



**UNITED STATES
NUCLEAR REGULATORY COMMISSION**
REGION I
475 ALLENDALE ROAD, SUITE 102
KING OF PRUSSIA, PA 19406-1415

December 13, 2023

EA-23-068

John Hale Jr.
Phoenix Federal No. 2 Mining, LLC
863 Quail Valley Drive
Princeton, West Virginia 24740

**SUBJECT: PHOENIX FEDERAL NO. 2 MINING, LLC, NRC INSPECTION REPORT
NO. 2022001**

Dear John Hale:

This letter refers to the inspection conducted from March 1, 2023, through December 13, 2023, by the U.S Nuclear Regulatory Commission (NRC) at the Phoenix Federal No. 2 Mining, LLC (Phoenix) complex in Fairview, West Virginia. The purpose of the inspection was to determine the current ownership of the site and status of any radioactive material under NRC regulatory authority located therein. Based on the results of this inspection, an apparent violation was identified and is being considered for escalated enforcement action in accordance with the NRC Enforcement Policy.

During the period between November 2022 and February 2023, the NRC attempted to conduct an inspection of the site to examine activities conducted under the existing NRC License No. 47-23053-01 issued to ERP Federal Mining Complex, LLC (ERP). However, the NRC inspector ascertained that the mine was no longer owned or operated by ERP and that the facility appeared to be abandoned. Through coordination with the West Virginia Department of Environmental Protection's (WV DEP's) Division of Mining and Reclamation, the NRC staff identified your company, Phoenix, as the current owner of the mine.

During a site visit on March 1, 2023, the NRC inspector confirmed that licensable radioactive material (one or more fixed nuclear gauges containing sealed cesium-137 and/or californium-252 sources) remained onsite and was not properly secured. In a telephone conversation on March 14, 2023, the NRC Region I Counsel informed you that the NRC had confirmed the presence of improperly secured radioactive material onsite. Regional Counsel informed you of your responsibility (as site owner) with respect to the possession of licensed materials. You stated that you would contact a previous site employee and update the NRC within a few days. After you did not respond, an NRC inspector called you on May 2, 2023. You said you had delayed your response to the NRC because you had thought you had a buyer for the mine. The inspector explained that you were in possession of regulated material without an NRC license, and you stated that you would prepare and submit a license application that week. After not receiving an application, on May 16, 2023, the inspector again called you, and you stated that you would provide an update by the following morning; however, you did not provide an update.

During an August 14, 2023, meeting with an NRC Office of Investigations (OI) Senior Special Agent, you affirmed that the site is owned by your company, Phoenix, and you provided OI a copy of the purchase agreement with ERP. You reiterated your previous statements about not having been aware that there was nuclear material at the site and stated that you have never been inside the facility. You told OI that you did not know how many gauges there were or where they were located onsite. You said you had hired a contractor who declined to search for the gauges due to the condition of the site and that you had retained an engineering firm to identify another contractor. You also stated that you intended to apply for a license if you could not identify a way to dispose of the gauges. As of the date of this letter, you have neither applied for a license nor informed the NRC that the gauges have been disposed of or transferred.

Consequently, based on the above, the NRC has determined that Phoenix is in apparent violation of Title 10 of the *Code of Federal Regulations* (10 CFR) 30.3(a), which specifies, in part, that no person shall acquire, own, or possess byproduct material except as authorized in a specific or general license. This apparent violation is being considered for escalated enforcement action in accordance with the NRC Enforcement Policy. The current Enforcement Policy is available on the NRC's Web site at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html>.

Unless Phoenix takes prompt and comprehensive corrective action for the apparent violation, the NRC may take enforcement action, including potentially proposing a civil penalty in accordance with Section 2.3.4 of the Enforcement Policy. Tables A and B in Section 8 of the Enforcement Policy set forth the civil penalty amounts based on the type of licensee and severity of the violation. A company possessing fixed gauge licenses would qualify as a "small material user," as described in Item e of Table A. As noted in Section 2.3.4 of the Enforcement Policy, the NRC may exercise discretion and assess a separate violation and attendant civil penalty up to the statutory limit for each day the violation continues. The NRC may exercise this discretion when a licensee is aware of a violation of at least moderate significance and had a clear opportunity to prevent, identify, and correct the violation but failed to do so.

