistake in dates. Tr. 215 (Miller).

[72] Tr. 117-18 (Miller, Matakas); Tr. 598 (Cuozzo).

[73] Tr. 118 (Matakas).

he (and company management) agreed to procedure revisions (including new audit forms) intended to preclude the production in the future of any misleading information.[74]

VI. RULINGS ON ALLEGED VIOLATIONS

In considering the violations at issue here, we must first observe that the burden of proof is on the Staff, as proponent of the Civil Penalty Order. 10 C.F.R. § 2.732. We have evaluated the entire record with that in mind, both with respect to whether the violations were committed and the civil penalty, if any, that should be imposed as a result of any such violations.

We will here deal with each of the alleged violations *seriatim*. To the extent necessary, we will rely on factual findings set forth earlier in this opinion.

At the outset, we must explain our view on the credibility of the witness providing the bulk of the Licensee's testimony, Mr. Joseph Cuozzo, the RSO who allegedly produced the records deemed by the Staff to be fraudulent. The Staff would have us find the testimony of Mr. Cuozzo not to be credible primarily because of its alleged inconsistencies.[75] Additionally, the Staff questions Mr. Cuozzo's credibility on the basis of his testimony that he on at least one occasion had predated or postdated welder qualification reports as requested by a customer.[76]

We reject this evaluation of Mr. Cuozzo's credibility. We acknowledge, of course, that there have been apparent inconsistencies in his version of the events under review here. But he has offered cogent explanations for the inconsistencies. The most persuasive is that on occasion his statements to the NRC have been misunderstood and hence do not represent inconsistencies — e.g., his statement that he "made up" the audit reports was construed by the Staff as an admission that he fabricated the reports, whereas his testimony stated only that he "prepared" the reports on a date later than that on which the audit was performed, a practice that he had frequently (if not routinely) followed at that time.[77] Similarly, the explanation he provided of the admittedly ambiguous language appearing in his signed statement demonstrated to us that he did not admit that he did not audit Mr. Ramero.

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[74] Tr. 561-62, 615 (Cuozzo).

[75] Staff PDF at 17-19.

[76] *Id.* at 18-19. Normally, a welder performs a weld on a sample plate (or coupon) on a given date, the weld sample is forwarded to CTL for testing, and the welder is considered qualified only after a successful test by CTL (on a date likely to be subsequent to the date of the weld sample). Messrs. Cuozzo and Sideras each testified that one particular customer had requested that the welders be considered qualified as of the date they performed their sample welds (assuming CTL found the samples to be qualified) and the welder qualification reports were dated to reflect that request. Tr. 328-35, 338-39, 550-58 (Cuozzo); Tr. 264-69, 270, 281, 303-05 (Sideras). Examples of such misdated documents appear to be Staff Exhs. 3 and 4.

[77] Tr. 549-50, 558 (Cuozzo).

As for the testimony concerning the misdating of a customer's welder qualification reports, it was corroborated in large part by Mr. Sideras' prior testimony. It represents no more than an attempt by a small business to satisfy the desires of its customers by complying with a particular dating request by that customer (*see* note 76, *supra*). Mr. Cuozzo also testified concerning CTL's warning of that customer concerning the potential adverse effects of the misdating.[78] Given those warnings, Mr. Cuozzo opined that he was not misleading anyone.[79] "[M]y client knew about it, and that's who we were concerned with[.]"[80]

But when questioned by the Board as to whether the NRC might be mislead, he conceded that such might be the result but stated that he had not considered this effect when agreeing to the postdating or predating.[81] In our view, this testimony reflects Mr. Cuozzo's candor in attempting to provide a complete account of his practices and does not (merely because it represents a misstatement of dates) represent a tendency for deliberately deceiving anyone.

