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March 25, 2009

**BY COURIER DELIVERY**

Office of the Secretary  
Sixteenth Floor  
One White Flint North  
11555 Rockville Pike  
Rockville, Maryland 20852  
Attn: Rulemaking and Adjudications Staff

Cynthia A. Carpenter, Director  
Office of Enforcement  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, Maryland 20852-2738

**RE: NOV EA-08-174, Packet No. 30-05373, License No. 29-09814-01  
Eastern Testing & Inspection Reply and Answer to NOV**

Dear Ms. Carpenter:

On behalf of Eastern Testing & Inspection, Inc. (ETI), I am hereby filing the attached Reply To NRC's Letter And Notice Of Violation And Answer To Proposed Imposition Of Civil Penalty which were issued by the Nuclear Regulatory Commission (NRC) on February 10, 2009. NRC subsequently granted ETI's request for an extension of time to file its Reply and Answer until today, March 25, 2009. At my request, an Electronic Information Exchange (EIE) Docket No. 30-05373 has been established for this matter, and the Reply and Answer also have been served electronically on the NRC-designated service list members today.

Sincerely,

Robert M. Andersen

cc: (By Facsimile)  
Region Administrator  
U.S. Nuclear Regulatory Commission, Region I  
475 Allendale Road  
King of Prussia, PA 19406-1415  
Attention: Marie Miller

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
Eastern Testing & Inspections, Inc.	)	EA-08-174
	)	Inspection No. 30-05373
	)	License No. 29-09814-01

**EASTERN TESTING & INSPECTION'S REPLY TO NRC LETTER AND NOTICE OF VIOLATION AND ANSWER TO PROPOSED IMPOSITION OF CIVIL PENALTY**

On February 10, 2009, the Nuclear Regulatory Commission ("NRC") issued, by letter, a Notice of Violation and Proposed Imposition of Civil Penalty ("NOV") to Eastern Testing & Inspection, Inc. ("ETI") located in Thorofare, New Jersey. NRC granted ETI an extension of time until March 25, 2009, to provide a written statement or explanation to the Director of NRC's Office of Enforcement ("Reply") pursuant to 10 CFR § 2.201 and to provide an Answer to the proposed imposition of a civil penalty in accordance with 10 CFR § 2.205. The NOV waived the affidavit requirement for ETI's submittal. The following are a detailed Reply to the NRC letter and NOV, and an Answer to the proposed penalty, that are being submitted today, March 25, 2009, on behalf of ETI by its undersigned attorney.

Before responding to the individual charges in the NOV, ETI wants to emphasize that it recognizes its responsibility to comply fully with all applicable NRC requirements, and that it made a good faith effort to comply with the NRC's Increased Control Order dated November 14, 2005. After the NRC Inspector informed ETI on September 20, 2006, that it was not in full compliance with some of the requirements of that Order, ETI corrected each instance of noncompliance. On November 17, 2006, a contractor for the U.S. Department of Energy ("DOE") took possession of ETI's radioactive sources. Nevertheless, ETI took further action to correct each of the deficiencies identified by the NRC Inspector even after the sources had been removed. These corrective actions included obtaining an alarm system that uses radio communication, which the NRC confirmed to be a dependable means of communication, and having a pre-arranged plan with the Local Law Enforcement Agency (LLEA) that incorporates that new means of communication. In addition, during the time prior to completion of the foregoing corrective actions, and in fact for the over ten years during which radioactive material was stored by the same secure manner, there has never been any loss of control or significant risk of theft, diversion or sabotage.

**I. ETI REPLY TO NRC NOTICE OF VIOLATION I.A.**

Section IC 2.b. of NRC's Increased Control Order ("IC") requires, in part, that the licensee establish a pre-arranged plan with the local law enforcement agency ("LLEA") for assistance in response to an actual or attempted theft, or sabotage of radioactive material or devices containing radioactive material. NRC's NOV states that contrary to this IC requirement, from May 13, 2006, through November 17, 2006, the licensee possessed radioactive material and



did not establish the required pre-arranged plan with LLEA for assistance in response to an actual or attempted theft. NRC further asserts that deliberate acts by ETI employees contributed to the violation.

A. ETI Answer To NOV Regarding a Pre-Arranged LLEA Plan

ETI **admits** that it did not have the required pre-arranged plan with LLEA for assistance during the period of May 13, 2006, through November 17, 2006. However, as discussed in detail in the Reply below, ETI **denies** the noncompliance with IC 2.b. was the result of deliberate or willful acts on the part of ETI officials or employees. ETI maintains that it made good faith efforts to comply with the IC Order and that the proximate cause for the noncompliance was action by the federal government. Compliance with the IC 2.b. was achieved by ETI when a contractor with DOE belatedly removed the source from the facility on November 17, 2006. Final ETI corrective action resulted in an approved pre-arranged plan with LLEA for assistance on January 11, 2007. These corrective actions will avoid any violations in the future. The reasons for the inadvertent noncompliance and an explanation of the corrective actions taken are provided in the detailed Reply which follows.