The NRC's primary interest in this matter is that Phoenix meets its obligation to ensure the proper transfer or disposal of the material. Accordingly, the NRC will suspend enforcement activities if: (1) within **30** days of the date of this letter, you inform us in writing of your plans to complete the proper transfer or disposal of all the gauges within **60** days of the date of this letter; and (2) complete the proper transfer or disposal of all the gauges within **60** days of the date of this letter, including submitting the required documents listed below to the NRC.

Independent organizations such as the Conference of Radiation Control Program Directors, Inc. (CRCPD) can provide assistance with the transfer or disposal of gauges. The CRCPD can provide information on radioactive source disposal options and may also have information on recycling events potentially available at a reduced cost. Additional information about CRCPD's assistance with unwanted radioactive material can be found at <https://www.crcpd.org/page/AssitanceUnwantedRAM>.

Upon properly transferring or disposing of the gauges, send the following information to the Regional Administrator, NRC Region I, 475 Allendale Rd. Suite 102, King of Prussia, PA 19406: (i) a completed NRC Form 314, "Certificate of Disposition of Materials" (Enclosure 2); and (ii) a copy of the certification from the authorized recipient that the material has been received.

If you have additional information you feel the NRC needs to consider before it makes its enforcement decision, you may respond to this letter requesting a Pre-Decisional Enforcement

Conference (PEC). Alternatively, you may choose to accept the apparent violation as characterized in this letter and its enclosure, in which case, the NRC will proceed with its enforcement action, and propose the appropriate civil penalty, if you do not properly dispose of or transfer the radioactive material as described above.

If you choose to request a PEC, the meeting should be held in our office in King of Prussia, PA, within **30** days of the date of this letter. The conference will provide an opportunity for you to provide your perspective on these matters and any other information that you believe the NRC should take into consideration in making an enforcement decision. The decision to hold a PEC does not mean that the NRC has determined that a violation has occurred or that enforcement action will be taken. This conference would be conducted to obtain information to assist the NRC in making an enforcement decision. The topics discussed during the PEC may include information to determine whether a violation occurred, information to determine the significance of a violation, information related to the identification of a violation, and information related to any corrective actions taken or planned. In presenting your corrective actions, you should be aware that the promptness and comprehensiveness of your actions will be considered in assessing any civil penalty for the apparent violation. The guidance in the enclosed excerpt from NRC Information Notice 96-28, "Suggested Guidance Relating to Development and Implementation of Corrective Action," (Enclosure 3) may be helpful. The PEC would be open for public observation, and the NRC would issue a press release to announce the conference time and date.

Please contact Chris Cahill, Chief, Commercial, Industrial, R&D, and Academic Branch, NRC Region I, at 610-337-5108 or Monica Ford at 610-337-5214 within 10 days of the date of this letter to notify the NRC of whether Phoenix will dispose of the gauges or to notify the NRC that you are interested in attending a PEC. If you do not contact the NRC within the time specified, and an extension of time has not been granted by the NRC, the NRC will proceed with its enforcement action.

In addition, please be advised that the number and characterization of apparent violations described in the enclosed inspection report may change as a result of further NRC review. You will be advised by separate correspondence of the results of our deliberations on this matter.

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response if you choose to provide one will be made available electronically for public inspection in the NRC Public Document Room and from the NRC Agency-wide Documents Access and Management System (ADAMS), accessible from the NRC Web site at <https://www.nrc.gov/reading-rm/adams.html>. To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the Public without redaction.

If you have any questions related to this matter, please contact Steve Shaffer of my staff at 610-337-5225 or steve.shaffer@nrc.gov.