Our evaluation of Mr. Cuozzo as a witness is that he was not always completely articulate in describing his activities but that he was doing his best to recollect what actually happened almost 4 years earlier. He occasionally had to be asked questions several times before he understood exactly what information the questioner was seeking. After understanding the gist of a question, he appears to have answered with candor. In addition, it is clear that Mr. Cuozzo often acted or testified precipitously, without completely considering the ramifications of what he was doing or saying — e.g., he testified that he would frequently sign reports or forms without reading them.[82] We thus consider Mr. Cuozzo to be a credible witness for whom some caution must be exercised because of his difficulty in vocalizing his thoughts fluently, as well as his lack of precise recollection. Turning now to the particular violations:

A. Violation I.A.1

Violation I.A.1 asserts that field audit inspection reports dated July 20, 1987, and July 21, 1987, documenting quarterly field audit reports of two radiographers (Messrs. Milton Ramero and Peter Sideras, respectively) were created by the Radiation Safety Officer (RSO), Mr. Joseph Cuozzo, but that field audits were not actually performed on the recorded dates.[83] This charge was based on an

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[78] Tr. 329, 334 (Cuozzo).
[79] Tr. 550-58 (Cuozzo).
[80] Tr. 551 (Cuozzo).
[81] Tr. 556-57 (Cuozzo).
[82] Tr. 479 (Cuozzo).
[83] Civil Penalty Order, Appendix, at 1; 55 Fed. Reg. 36,730; Notice of Violation and Proposed Imposition of Civil Penalty — $8000, dated March 9, 1990, referenced by Cant, ff. Tr. 77, at 22-23.

alleged admission by Mr. Cuozzo to an NRC investigator (Mr. Matakas) on February 8, 1989.[84]

1. With respect to the field audit of Mr. Sideras on July 21, 1991, the evidence clearly reflects that no audit was performed on the date indicated. The firm's personnel records, as well as Mr. Sideras himself, indicate that Mr. Sideras was on vacation on that date.[85] Indeed, Mr. Sideras testified that he was not in the Bordentown area during that week but was "down at the New Jersey shore," so that he would not have been able to come to work for even a brief interval during that time period.[86]

Furthermore, Mr. Matakis reiterated that, on February 8, 1989, during an interview at the Bordentown facility, Mr. Cuozzo had conceded that he had not performed an audit of Mr. Sideras on July 21, 1987.[87] And Mr. Cuozzo testified at the hearing that he had not performed an audit of Mr. Sideras on that date.[88]

Based on this evidence, the Board concludes that no audit of Mr. Sideras was performed on July 21, 1987, and that Mr. Cuozzo admitted as much to the NRC on February 8, 1989 (as alleged in the violation). This portion of Violation I.A.1 has therefore been proved. Whether an audit of Mr. Sideras was performed in that general time frame (i.e., July 1987) will be discussed in conjunction with Violation I.B, *infra*.

2. With respect to the alleged audit of Mr. Milton Ramero on July 20, 1987, the evidence is less clear. During that time period, Mr. Ramero was a radiographer associated with the Licensee's New York facility, but on occasion he came to the Bordentown facility to perform work. Specifically, he performed work at the Bordentown facility on both July 9, 1987, and July 20, 1987.[89]

Moreover, as set forth earlier, Mr. Cuozzo denied that he had admitted not performing an audit of Mr. Ramero on July 20, 1987. All he said he admitted was that he had not prepared an audit sheet on that day and that the audit sheet with the July 20, 1987 date on it may not be accurate. We find this explanation by Mr. Cuozzo to be reasonable and the Staff's interpretation of Mr. Cuozzo's admission to be incorrect (although clearly not unfounded). That being so, the basis relied on by the Staff for demonstrating that Mr. Cuozzo admitted to not auditing Mr. Ramero on July 20, 1987, has not been proved.