B. ETI's Detailed Reply To NOV Regarding a Pre-Arranged LLEA Plan

The IC Order required ETI to complete implementation of the Order by May 13, 2006. In its December 16, 2005 letter to the NRC, ETI said that full compliance with IC 2 was anticipated by May 1, 2006. However, ETI did not have a pre-arranged plan with LLEA on September 20, 2006, when the NRC inspected. This was a violation of IC 2.b.

On November 17, 2006, a contractor for DOE took possession of the radioactive sources. As a result of the removal of the radioactive materials, ETI no longer possessed sources containing radioactive material in quantities of concern at its facility in Thorofare, New Jersey, and was no longer required to implement the increased controls imposed by NRC's Order. Nevertheless, in its continued good faith efforts to comply with the Order, ETI still met with the LLEA and now has a pre-arranged plan in place with the LLEA.

The primary reason ETI failed to complete a pre-arranged plan with LLEA by May 13, 2006, was that ETI anticipated that the unwanted sources located at its Thorofare facility would be removed well before the IC Order deadline. In early 2006, ETI received the NMSS Quarterly Newsletter dated December 31, 2005. This NRC Newsletter included a discussion of "Options For Dealing With Unwanted Sealed Sources" and provided information about how to contact DOE to request it to remove unwanted radioactive sealed sources. This prompted ETI to switch its compliance strategy from the one identified in its December 15, 2005, letter to one predicated upon removal. DOE agreed to remove ETI's sources, but took much longer to do so than ETI had expected. When the delays stretched past May 13, 2006, ETI did not recognize that it was not in compliance with IC 2.b of the Order, having made arrangements for the sources removal.

Although the violation identified in the NRC's Order were identified by the Inspector on September 20, 2006, just twenty-seven (28) days before ETI was in full compliance, NRC questions the timeliness of ETI's corrective action in developing the pre-arranged plan with LLEA. ETI did act promptly to take corrective actions after the compliance deficiencies were identified on September 20, 2006. The initial focus of ETI's corrective action was replacing the alarm system to comply with the NRC Inspector's guidance on the requirements for a dependable means of communication. As the NRC Inspection Report acknowledges, when the NRC Inspector called on October 3, 2006, ETI had identified a radio communication link as the desired design alternative, which confirms that ETI had promptly initiated corrective actions. ETI waited to contact LLEA until it had arrangements in place for installation of a replacement alarm system because it concluded that information about the means of communication would affect the pre-arranged plan and should be resolved before developing that plan.

Corrective action for the other noncompliance identified by the NRC Inspector was completed when ETI revised its security procedures on November 18, 2006. The revised procedure that ETI developed also reflected that ETI still planned to meet with the LLEA concerning assistance in the event of any actual or attempted theft, sabotage or diversion of radioactive material. After revising the procedure, ETI attempted several times to schedule a meeting with the LLEA. In December 2006, the LLEA finally agreed to meet with ETI after the holiday season. On January 11, 2007, ETI met with the LLEA and fulfilled the requirement for a pre-arranged plan with the LLEA. However, ETI actually achieved compliance on November 17, 2006, when the sources were removed.

During the time that it did not have a pre-arranged plan, there were no incidents of attempted theft, diversion or unauthorized access to the radioactive materials. During the same time, the radioactive materials were continuously secured in bulky devices that were locked to the floor in a locked room. Since the police station is immediately across the road from the ETI facility, there was a high likelihood that the LLEA would have responded promptly to any request from ETI for assistance despite the lack of a pre-arranged plan. In fact, police visited the site over the years on several occasions when they observed what they perceived as suspicious activity.

## II. ETI REPLY TO NOTICE OF VIOLATION I.B.

Section III C.2. of the IC Order requires that the licensee report to NRC when the licensee achieved compliance with the requirements specified in the IC Order.

NRC asserts that contrary to the above, on December 16, 2005, and September 20, 2006, ETI provided information to the Commission that was not complete and accurate in all material respects regarding the licensee's status of compliance with the IC Order. The NOV specifically alleges: (1) in a letter to the NRC dated December 16, 2005, Eastern Testing and Inspection, Inc. (ETI) stated that it was in full compliance with IC 1, IC 3, IC 4, IC 5, and IC 6, and that full compliance with the IC Order was anticipated by May 1, 2006; and, that ETI had "preliminary



discussions with LLEA. Written procedure when finalized;" and, (2) in statements ETI made during conversations with an inspector on September 20, 2006, ETI indicated that ETI had discussions with the LLEA. NRC asserts these statements were inaccurate. NRC disputes that the licensee had any discussions with the LLEA regarding compliance with the LLEA plan requirements of the IC Order at the time the statements were made. NRC asserts that the allegedly inaccurate statements provided in the December 16, 2005 letter and during the NRC Inspection were material because the NRC relied on them to evaluate the need to intercede, in the first instance, to ensure that the LLEA plan requirements would be complied with by the May 13, 2006 deadline, and, in the second instance during the NRC inspection, to ensure that ETI and the LLEA were engaged to complete the LLEA plan requirements and obtain ETI commitments to timely action to achieve compliance.

