

U. S. NUCLEAR REGULATORY COMMISSION

REGION II

Docket No.: 030-32882  
License No.: 47-24923-02  
Report No.: 47-24923-02/96-02  
Licensee: Nelson Excavating, Inc.  
Location: Thomas, West Virginia  
Dates: August 14-15, 1996  
Inspector: David J. Collins, Health Physicist  
Approved By: John P. Potter, Chief  
Materials Licensing/Inspection Branch 2  
Division of Nuclear Materials Safety

Enclosure 1

## EXECUTIVE SUMMARY

NELSON EXCAVATING, INC.  
NRC Inspection Report No. 47-24923-02/96-02

### Introduction

An NRC Order Suspending License dated October 24, 1995, was issued following repeated failure to pay fees. This Order required an answer within 30 days, and directed other actions. The licensee did not respond to the Order as required.

Inspection 96-01, completed on April 1, 1996, determined compliance with the Order, and raised questions regarding use of the gauge in violation of the Order. During the inspection, the licensee paid a portion of the fees due. Inspection Report 96-01 with a Notice of Violation, and a Demand for Information were issued to the licensee on June 11, 1996.

Inspection 96-02 was conducted on August 14-15 1996, to verify "storage only" of a portable gauge as required by the Order, and to determine why the licensee had not responded to the Demand for Information.

### Presentation of Significant Findings and Conclusions

Inspections 96-01 and 96-02 determined the following:

- A. The licensee presented incorrect and/or inaccurate information regarding who was functioning as the Radiation Safety Officer to the NRC during the renewal process in September 1992. Failure to submit accurate and complete data in an application is an apparent violation of 10 CFR 30.9(a)
- B. The licensee failed to utilize the Radiation Safety Officer specified in the license. This use of a Radiation Safety Officer who was not authorized is an apparent violation of License Condition 21.
- C. The licensee failed to respond to the October 24, 1995 Order within the 30 days allowed.
- D. The licensee used the portable gauge during the period when use was prohibited by the Order Suspending License.
- E. The licensee failed to perform tests for leakage and/or contamination on the portable gauge for a period exceeding six months. This is an apparent violation of License Condition 14.
- F. The licensee failed to respond to a Demand for Information within the timeframe allowed. Response was received after Inspection 96-02.

## REPORT DETAILS

### 1. MANAGEMENT OVERSIGHT

#### 1.1. Inspection Scope

This portion of the inspection was performed to determine how licensed activities are conducted and controlled. The inspector interviewed the owner, office manager and an available portable gauge operator and reviewed documents submitted in support of the NRC license.

#### 1.2. Observations and Findings

The NRC license was issued to Nelson Excavating, Inc. on June 24, 1987 and last renewed on September 17, 1992. As a part of support for the license renewal, the licensee indicated who the Radiation Safety Officer was in a September 17, 1992 letter. The licensee used one portable moisture density gauge.

License Condition 21 requires the conduct of licensed activities to be as documented, in part, as in a September 17, 1992 letter stating the named Radiation Safety Officer.

In Inspection Report 47-24923-02/96-01, the Inspector determined that the named Radiation Safety Officer was no longer employed by Nelson Excavating, Inc., and had not been since September 1987. Instead, the owner of Nelson Excavating, Inc. exercised extensive control over operations of the company, and that the office manager and the portable gauge operator believed that they were to follow his instructions. Day-to-day operations are directed by the owner and relayed throughout the company by the office manager and the foreman-engineer. The inspector determined that the owner was functioning as the Radiation Safety Officer. The use of the owner as the Radiation Safety Officer is contrary to the September 17, 1992 licensee letter, which stated that the named Radiation Safety Officer would remain in that position. The Inspector interviewed the owner who stated that he only wished to have the license renewed as quickly as possible and he thought that changing the Radiation Safety Officer would result in a delay. The owner stated that the named Radiation Safety Officer no longer had any connection with the company. As stated in 10 CFR 30.9(a), complete and accurate information in all material respects is expected in licensee applications and information submitted by a licensee.

#### 1.3. Conclusions

The Radiation Safety Officer was not as indicated in the NRC license since 1987. The owner exercises close control over company activities, and appears to be performing as the Radiation Safety Officer.

Failure to provide accurate information concerning the named Radiation Safety Officer is an apparent violation of 10 CFR 30.9(a).

Failure to operate without a Radiation Safety Officer as indicated in the NRC license is an apparent violation of License Condition 21 of License No. 47-24923-02.

## 2. Materials Receipt, Use, Transfer and Control

### 2.1. Inspection Scope

This portion of the inspection was performed to determine the current status of the licensed gauge and use since the October 24, 1995 Order.

The inspector reviewed licensee actions after receipt of an Order Suspending License (Effective Immediately) (See paragraph 5.) issued October 24, 1995 and a Demand for Information (See paragraph 6.) dated June 11, 1996. The inspector reviewed licensee records of use of the portable gauge for the period October 24, 1995 through August 14, 1996. The inspector reviewed the transfer records for the portable gauge to an authorized recipient on August 15, 1996.

### 2.2. Observations and Findings

The Order Suspending License was issued on October 24, 1995, and required the licensee to take certain actions. The actions are specified in paragraph 5 of this report.

The inspector obtained a copy of the logbook pages and cover sheet on August 15, 1996 at the temporary job site (Enclosure 1). The data indicates uses of the portable gauge after the October 24, 1995 effective date of the Order Suspending License: November 6, 1995, January 4, 1996, April 22, 1996 (3 days). The logbook data shows uses after the May 15, 1996 telephone discussion between the owner and Dr. Bruce Mallett, Director, Division of Nuclear Materials Safety and Mr. Douglas M. Collins, Deputy Division Director on the following dates: July 12, July 16, July 17, July 18, July 19, July 22, July 22, July 24, July 25, July 26 and August 8, 1996 (10 days). Use of the portable gauge while under the terms of the Order Suspending License is a violation of the Order, issued under the provisions of 10 CFR 171.23.