That is not to say that the audit of Mr. Ramero recorded on the report dated July 20, 1987, was not in fact performed on July 20, 1987. Indeed, although we would have preferred that the Licensee call Mr. Ramero as a witness to clarify

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[84] *Id.*
[85] Staff Exh. 2, Tr. 257-59 (Sideras).
[86] Tr. 259 (Sideras).
[87] Matakis ff. Tr. 77, at 14.
[88] Tr. 411 (Cuozzo).
[89] The Staff stipulated that Mr. Ramero was at the Bordentown office of the Licensee on both July 9 and 20, 1987. Tr. 476 (Bordenick).

this point, we recognize the logistical difficulties faced by a relatively small company in doing so.[90] In the first place, the evidence supports a finding that an audit of Mr. Ramero was in fact performed on July 9, 1987. As noted above, Mr. Ramero was in Bordentown that day and received what is denominated as a "practical exam."[91] Although the Staff questions whether a "practical exam" is in fact the same as an audit,[92] the practical exam appears to us to involve many, if not all, of the same findings or observations as does the audit.

Indeed, it would appear that the "field audit" is concerned primarily with radiological safety whereas the "practical exam," which is administered prior to a radiographer's assumption of duties with the company, is intended to measure not only the safety aspects of a radiographer's activities but also the ability of the radiographer to produce a proper film.[93] For that reason, we will regard the July 9, 1987 "practical exam" as encompassing the substantive requirements of an audit and, for purposes of this inquiry, as being equivalent.[94]

As for whether an audit of Mr. Ramero was also performed on July 20, 1987, Mr. Cuozzo testified that he would audit radiographers every time he observed their work and would routinely prepare the audit forms at a subsequent date.[95] Thus, the form dated July 20, 1987, for Mr. Ramero could represent an audit performed on either July 9 or 20, 1987. We find that it is likely that Mr. Cuozzo audited Mr. Ramero on both of the above dates but that it is uncertain whether the audit form dated July 20, 1987, is correct — i.e., that it recorded the audit performed on July 20, 1987 rather than the July 9, 1987 audit.

We conclude, therefore, with respect to the July 20, 1987 audit of Mr. Ramero, that the basis for the Staff's allegation does not support the alleged violation but that, in any event, it is unclear whether the audit report reflects the audit performed on July 9 or 20, 1987, and may therefore be dated incorrectly. We further find, however, that an audit was likely performed on July 20, 1987, but, because of the failure of the Licensee at that time to have in operation a reasonable system for audit reports, such audit may not have been recorded. No evidence was presented that the date on the Ramero audit form, if incorrect, was

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[90] The Licensee testified that it was unaware of Mr. Ramero's location until about a week before the hearing. Tr. 483-84 (Cuozzo). We agree with the Staff (Staff FOF, n.6; Staff Reply FOF, n.2) that the Licensee had an obligation to notify the Staff when it discovered Mr. Ramero's location. *See* 10 C.F.R. § 2.740(e)(1)(i). We reject the Licensee's observation (Licensee FOF Comments at 1) that it would have been "silly" for it to have so notified the Staff, although we also reject the Staff's conclusion that its failure to do so adversely reflects upon Mr. Cuozzo's credibility. We recognize the difficulties faced by CTL, a relatively small organization, responding at virtually the last minute, in a proceeding where the total amount at stake is $8000.

[91] Tr. 429 (Cuozzo); Licensee Exh. 2D.

[92] Staff FOF at 17-18.

[93] Tr. 430, 433, 435-36, 439, 486-87, and 494 (Cuozzo).

[94] *See also* note 41, *supra*. We express no opinion as to whether the practical test in question complies procedurally in all respects with the applicable license requirement for audits. In particular, it is not clear whether the July 9, 1987 practical exam was "unannounced." *Cf.* Tr. 436 (Cuozzo) *with* Tr. 491 (Cuozzo).

[95] Tr. 357-58, 360 (Cuozzo).

intentionally so. (The Staff concedes that, in itself, the use of a photocopied form with a substituted name violates no requirement.)[96] The NRC Staff thus has not sustained its burden of proof with respect to whether an audit of Mr. Ramero was not performed on July 20, 1987.

B. Violation I.A.2

Violation I.A.2 asserts that, between July 1987 and January 6, 1988, no field audits for one specific radiographer (Mr. Sideras) were performed.[97] The record reflects that Mr. Sideras performed radiographic work on several occasions from August 1987 up to January 6, 1988,[98] but that there were no audit reports prepared for any such work activities.[99] Mr. Cuozzo also conceded that he had not audited Mr. Sideras for a period in excess of 3 months and thus had violated CTL's license.[100] The Licensee has admitted this violation.