A. ETI Answer to NOV Regarding Communications with LLEA and NRC

ETI **admits** that there were miscommunications and misunderstandings between ETI officials and the NRC regarding compliance with the LLEA requirement. However, as detailed more fully below, ETI **denies** it provided inaccurate information to NRC officials and **denies** that ETI attempted to deceive NRC officials in any way regarding compliance with the IC Order. NRC's interpretation of the cited written and oral communications are contrary to their plain meaning and are clearly erroneous. As such, those communications can not be the basis for a willful or intentional violations or for escalated enforcement. Moreover, contrary to the implications of NRC's assertions, none of the statements made by ETI to NRC could be construed as ETI informing NRC that the LLEA requirement had been fully complied with before the May 13, 2006, deadline, and, therefore, the statements are immaterial. Finally, none of ETI's correspondence with, or statements to, NRC officials could have been reasonably relied upon by NRC as a substitute for ETI submittal of an LLEA pre-arranged plan to NRC. Further reasons for ETI's denial of the willful violation, and an expanded explanation for ETI's unintentional noncompliance with the LLEA pre-arranged plan requirement, are contained in Section II. B. below.

B. ETI's Detailed Reply To NOV Regarding Communication with LLEA and NRC

1. Explanation of ETI's December 16, 2005, Correspondence with NRC

ETI's letter dated December 16, 2005, that NRC cites in its NOV, was submitted to fulfill the NRC IC Order requirement that ETI submit a schedule for completion of each requirement described in Attachment B of the Order. ETI's letter stated that ETI was in only partial compliance with the actions required by IC 2, and that full compliance was anticipated by May 1, 2006. With respect to the requirement of IC 2.b. to have a pre-arranged plan with LLEA for assistance, ETI stated that "Eastern Testing & Inspection, Inc. has had preliminary discussions with LLEA. Written procedure when finalized." It is unclear how NRC interprets this statement, but its plain and ordinary meaning is that written procedures would be available when finalized, not that such procedures had already completed when the letter was sent. Neither the NRC Inspector nor the

NOV assert that ETI so much as gave the Inspector a date certain when plan would be completed in its initial letter, or even during the September 20, 2006 inspection.

The December 16, 2005, letter was submitted to NRC before ETI learned of other options for complying with IC Order by having the sources removed. When it learned of this option, ETI's focus and compliance strategy for the LLEA requirement shifted to removal of the unwanted and unused sources. Soon after submitting its December 16, 2005 letter, ETI received the NMSS Newsletter dated December 31, 2005, which discussed "Options For Dealing With Unwanted Sealed Sources," and informed ETI of a program to remove unwanted sources. ETI promptly called the number NRC provided in the newsletter and asked to have ETI's sources removed from the New Jersey facility. ETI was one of the first, if not the first, company to ask to be included in the program. ETI was informed that its sources would be included in the program, and that the sources would be removed within a few months, well before the May 13, 2006 deadline.

ETI believed the newsletter for unwanted sources provided an alternative method for complying with the IC Order and expected the plan for removal to eliminate any security concerns NRC had. Therefore, ETI believed it would not need to develop a prearranged LLEA plan. The removal program did not proceed as expected; the process was drawn out by federal government actions beyond ETI's control. DOE selected a contractor for picking up the NRC licensed sources. Instead of picking up ETI's sources first, the contractor established a schedule based on the locations of the sources. ETI followed up with DOE and its contractor, J. L. Shepherd, on several occasions, trying to have the sources removed as soon as possible, but the contractor ended up not removing the sources until November 17, 2006, after the anticipated pickup date.

NRC issued Order IA-08-023 to Himat Soni in a related NRC action. That Order states that "evidence gathered" during the investigation revealed that the DOE contractor, in a letter dated April 20, 2006 [just 23 days prior to the May 13, 2006 deadline] clearly informed Himat Soni that licensees could not depend on recovery (removal of the material from the facility) by DOE to meet IC Order requirements. The NRC Order fails to note that Himat Soni, the President of ETI, provided the April 20, 2006, letter to NRC during the investigation, along other correspondence with the DOE contractor, to demonstrate the numerous efforts made to comply with the IC requirements and to show that the federal governments actions were the proximate cause of the noncompliance. No effort was made to conceal the correspondence with the DOE contractor from NRC. Despite the NRC characterization of the April 20, 2006 contractor's letter as "clear," it does not specifically refer to the LLEA plan as a requiring interim action if the source was not removed by May 13, 2006.