Sincerely,

Paul G. Krohn, Director
Division of Radiological Safety and Security

Enclosures:

1. NRC Inspection Report No. 2022001
2. NRC Form 314, "Certificate of Disposition of Materials"
3. NRC Information Notice 96-28, "Suggested Guidance Relating to Development and Implementation of Corrective Action"

Docket No. NA
License No. NA

cc w/Enclosures:

SUBJECT: PHOENIX FEDERAL NO. 2 MINING, LLC, NRC INSPECTION REPORT NO. 2022001 AND APPARENT VIOLATION DATED DECEMBER 13, 2023

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J Lubinski, NMSS	RIDSNMSSOD RESOURCE
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Enforcement Coordinators	
RII, RIII, RIV (M Kowal; D Betancourt-Roldan; J Groom)	
P Moulding, OGC	RIDSOGCMAILCENTER
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T Higgs, OI	RIDSOIMAILCENTER
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S Shaffer, DRSS, RI	
D Screnci, PAO-RI / N Sheehan, PAO-RI	
M Ford, SAO-RI / F Gaskins, SAO-RI	
B Klukan, ORA, RI	
R1Enforcement	
Region I OE Files (with concurrences)	

DOCUMENT NAME: <https://usnrc.sharepoint.com/teams/Region-I-CIRDA/Shared Documents/Branch 2/Phoenix Mining/EA-23-068 Phoenix Choice Letter.docx>

ADAMS ACCESSION NO. ML23300A105

<input checked="" type="checkbox"/> SUNSI Review/S. Shaffer		<input checked="" type="checkbox"/> Non-Sensitive <input type="checkbox"/> Sensitive		<input checked="" type="checkbox"/> Publicly Available <input type="checkbox"/> Non-Publicly Available	
OFFICE	RI:DRSS	RI:ORA	RI:DRSS	RI:ORA	RI:ORA
NAME	S Shaffer	M McLaughlin	C Cahill	B Klukan	J Nick
DATE	12/08/23	12/08/23	12/12/23	12/12/23	12/13/23
OFFICE	OE	NMSS	OGC	RI:DRSS	
NAME	D Bradley	M Burgess	R Carpenter	P Krohn	
DATE	12/08/23	12/08/23	12/08/23	12/13/23	

**U.S. NUCLEAR REGULATORY COMMISSION
REGION I**

INSPECTION REPORT

Inspection No. Non-Licensee
 (Previous Docket 030-20218)/2022001

EA No. EA-23-068

Docket No. 03020218

License No. Non-Licensee (Previous License 47-23053-01)

Entity: Phoenix Federal No. 2 Mining, LLC

Address: 1044 Miracle Run Road
 Fairview, WV 26570

Inspection Dates: March 1, 2023, through December 13, 2023

Inspector: _____ _____
 Steve Shaffer, Sr. Health Physicist Date
 Commercial, Industrial, R&D and
 Academic Branch
 Division of Radiological Safety and Security

Approved By: _____ _____
 Christopher G. Cahill, Chief Date
 Commercial, Industrial, R&D and
 Academic Branch
 Division of Radiological Safety and Security

REPORT DETAILS

Organization and Scope of the Program

1 Introduction

The inspector began attempts to contact ERP Federal Mine No. 2 in the fourth quarter of 2022. Calls placed to all phone numbers for the licensee in ADAMS and Web-Based License system went unanswered. The inspector attempted to find the licensee via internet searches. The search results identified that the licensee had entered bankruptcy without notifying the NRC. The inspector then asked the NRC Region I Office of Investigations (OI) to assist in identifying who currently owns Federal Mine No. 2 (mine). The OI Investigator identified the mine was purchased by Phoenix Federal No. 2 Mining, LLC (Phoenix). John Hale Jr. is the principal of Phoenix. The inspector made multiple attempts to reach John Hale Jr. via phone and email with no response. The inspector then asked the OI inspector and RI counsel to reach out to John Hale Jr. John Hale Jr. spoke with both individuals and eventually agreed to speak with the inspector.

The inspector tried to coordinate a site visit at the now unoccupied mine. John Hale Jr. was unwilling to meet the inspector at the site. In February of 2023, John Hale Jr. provided the inspector with a contact at the West Virginia Department of Environmental Protection (WV DEP). John Hale Jr. stated that Joel Brown, WV DEP had access to the mine and might be able to facilitate an NRC site visit. Joel Brown was very helpful and was able to provide the inspector site access on March 1, 2023.

2 Inspection Scope

The inspection was of limited scope. The mine was not occupied or in use. The buildings were in disrepair. The majority of buildings had all the ground level access points blocked to prevent ingress. The inspector was able to enter the loadout building. Due to the condition of the loadout building, the inspector only toured the first level of the loadout building. The inspector could not find any records to review.