C. Violation I.B

Violation I.B asserts that, in a telephone conversation with NRC representatives on April 25, 1988, the RSO provided information to NRC that was not complete and accurate in all material respects — namely, that he had performed a field audit of Mr. Sideras on July 21, 1987 — and that he subsequently had admitted in the 1989 interview by Mr. Matakas that he had not performed such an audit but had "made up" the audit report to give the appearance of complying with the quarterly audit report requirement. The violation further asserts the materiality of the statement in question.

It is clear to us that, in the telephone conversation in question, Mr. Cuozzo provided inaccurate information concerning the reported July 21, 1987 audit of Mr. Sideras. Mr. Cuozzo has conceded that he did not audit Mr. Sideras on that date. Further, he conceded that he had advised NRC that he had "made up" the report although, as we have seen, he meant that he prepared the report after the fact, not that he had fabricated it.

Mr. Cuozzo strongly denies any admission that he "made up" the report to give the appearance of compliance with license reporting requirements. In the

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[96] Tr. 129-30 (Miller).

[97] We understand, as acknowledged by the Staff, that this period begins in August 1987 and ends on January 6, 1988. These dates were chosen because, during the period, there were no "true or alleged" audits of Mr. Sideras, thus clearly exceeding the audit period specified in the license. Tr. 208 (Sans).

[98] Specifically, September 15, 1987; October 12, 1987; November 4, 6, and 25, 1987; and December 11, 15, and 21, 1987. *See* Licensee Exh. 1.

[99] An audit report for Mr. Sideras, dated January 6, 1988, was included among the documents transmitted to the Staff by Mr. Cuozzo on April 28, 1988. Miller, ff. Tr. 77, at 9. *See* Staff Testimony, Attach. 6, Exh. 7 at 10.

[100] Tr. 582 (Cuozzo); Matakas, ff. Tr. 77, at 14; Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 4, at 4.

first place, no report in July 1987 was required for Mr. Sideras, inasmuch as an earlier audit had been performed in May 1987,[101] and the license only required an audit every 3 months.[102]

More important, under the procedure that he routinely followed in 1987, Mr. Cuozzo frequently did not prepare a report on the same day that an audit had been performed.[103] Thus, in preparing the report dated July 21, 1987, Mr. Cuozzo appeared to be following the same practice that he routinely followed and for which he had not previously been cited. The record reflects that Mr. Sideras performed radiographic activities on July 6, 14, and 27, 1987.[104] Although the record is not clear in this respect, the audit report incorrectly dated July 21, 1987, could have represented any of these work sessions (or, indeed, others).

Given these considerations, we do not find that Mr. Cuozzo fabricated the report in question for the purpose of appearing to comply with the reporting requirements. Finally, we agree with the Staff that accurate reports are material to the NRC's licensing scheme and that the inaccurate advice to the NRC accordingly was material, whether or not the NRC would be led to take action on the basis of the erroneous information. *See Federal Communications Commission v. WOKO, Inc.*, 329 U.S. 223, 227 (1946).

VII. SEVERITY OF VIOLATIONS AND APPROPRIATE CIVIL PENALTY

A. General Description

Standards for determining the amount of a civil penalty for various types of violations appear in 10 C.F.R. Part 2, Appendix C, "General Statement of Policy and Procedure for NRC Enforcement Actions." In general, the "nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved."[105] Further, the penalty should be tailored to the particular facts and circumstances of the violation or violations involved.