When the May 13, 2006 date passed and DOE had still not removed the sources, Himat Soni did not realize that ETI was violating the NRC Order. Mr. Soni now admits that he made a mistake in judgment, but that does not amount to a deliberate action in violating the Order. NRC itself recognized that the IC Order has been misinterpreted by licensees and that common



misunderstandings existed. Therefore, NRC issued an Information Notice 2007-16 on May 2, 2007, with additional clarification and guidance, stating that the IC Order was subject to "common misunderstandings" as was being misinterpreted.

Although NRC's early correspondence with ETI does not suggest that the statements in ETI's December 16, 2005, letter were material to any decision the NRC might make, the NOV asserts that the allegedly inaccurate statements provided in the December 16, 2005 letter and during the NRC inspection were material because the NRC relied on them to evaluate the need to intercede, in the first instance, to ensure that the LLEA plan requirements would be complied with by the May 13, 2006 deadline, and, in the second instance during the NRC inspection, to ensure that ETI and the LLEA were engaged to complete the LLEA plan requirements and obtain ETI commitments to timely action to achieve compliance. However, the letter could not be material to such decisions because it did not make any claim about the nature of the preliminary discussions with LLEA, other than that they were preliminary. The letter statement was so general that it would not be reasonable for NRC to attach dispositive significance to it or to rely upon it without making further contact with ETI for clarification.

In fact, the originally stated NRC bases for questioning the accuracy of ETI's statement are unrelated to any significance the NRC might reasonably attach to the letter. If the NRC's interpretation of ETI's letter had been correct -- i.e., if Mr. Dhiraj Soni had mentioned the NRC Order and/or radioactive material to the police officers -- ETI would still not have had a pre-arranged plan with LLEA and would not necessarily have made sufficient progress toward creating one. Consequently, NRC could not reasonably have relied on the letter and ETI's statement for compliance purposes. While it is clear that there was miscommunication and misunderstanding between ETI and the NRC Inspector, that does not justify a strained interpretation of what was said to support charging a deliberate or willful violation. The NOV proposed penalty and escalated enforcement are disproportionate responses to a simple misunderstanding.

## 2. Discussions Regarding the Plan with LLEA

The preliminary oral discussions ETI referenced in its December 16, 2005 letter were between Dhiraj Soni and two police officers who came to the ETI facility to investigate a concern about unusual activity at the ETI facility in the late summer or fall of 2005, prior to December 16, 2005. During the course of the NRC investigation, ETI officials provided a police report of the incident to prove that Dhiraj Soni had in fact had a preliminary discussion with LLEA. This discussion was **not** about the NRC Order itself, and may even have occurred before ETI received that Order, but it did involve the same general subject as IC 2.b: ETI's intent to communicate further with the LLEA.

In the summer of 2005, ETI had already been advised to expect NRC to require increased coordination with the LLEA. Himat Soni had, in turn, mentioned this to Dhiraj Soni. When Dhiraj Soni encountered the West Deptford police officers, and was explaining his presence at

the facility, he stated that ETI would need to meet with the Police Chief. Dhiraj Soni mentioned a desire to meet with the police chief because Himat Soni had told him that the NRC would be requiring increased coordination with LLEA. Further, after this encounter, Dhiraj Soni mentioned his discussion with the police officers to Himat Soni. Accordingly, when Himat Soni later wrote ETI's December 2005 letter, he recalled this discussion and characterized it in ETI's letter as a preliminary discussion with LLEA.

ETI characterized this conversation as a preliminary discussion because the reason ETI needed to see the Police Chief was related to police protection for the radioactive material stored at the ETI facility. While the conversation between Dhiraj Soni and the police officers was not specifically in response to the Order, it *was* preliminary to later discussion ETI's storage of radioactive materials with the LLEA, which was a core requirement of IC 2.b. ETI recognizes that the summary of the Office of Investigations (OI) report implies that the police officers did not recall that Dhiraj Soni told them that ETI would want to meet with the Police Chief<sup>1</sup>. This is insufficient to prove that Dhiraj Soni's recollection was mistaken. It would not be surprising if the officers did not recall his statement, since the statement would not have been significant to them. Dhiraj Soni would be more likely to recall this part of the conversation, because it was more significant to him. Discussions with private citizens would likely have been routine for the officers, but for Dhiraj Soni, interactions with local police were not routine.

In any event, ETI's letter called this discussion "preliminary" and did not claim that it had been substantive or that the NRC Order was mentioned. NRC is making unwarranted and unsubstantiated assumptions when it infers that ETI claimed that the preliminary discussions with the LLEA were specifically about the Order. ETI's statement to the police was preliminary to a meeting to inform the LLEA about the radioactive materials stored by ETI.

ETI's intention to inform the LLEA about its storage of radioactive materials is confirmed by a letter ETI mailed to the Chief of Police on October 17, 2005, stating that ETI stored radioactive materials subject to a NRC license. Unfortunately, that letter was never delivered because ETI mistakenly addressed it to the Chief of Police, Thorofare Township, when the proper address was Chief of Police, West Deptford Township (although just across the road, the police station is, in fact, in the adjoining township).