3 Observations and Findings

The inspector found a Thermo Gamma Metrics gauge on the first level of the Loadout building. The gauge contains one or more sources of californium-252. Based on the previous license, this/these source(s) would each be of 14 millicuries. Based on survey meter readings, there was clear indication that a second source was located in the levels above. This survey confirmed that there was radioactive material present on the site and that the remaining nuclear gauges previously licensed to be at the facility were still likely present.

The inspector informed John Hale Jr. on March 14, 2023, that at least one and likely more than one gauge containing quantities of licensable radioactive material were onsite at the mine. John Hale Jr. stated that he would make a decision on whether to get a license or properly dispose of the gauge(s) by March 17, 2023.

The inspector has reached out to John Hale Jr. multiple times to determine when the corrective actions would be completed. As of December 13, 2023, John Hale Jr. has neither properly disposed of the gauge(s) nor applied for an NRC license.

10 CFR 30.3(a) states, in part, that no person shall acquire, own, or possess byproduct material except as authorized in a specific or general license issued in accordance with the regulations in this chapter.

Contrary to the above, as of approximately June 7, 2018, Phoenix Federal No. 2 Mining, LLC acquired, owned, and possessed byproduct material that was not authorized in a specific or general license issued in accordance with the regulations in Chapter I of Title 10 of the *Code of Federal Regulations*. Specifically, the company purchased a coal mining facility in Fairview, West Virginia, from the licensed entity. The facility contained equipment left by the previous owner, which included byproduct material in the form of fixed nuclear gauges containing sealed sources [4 Ronan Engineering Model SA-1 fixed gauge containing up to 505 mCi of cesium-137 each and 200 mCi of cesium-137 in a ThermoProcess Instruments, LP, Model 5201 fixed gauge and one Cross-Belt Elemental Analyzer containing sealed sources of cesium-137 (10 mCi) and up to 3 californium-252 (14 mCi each)]. Phoenix does not have a specific or general license authorizing possession of this material.

4. Conclusions

During this inspection, an apparent violation of NRC requirements was identified. The apparent violation is being considered for escalated enforcement action in accordance with the NRC's Enforcement Policy. The apparent violation being considered for escalated enforcement is as follows:

10 CFR 30.3(a) states, in part, that no person shall acquire, own, or possess byproduct material except as authorized in a specific or general license issued in accordance with the regulations in this chapter.

Contrary to the above, as of approximately June 7, 2018, Phoenix Federal No. 2 Mining, LLC acquired, owned, and possessed byproduct material that was not authorized in a specific or general license issued in accordance with the regulations in Chapter I of Title 10 of the *Code of Federal Regulations*. Specifically, the company purchased a coal mining facility in Fairview, West Virginia, from the licensed entity. The facility contained equipment left by the previous owner, which included byproduct material in the form of fixed nuclear gauges containing sealed sources [4 Ronan Engineering Model SA-1 fixed gauge containing up to 505 mCi of cesium-137 each and 200 mCi of cesium-137 in a ThermoProcess Instruments, LP, Model 5201 fixed gauge and one Cross-Belt Elemental Analyzer containing sealed sources of cesium-137 (10 mCi) and up to 3 californium-252 (14 mCi each)]. Phoenix does not have a specific or general license authorizing possession of this material.

PARTIAL LIST OF PERSONS CONTACTED

NRC Staff

Steve Shaffer, Senior Health Physicist
Henry McCullough, Senior Special Agent
Brett Klukan, Regional Counsel

INSPECTION PROCEDURES USED

IP 87124 Fixed Nuclear Gauge Programs

LIST OF ACRONYMS AND ABBREVIATIONS USED

ADAMS	Agency-wide Documents Access and Management System
10 CFR	<i>Code of Federal Regulations</i>
CRCPD	Conference of Radiation Control Program Directors
ERP	ERP Federal Mining Complex, LLC
NRC	United States Nuclear Regulatory Commission
OI	Office of Investigations
PEC	Pre-decisional Enforcement Conference
SCTR	Source Collection and Threat Reduction
WV DEP	West Virginia Department of Environmental Protection