Base civil penalties, as set forth in Table 1A of those regulations, are categorized in accordance with the type of activity authorized by the license under review and the particular aspect of that activity giving rise to the violation in question.[106] Here, the Licensee falls within the activity generally described,

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[101] Staff Testimony, ff. Tr. 77, Attach. 6, Exh. 7, at 9; Tr. 581-82 (Cuozzo).
[102] Staff Testimony, ff. Tr. 77, Attach. 6, Exhs. 2 and 3; Tr. 209-11 (Miller); Tr. 538-39, 549 (Cuozzo).
[103] Tr. 359-60, 548 (Cuozzo).
[104] Licensee Exhs. 1, 2A.
[105] 10 C.F.R. Part 2, Appendix C, § V. For a further description, *see Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 304-05 (1991).
[106] 10 C.F.R. Part 2, Appendix C, § V.B, Table 1A.

at the time of the alleged violations, as "Industries [sic] users of material"[107] (specifically defined to include "industrial radiographers"). The specific aspect of that activity giving rise to all the violations here under review is denominated as "Plant operations." For the activity and aspect of the activity involved here, the base civil penalty is $10,000.

The base civil penalty for a given violation is then adjusted for the severity of the identified violation, using percentages of the base violation. As set forth in Table 1B of the regulations,[108] there are five severity levels of violations, ranging from the most serious (Level I) to the least serious (Level V). The applicable percentages of the base civil penalty for particular severities are 100% for Severity Level I, 80% for Severity Level II, 50% for Severity Level III, 15% for Severity Level IV, and 5% for Severity Level V. The rules also permit violations to be evaluated "in the aggregate and a single severity level assigned for a group of violations."[109] As evaluated by the Staff, the violations under review here collectively represent Severity Level II, and the Staff is seeking the standard civil penalty ($8000) for that level of violation (80% of the base civil penalty of $10,000).

To determine the appropriate severity level for a violation, various examples are set forth in eight Supplements to the regulations. The examples potentially appropriate to be considered in this proceeding are set forth in Supplement VI (*Fuel Cycle and Materials Operations*) or Supplement VII (*Miscellaneous Matters*). The Staff deems the violations here at issue to fall within Supplement VII,[110] although the Licensee seeks to include the violations within the lowest severity level of Supplement VI.

Other factors may also be taken into account in determining the amount of a civil penalty. The tables referenced above take into account "the gravity of the violation as a primary consideration and the ability to pay as a secondary consideration."[111] In addition, the severity levels may be escalated or mitigated for various listed factors. The criteria intend to permit the NRC to consider each civil penalty case on its own merits and, after considering all relevant circumstances, to adjust "the base civil penalty values upward or downward appropriately."[112]

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[107] This typographical error was later corrected to read "Industrial Users of Material." 56 Fed. Reg. 40,664, 40,686 (Aug. 15, 1991).

[108] 10 C.F.R. Part 2, Appendix C, § V.B, Table 1B.

[109] 10 C.F.R. Part 2, Appendix C, § III.

[110] Notice of Violation and Proposed Imposition of Civil Penalty, dated March 9, 1990, at 2; Civil Penalty Order, dated August 29, 1990, Appendix, at 2; 55 Fed. Reg. at 36,370.

[111] 10 C.F.R. Part 2, Appendix C, § V.B. The regulations add that it is not NRC's intention to put a licensee out of business through the imposition of civil penalties (NRC relies on orders for that purpose), or to compromise a licensee's ability to conduct safe operations.

[112] 10 C.F.R. Part 2, Appendix C, § V.B. *See also* section V.D ("Escalation of Enforcement Sanctions"), where it states that "enforcement sanctions will normally escalate for recurring similar violations."

Finally, in reviewing the civil penalty sought to be imposed by the Staff, we may determine whether the proposed severity level and penalty are appropriate or, alternatively, whether the proceeding should be dismissed or the penalty imposed, mitigated, or remitted. 10 C.F.R. § 2.205(f). We may not increase the penalty sought by the Staff. *Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 224 (1987).