NRC described Dhiraj Soni's conversation with the police officers as "preliminary discussions" with the police "related to" ETI wanting to meet with the police about the radioactive materials stored at the ETI facility. NRC plays semantics with Dhiraj Soni's statement to NRC in which he said: "I agree with [the ETI's letter's] ...description" of the discussion with the police as a "preliminary" one. His statement does not mean that he

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<sup>1</sup> To be clear, the OI report summary says that the officers denied that Dhiraj Soni said he wanted to meet the Police Chief about the NRC Order. The summary does not actually state that the officers did not recall a more general statement by Dhiraj Soni about wanting to meet with the Police Chief or even whether the investigator asked questions of the officers about more general statements by Dhiraj Soni. In fact, Dhiraj Soni has never asserted that he specifically told the police ETI wanted to discuss the NRC Order, only that he expressed a desire on ETI's part to meet with the Police Chief about security.



specifically claimed to have told police that there were radiological materials at the site or that there was a need for a plan—the ETI letter simply states that the conversation he had "related to" ETI wanting to have a meeting with police about the stored material. His telling the police that Himat Soni wanted to speak with the police did in fact "relate" to the NRC Increased Control requirements, even though Dhiraj Soni was not aware of those specific requirements at the time and did not mention the purpose of the meeting to the police.

Even if the NRC does not agree that ETI's characterization of the interaction between Dhiraj Soni and the police officers was complete and accurate, it should not consider ETI's statement to have been material. Neither the NRC's June 19, 2008 letter to ETI nor the NOV provides any basis for considering the statement to have been material. In its June 19, 2008 letter to Dhiraj Soni, the NRC asserts that "This information was material to the NRC because it was used to determine ETI's compliance with the Order." This explanation, *per se*, cannot be correct because ETI's letter did not claim that ETI had a pre-arranged plan with LLEA, and actually indicated that ETI had not completed the action required to comply with IC 2.b. It also should be clear that NRC did not rely on this statement in making a decision about ETI's compliance with IC 2.b. The NRC's earliest compliance determination was the one made on September 20, 2006, in which the NRC found that ETI was not in compliance with this aspect of the Order. NRC's letter dated June 19, 2008, and the NOV state that ETI also provided inaccurate information to the NRC Inspector during a conversation on September 20, 2006, in which ETI informed the Inspector that preliminary discussions had been held with LLEA. Although ETI does not have any record of the statements made by Dhiraj Soni during the NRC inspection on September 20, 2006, it appears that the statements at issue were similar to the statement in ETI's letter of December 16, 2005, discussed above. Consequently, these statements would have been accurate for the same reason that the letter was accurate.

At unnumbered page 6, section II.b, the NRC Inspection Report (and the subsequent February 10, 2009 NRC Orders and NOV) describe the NRC Inspector's conversation with ETI representatives in terms that are different from the characterization in NRC's June 19, 2008, letter. The Report asserts that ETI said it had discussions with LLEA about assistance and that LLEA was aware of stored radioactive material, but does not say that ETI claimed to have a pre-arranged plan with LLEA. In fact, the NRC Inspection Report states that ETI said that the Police Station was across the road from the facility and an officer would frequently investigate unfamiliar vehicles parked there. This statement relies on LLEA practice rather than a pre-arranged plan, and implies that ETI did not say there was a pre-arranged plan with LLEA.

The ETI representatives during the NRC inspection (principally Himat Soni and, to a much lesser extent, Dhiraj Soni) do not recall all of the specific details of the discussions, but in all events were entirely truthful and did not knowingly mislead the NRC Inspector. They may have stated that they believed the police knew that radioactive material was stored at the ETI storage shed. Himat Soni recalls that he had informed the police about ETI's plans to possess and use radioactive materials when ETI established its Thorofare facility in the early 1990s. In addition, before the facility was occupied, a public hearing and township meeting was held during which

public officials, including the police and fire department, were informed of the nature of ETI's business and the materials it intended to possess.

While Dhiraj Soni is not sure if he mentioned radioactive material to the police officers, he knew that his conversation with the officers had occurred adjacent to the storage shed, which displays conspicuous signs, consistent with 10 CFR 20.1902(e), warning about the presence of radioactive materials. Both Himat Soni and Dhiraj Soni also knew that police officers had been on the ETI property on other occasions. Therefore, ETI officials reasonably believed that the police were in fact aware of the presence of radioactive materials at the Thorofare facility. In any event neither the Inspection Report nor the NOV states that any ETI representative ever claimed that ETI had a pre-arranged plan with LLEA - the only statement that would have been a material misrepresentation.

ETI's statements in its letter dated December 16, 2005 and during the NRC inspection were complete and accurate at the time they were given. ETI did have preliminary discussions with the LLEA concerning ETI's need to meet with the LLEA. When the May 13, 2006 date passed and DOE had still not removed the sources, Himat Soni did not realize that ETI was violating the NRC Order; while he now knows that was a mistake in judgment, it does not amount to a deliberate action in violating the Order. NRC itself recognized that the IC Order has been misinterpreted by licensees and that common misunderstandings existed. Therefore, NRC issued an Information Notice 2007-16 on May 2, 2007, with additional clarification and guidance, stating that the IC Order was subject to "common misunderstandings" and was being misinterpreted. Furthermore, as discussed above, after the NRC Inspector determined that ETI had not yet satisfied the requirement for a prearranged plan with the LLEA, ETI met with the LLEA on more than one occasion and now has a documented pre-arranged plan with LLEA that is in full compliance with the Order. During the time before establishment of a prearranged plan with the LLEA, there were no incidents of threatened or actual theft, diversion or sabotage at the ETI facility, and there was little risk of such incidents.

To complete its response to this NOV, ETI hereby incorporates, by reference, the sworn responses of Himat Soni and Dhiraj Soni on March 16, 2009, filed with NRC in actions related to NRC Orders IA-08-023 and IA-08-022. NRC should acknowledge well-recognized scientific research concerning the imprecision of human communications, especially when there are language barriers involved. The most likely causes of the non-compliances were misimpressions formed regarding the new IC requirements, miscommunication between the parties, and a failure to achieve a meeting of the minds on what was to be done when the federal government failed to pick up the sources as scheduled prior to the deadline— the proximate cause for the noncompliance.



### III. VIOLATIONS NOT ASSESSED A CIVIL PENALTY

NRC's IC Order Section IC.6.b requires that the licensee develop, maintain and implement policies and procedures for controlling access to, and for proper handling and protection against unauthorized disclosure of, its physical protection information for radioactive material covered by these requirements.

Contrary to the above, from May 13, 2006, through November 17, 2006, the NOV asserts that the licensee did not develop, maintain and implement policies and procedures for controlling access to, and for proper handling and protection against unauthorized disclosure of, its physical protection information for radioactive material covered by these requirements.

#### A. ETI Reply to the NOV Regarding Procedures for Protection of Radioactive Material Information

ETI had limited access to security information. Moreover, it took consistent actions to assure that there was no unauthorized access to the information it had in its possession. ETI, however, had not formalized and documented its policies and procedures for protection of such information. After the NRC Inspector told ETI that it needed to document its procedures, ETI did so. During the time that it did not have a written procedure in place, ETI had not allowed any person to have access to such information who would not have been authorized by the procedure.

#### B. ETI Reply to NOV Regarding Documentation of Basis for Concluding Individuals Granted Access Were Trustworthy

NRC's IC Order Section IC 1.d. requires, in part, that the licensee document the basis for concluding that there is reasonable assurance that an individual granted unescorted access is trustworthy and reliable, and does not constitute an unreasonable risk for unauthorized use of radioactive material quantities of concern.

The NOV asserts that contrary to this requirement, as of September 20, 2006, the licensee had not documented the basis for concluding that there was reasonable assurance that the individuals granted unescorted access are trustworthy and reliable, and did not constitute an unreasonable risk for unauthorized use of radioactive material quantities of concern.

ETI does not contest this NOV, for which no penalty was assessed. Although ETI had in fact confirmed that the individuals who have access to radioactive materials are trustworthy and reliable, it had not fully documented its basis for the conclusions. Accordingly, after the NRC Inspector informed ETI that it needed to document its conclusion, ETI did so. ETI is now in full compliance with this requirement. During the time it had not documented the basis of these conclusions, ETI had not allowed any person who is not considered trustworthy and reliable to have access, escorted or otherwise, to the radioactive materials.

#### IV. ANSWER TO NRC's PROPOSED PENALTY

##### A. As Demonstrated Above, ETI Did Not Willfully or Deliberately Violate NRC's IC Order

The NRC NOV directs that any Answer to the proposed penalty be separate from the Reply to the NOV, and that such Answer address factors outlined in 10 CFR § 2.205, the NRC's Enforcement Policy, and related guidance, as appropriate. NRC's conclusions that the alleged violation(s) were willful and deliberate are key to Severity Levels designated for the violations, and to the amount of the penalties proposed. ETI believes those conclusions are clearly in error and lack support in the record. Therefore, ETI incorporates in its Answer those portions of its foregoing Reply (Sections II.B.1.-2. at pp. 4-9) that were offered to rebut the conclusion that ETI officials deliberately and willful violated NRC's IC Order. As provided for on page 4 of the February 10, 2009 NOV, those portions of the Reply which address the claim of willful and deliberate acts are hereby incorporated by reference, as if fully restated herein. ETI believes that its Reply previously demonstrated that errors were made in NRC's proposing a Severity Level III violation, and concomitant penalty, because the assessment was erroneously based upon the conclusion that deliberate acts by ETI officials justified combining NOV I.A. and NOV I.B. into a single Level III. violation. Both NOV I.A. and I.B. are, at the most, Severity Level IV violations absent willful and deliberate conduct by ETI officials.