B. Severity Levels Governing This Proceeding

The NRC Staff categorized the two overall violations and their subparts as, in the aggregate, a Severity Level II problem.[113] On the other hand, the Licensee judged the violations collectively (including the one that it admitted) as no more than a Severity Level V.[114]

As set forth in the Staff letter transmitting the Notice of Violation to CTL, dated March 9, 1990, the basis for the Severity Level II categorization was that the violations "involved falsification of records and willfully providing information that was not accurate in all material respects to the NRC by a licensee official responsible for the Radiation Safety Program, namely, the VP/RSO." In that connection, the regulations define willfulness to include "a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements."[115] Among other matters, however, the "intent of the violator" is to be taken into account in establishing severity levels.[116]

Turning to the examples set forth for Severity Level II, under Supplement VI (*Fuel Cycle and Materials Operations*), all either involve excessive radiation exposures or relate to deficiencies in the actual conduct of radiographic operations. None would serve as an example for use in this proceeding.

Under Supplement VII (*Miscellaneous Matters*), which is relied upon by the Staff, Severity Level II includes two examples that might be applicable here. Specifically, in pertinent part

> 1. Inaccurate or incomplete information which is provided to the NRC (a) by a licensee official because of careless disregard for the completeness or accuracy of the information . . . .
>
> 2. Incomplete or inaccurate information which the NRC requires be kept by a licensee which is (a) incomplete or inaccurate because of careless disregard for the accuracy of the information on the part of a licensee official . . . .

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[113] Staff POF at 27.
[114] Licensee FOF, ¶ 34, at 3.
[115] 10 C.F.R. Part 2, Appendix C, § III.
[116] *Id.*

In contrast, Severity Level III currently includes the following under Supplement VI:

> 7.[117] Breakdown in the control of licensed activities involving a number of violations that are related or, if isolated, that are recurring violations that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities.

And under Supplement VII, Severity Level III includes, in pertinent part:

> 1. Incomplete or inaccurate information which is provided to the NRC (a) because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation . . . .
>
> 2. Incomplete or inaccurate information which the NRC requires be kept by a licensee which is (a) incomplete or inaccurate because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation . . . .

The only relevant example provided for Level V, which the Licensee appears to deem appropriate, is (for Supplement VI) violations "that have minor safety or environmental significance." (No applicable examples appear in Level V of Supplement VII.) The Staff indicated that a simple failure to perform an audit as required by the license would amount to a Severity Level IV violation.[118] There are no applicable examples under Severity Level IV of Supplement VI but, in pertinent part, Severity Level IV of Supplement VII includes

> 1. Incomplete or inaccurate information of more than minor significance which is provided to the NRC but not amounting to a Severity Level I, II, or III violation[.]
>
> 2. Information which the NRC requires be kept by a licensee and which is incomplete or inaccurate and of more than minor significance but not amounting to a Severity Level I, II, or III violation[.]

C. Determination of Severity Level of Proved Violations

As set forth above, we have determined that the Licensee committed Violation I.A.1 (in part) and Violation I.A.2 (admitted). Each of these standing alone would appear to constitute a Severity Level IV violation. (If Violation I.A.1 had been proved in full, it would have constituted an additional, separate Severity Level IV violation.)

As for Violation I.B, the Staff has demonstrated that the July 21, 1987 audit of Mr. Sideras was not performed on that date and that the information provided by Mr. Cuozzo by telephone concerning that audit was incorrect. The Staff has

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[117] When the violations in this case occurred, this criterion was numbered as "8" under Supplement VI, Severity Level III.

[118] Cant, ff. Tr. 77, at 23; Tr. 154 (Cant).

not proved, however, that Mr. Cuozzo intended to mislead the NRC or to falsify the audit report for that date. Nor has the Staff proved a "careless disregard" of requirements, for there was no explicit requirement to prepare a report on the date of an audit.[119] All that the Staff has proved is that the system used by Mr. Cuozzo — preparing audit reports some time after the audit had taken place — was inappropriate for complying with the license requirement.

We evaluate these proved violations as falling within the criteria for Severity Level III. They do not include any of the aspects of willfulness — either improper intent or a careless disregard of requirements — that would elevate these violations to a Level II. They appear rather to be comprehended by "inadequate actions" by licensee officials or, alternatively, by a "breakdown in the control of licensed activities" — each constituting a criterion for Level III. In the words of Mr. Cuozzo, he was "sloppy with [his] paperwork."[120]

On the other hand, because of the demonstrated potential dangers of radiographic operations to the public health and safety and the importance of the audit reports to NRC's system of regulation, we view the foregoing violations as of a significantly higher level than the "minor safety significance" accorded it by the Licensee. There clearly were "inadequate" Licensee actions amounting to a "breakdown" in control of licensed activities.