##### B. Other Extenuating Circumstances and Reasons Why Penalty Should Not Be Imposed

###### 1. Additional Evidence That the Violations Were Not Deliberate

ETI also believes there were extenuating circumstances and reasons why the penalties should not be imposed. NRC's Enforcement Policy and Guidance Memorandum 06-03 provide that for non-willful violations of the NRC Order, the NRC should consider whether the licensee made a good faith effort to comply. In its earlier descriptions of the apparent violations, the NRC's letter does not label the violations as willful, but it does state that the OI report concluded the apparent violations were intentional. The only explanation in the original NRC's letter for that OI conclusion is contained in the summary of the OI report, which states only that the conclusion is based on the fact that Himat Soni knew that a pre-arranged plan with LLEA was required and he was responsible for compliance with the Order. This explanation is not in itself adequate to support the conclusion. The same statement could be made about most licensee violations of NRC requirements, the majority of which NRC does not label as deliberate. In fact, Information Notice 2007-16 states that licensee violations of virtually every requirement of the IC Order were common. It is likely that in almost every one of these violations, a responsible person at each licensee had the same information as was available to Himat Soni, but also failed to comply with some aspect of the Order. Nevertheless, the Information Notice does not indicate that NRC viewed the violations as deliberate. Nor could it.

The information NRC has established during the course of the inspection and investigation demonstrates that ETI did not intend to violate the Order. In fact, the concrete steps ETI took to



comply with the Order demonstrate that it intended to comply. For example, ETI had modified its trucks to comply with the requirement for two physical barriers, and as described in NRC's Inspection Report, ETI had an alarm system that would have been acceptable if it had met the NRC's criteria for a dependable means of communication. When the NRC Inspector told ETI that its alarm system was inadequate, ETI obtained a replacement system to meet the Inspector's guidelines.<sup>2</sup> Similarly, after the NRC Inspector brought the lack of a pre-arranged plan with the LLEA to ETI's attention, ETI did develop a pre-arranged plan. ETI completed this action after the radioactive materials already had been removed on November 17, 2006, even though at that point the increased controls were no longer applicable, and ETI had received NRC Inspection Report 0300573/003, dated January 4, 2007, which stated that no violations were identified during the September 20, 2006 NRC inspection. ETI's efforts to establish a pre-arranged plan after it was no longer required, and after it reasonably appeared to ETI to no longer be an NRC concern, demonstrate ETI's continuing good faith efforts to comply.

Thereafter, ETI followed up with DOE and its contractor to have the sources removed as soon as possible. Since these records are incomplete, ETI recently asked DOE's representative if DOE maintained records of these contacts. The response shows ETI's continuing efforts to achieve compliance<sup>3</sup> and demonstrates ETI's diligence. This confirms that ETI had contacted DOE before February 3, 2006. ETI also has evidence of communications with the DOE contractor, starting with April 20, 2006, in which ETI urged it to remove ETI's sources as quickly as possible. These records demonstrate that ETI was trying to dispose of the radioactive material as soon as possible, and

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<sup>2</sup> The NRC Inspection Report appears to emphasize that ETI's corrective actions after the NRC inspection were not completed promptly. However, NRC never inquired into the timing of these actions. The Inspection Report does not indicate that the NRC Inspector applied the direction in Enforcement Guidance Memorandum EGM 06-03 that the NRC Inspector should work with the licensee to establish agreed-upon corrective actions and time-frames for correcting the non-compliances. Instead, the NRC Inspector simply declared that the corrective actions must be immediate, without any consideration of the time it would take to identify, procure and install a replacement alarm with a different communications system, or the need to address and incorporate that communications system in a pre-arranged plan with the LLEA.

<sup>3</sup> The DOE representative stated:

Good afternoon Mr. Soni.

As you requested, the following is a summary of our documented correspondence and activities related to the recovery of two Co-60 devices (SNs 2376 and 2142) from your facility:

1. February 3, 2006: I contacted you to confirm the information you provided on the devices and to inform you that the devices would be recovered as part of the subcontract to be awarded.
2. April 13, 2006: I informed you via e-mail that J.L. Shepherd and Associates would complete the recovery at your facility.
3. November 17, 2006: The devices were removed from your facility for shipment to a DOE interim storage site.

You also contacted me a number of times by phone to find out the status of the subcontract and schedule. It took longer than anticipated to get the subcontract in place and complete all of the recoveries on the subcontract.

before the May 13, 2006 deadline. Although the NRC IC Order did not explicitly state that source removal was an alternative means of compliance, it was clear that source removal would have achieved complete compliance with the NRC Order and would have achieved more effective security. NRC should recognize this as a good faith effort to comply with the Order, including IC 2.b, and the completion of this effort should be recognized as comprehensive corrective action that was completed before the NRC Inspector returned to ETI in December 2006.