Accordingly, we rate the violations, in the aggregate, as a Severity Level III violation. A civil penalty reflecting that level of severity is to be assessed.

CTL previously sought mitigation on the basis of the administrative changes that it put into place. Under 10 C.F.R. Part 2, Appendix C, § V.B.2, the promptness and extent to which a licensee takes corrective action is a factor we may consider in determining the amount of a civil monetary penalty. Here, however, CTL effectuated its changes only subsequent to the enforcement conference in December 1989, almost 2 years after the Staff discovered the violations and discussed them with the Licensee in the exit interview. We agree with the Staff that the changes were not instituted early enough, and then only through Staff influence, for mitigation to be appropriate. Accordingly, we deny any mitigation.

Conclusions of Law

1. As in part claimed by the NRC Staff, the Licensee committed Violation I.A.1, but only insofar as it asserts that field audit inspection reports, dated July 20, 1987, and July 21, 1987, documenting audits of two radiographers, were created by the VP/RSO, and that one audit, on July 21, 1987, was never

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[119] *See* note 69, *supra*.
[120] Tr. 585 (Cuozzo).

performed. Contrary to the conclusion of the Staff, a field audit was performed on July 20, 1987.

2. Violation I.A.2 was committed by the Licensee, as claimed by the Staff and admitted by the Licensee.

3. Violation I.B was committed by the Licensee in part, to the extent that the VP/RSO incorrectly advised NRC representatives that he personally performed the July 21, 1987 audit and the statement was material because it had the potential to affect an ongoing NRC review of the matter. The record fails to support the allegation that the VP/RSO stated that he "made up" the audit report to give the appearance of compliance with the quarterly audit requirement.

4. Contrary to the claim of the Staff, the foregoing violations do not comprise a Severity Level II violation, inasmuch as they did not involve attempts to mislead the NRC.

5. These violations in the aggregate amount to a Severity Level III violation and warrant a base civil penalty of $5000.

6. The Staff has not sought escalation of the base civil penalty. Mitigation, as sought by the Licensee, is not warranted.

7. Accordingly, a civil penalty of $5000 should be substituted for the $8000 sought by the Staff and be imposed on and assessed against the Licensee.

Order

On the basis of the foregoing opinion, including findings of fact, conclusions of law, and the entire record, it is, this 29th day of January 1992, ORDERED:

1. The Order Imposing a Civil Monetary Penalty, dated August 29, 1990, is *modified* by substituting a civil monetary penalty of $5000 for the $8000 originally sought by the Order.

2. A civil penalty of $5000 is hereby *assessed* against the Licensee, Certified Testing Laboratories, Inc.

3. This Initial Decision is effective immediately and, in accordance with 10 C.F.R. § 2.760 of the Commission's Rules of Practice, shall become the final action of the Commission forty (40) days from the date of its issuance, unless any party petitions for Commission review in accordance with 10 C.F.R. § 2.786 or the Commission takes review *sua sponte*. *See* 10 C.F.R. § 2.786, as amended effective July 29, 1991 (56 Fed. Reg. 29,403 (June 27, 1991)).

4. Within fifteen (15) days after service of this Decision, any party may seek review of this Decision by filing a petition for review by the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.786(b)(1).

5. The petition for review shall be no longer than ten (10) pages and shall contain the information set forth in 10 C.F.R. § 2.786(b)(2). Any other party may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. Such an answer shall be no longer than ten (10) pages and, to the extent appropriate, should concisely address the matters in 10 C.F.R. § 2.786(b)(2). The petitioning party shall have no right to reply, except as permitted by the Commission.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Cadet H. Hand, Jr. (by C.B.)
ADMINISTRATIVE JUDGE

Elizabeth B. Johnson
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 29, 1992