## 2. The Violations Were of Low Safety Significance

ETI does not wish to minimize the importance of compliance with the NRC Order, but in deciding whether to impose escalated enforcement, the NRC rules, Enforcement Policy, and guidance require NRC to consider the actual safety significance of the violations. There was very little risk of theft, diversion or sabotage of the radioactive material ETI possessed because of the nature of the materials, the security systems that were in place, the lack of public visibility of the material storage area, and the close proximity of the police station. The radioactive material quantities of concern were in two heavy devices that would have been difficult for a thief to move. The devices were locked to the floor in a locked room. This room was in storage shed behind the ETI offices, and not readily visible to the public. As a result, few persons who were not approved for access to the radioactive material would have known of its existence. Thus, there was little likelihood that anyone would have attempted to steal, divert or sabotage the material. In addition, in ETI's experience, even without a pre-arranged plan, the police have been very prompt to respond when they receive calls about the ETI facility. This is not surprising, given that the ETI facility is close to the police station, making it easy for the police to observe suspicious activity on the ETI property and respond as necessary.

## 3. ETI Has A Good Compliance Record

ETI has not had any escalated enforcement for some 10 years and 10 NRC inspections. The most recent escalated enforcement against ETI was over ten years ago, and was unrelated to security requirements. After that enforcement, in SECY 98-009 the NRC staff informed the Commission that on January 14, 1998 NRC had terminated the Settlement Agreement with ETI based on ETI's acceptable performance of licensed activities since issuance of the Agreement. That Agreement had required oversight and audits of ETI by an independent third party. After the NRC terminated the Agreement, ETI **voluntarily** continued the oversight and audits by the independent third party, and this arrangement is still ongoing. In any event, under the NRC Enforcement Policy, assessment of ETI's compliance record should be based on the last two years, and escalated enforcement that occurred a decade ago should not have any bearing on NRC's current enforcement decision.

ETI recognizes that NRC has concluded that the violations were willful, and that NRC does not credit a good compliance record for willful violations. Nevertheless, ETI should receive credit for its good compliance record in this instance because the NRC finding of willfulness is unjustified for the reasons stated in Sections I and II of the Reply. Nothing that NRC has disclosed to ETI about



the results of the OI investigation provides a reasonable basis for concluding that the violations were due to any cause other than inadvertent error. The NRC inspection found that ETI had acted to comply with the requirements of the Order that would have been most burdensome for a small business, such as the requirements that involved acquisition of new equipment. The apparent violations that ETI does not contest involved documentation requirements that were clearly less burdensome. ETI had every incentive to comply with these less burdensome requirements, and no incentive to violate them. The NOV and OI finding fail to consider that ETI had no motive to violate IC 2.b or IC 2.c, and that its actions to comply with the other requirements of the NRC Order, including its modification of its trucks and its initial alarm system, demonstrate that it did intend to comply with all aspects of the Order. The NOV, NRC Inspection Report, and the OI Report summary all fail to explain why NRC concluded that ETI would have deliberately violated the least burdensome requirements, while making clear efforts to comply with the other requirements that would ultimately have to be documented in the LLEA pre-arranged plan.

#### 4. ETI Took Comprehensive Corrective Action

ETI should be credited with having taken prompt, comprehensive corrective action because its voluntary action to dispose of the radioactive material was initiated soon after NRC issued its Order, and when completed, both achieved full compliance and completely eliminated the possibility of any theft, diversion or sabotage. In addition, even after ETI had disposed of the materials and implementation of the increased controls was no longer required, ETI took action to correct the deficiencies identified by the NRC Inspector and implement each of the increased controls. All of these actions were undertaken before ETI had any indication that NRC might consider escalated enforcement.

#### CONCLUSION AND REQUEST FOR RELIEF

In summary, the violations that did occur at the ETI facility were not deliberate or willful, and were not safety-significant. ETI made good faith efforts to come into compliance and took comprehensive action to correct the violations after the September 20, 2006 inspection. Its relevant compliance record has been very good. Consequently, a finding of willful violations and imposition of escalated enforcement against ETI would be unjustified.

As a final extenuating circumstance, ETI notes that it is a small business, and like others similarly situated in this economic climate, can ill-afford the imposition of an unjustified monetary penalty or the loss of business that could result from damage to its reputation should the willful and deliberate findings not be corrected. Therefore, ETI requests (1) that the erroneous severity designation of NOV I.A. and NOV. I. B. be reduced from Level III to Level IV; (2) that the proposed escalation of the enforcement be dismissed; and (3) the proposed penalties be remitted, reduced, or mitigated to zero, as is appropriate for Severity Level IV violations that have been fully corrected and pose no threat of recurrence in the future.

CONTAINS SECURITY-RELATED INFORMATION-WITHHOLD UNDER 10 CFR 2.390

ETI further requests that all references to willful and deliberate violations be removed from any final action taken by NRC on the Notice of Violation against ETI.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Robert M. Andersen". The signature is fluid and cursive, with the first name "Robert" and last name "Andersen" being clearly legible, and "M." as a middle initial.

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