The inspector interviewed the owner and the office manager. The owner claims not to have understood the Order or Demand for Information, nor the explanation conducted in telephone interviews with a Region II inspector and Region II Division Director and Deputy Division Director and Branch Chief, on May 15, 1996 and successive dates. However the owner sought no guidance from the Commission concerning the Demand for Information or Order.

The inspector determined through interviews that the owner did not reply, nor was the office manager directed by the owner to reply, to the Order Suspending License within the 30 days allowed in the Order. Failure to respond to the Order is an apparent violation of the Order.

The licensee transferred the gauge to another company, licensed by the NRC. Therefore the licensee did not possess licensed material as of the date of transfer. The inspector reviewed the license and the agreement with the licensee to whom the portable gauge was transferred on August 15, 1996. The recipient's NRC license authorizes possession of the portable gauge and authorizes temporary job sites. The inspector reviewed the transfer document and observed that the owner of Nelson Excavating, Inc. relinquished control of the gauge and committed to no interference during Nelson Excavating, Inc. staff's use of the gauge under the supervision of the licensed recipient.

### 2.3 Conclusions

The owner authorized/directed the use of the portable gauge on two occasions, November 6, 1995 and January 4, 1996, knowing that use of the gauge was not permitted. The owner authorized/directed the use of the portable gauge on April 22, 1996 despite the inspection conducted March 19 through April 1, 1996, during which the inspector conveyed the instruction from the Order that the portable gauge was not to be used and to be placed in storage. The owner authorized/directed the use of the portable gauge between July 12, 1996 and August 14, 1996 knowing that the Division Director and Deputy Division Director, Division of Nuclear Materials Safety on May 15, 1996 reiterated that the portable gauge was not to be used and was to be placed in secure storage. The portable gauge was transferred on August 15, 1996 to an authorized recipient.

Failure to prohibit use of the portable gauge is an apparent violation of the Order Suspending License.

## 3. Portable Gauge Storage and Leak Tests

### 3.1. Inspection Scope

This portion of the inspection was performed to determine the licensee's compliance with other safety conditions of the license.

- A. The inspector surveyed the temporary job site where the gauge had been stored under this license. Radiation dose to members of the public from licensed activities is required by 10 CFR 20.1201(a) to be less than 1 millisievert (100 millirem) in a year, and in an unrestricted area to be less than 0.02 millisievert (2 millirem) in any one hour.
- B. The inspector interviewed the office manager and the available portable gauge operator to ascertain the status of licensee efforts to identify tests for leakage/contamination conducted between February 20, 1995 and March 29, 1996, as identified in Inspection Report 47-24923-02/96-01. Tests for leakage and/or contamination are required by License Condition 14 of License

No. 47-24923-02 to be conducted on all sealed sources in possession of the licensee at intervals not to exceed six months.

### 3.2. Observations and Findings

- A. The inspector's survey indicated that the 0.002 millisievert (0.2 millirem) radiation level at the outside of the trailer storage location at the temporary job site was below 0.02 millisievert (2 millirem) at any point in an unrestricted area. Because the location of the highest radiation reading was in an area not normally occupied (head height at the outside of a construction trailer), the inspector determined that the dose to any member of the public would not exceed 1 millisievert (100 millirem) in a year.
- B. As identified in Inspection Report 47-24923-02/96-01, no tests for leakage and/or contamination were conducted between February 20, 1995 and the March 29, 1996 of the sealed sources in the licensee's portable gauge. The inspector was not able to identify any record indicating the tests, and the licensee stated that a search for the record would be made.

In this Inspection the inspector determined through interviews that no records had been found indicating the performance and/or analysis of tests for leakage and/or contamination, neither at the leak testing service, nor in the licensee's check register, invoice records or the portable gauge records. The inspector was shown a completed test record for leakage and/or contamination performed on April 22, 1996. The inspector verified through the leak test service company that there was no record of a test for leakage and/or contamination between these dates and that the April 22, 1996 test had been processed. The licensee staff stated that they depend upon notification from the leak testing service to perform testing. The licensee staff stated that the leak test performance would be recorded in the use record and an internal tickler would be established.

### 3.3. Conclusions

The licensee stored the gauge in accordance with the NRC requirements. Leak tests were not performed as required. The licensee's reliance upon a single outside method for a reminder of leak testing requirements was inadequate.

Failure to test for leakage and/or contamination at intervals not to exceed six months, between February 20, 1995 and April 22, 1996, is an apparent violation of License Condition 14.



#### 4. Sequence of Events

An Order Suspending License (Effective Immediately) (Order) (see paragraph 5) was issued by the Commission on October 24, 1995 in response to the licensee's failure to pay annual fees and penalties. The Order was issued in accordance with the regulations at 10 CFR 2.202 and 10 CFR 171.23. Prior notice, as required in 10 CFR 15.21 and \$15.29, to the licensee had been provided in the form of invoice, second notice, final notice and delinquent notice as required by 10 CFR 171.23.

The Order provided further that extensions for good cause would be considered, that a hearing could be requested, and the Order would be withdrawn should payment of the debt within 30 days be made. No request for extension, or hearing, and no payment of the debt was received prior to November 24, 1995.

An inspection (47-24923-02/96-01) was conducted between March 19 and April 1, 1996 to review the licensee's compliance with the terms of the Order. The inspector determined that there were apparent violations of the Order, regulations, and conditions of the license. The inspector ensured that the owner and the technician understood the gauge was to be placed in storage and not used. The inspector obtained, and subsequently forwarded to License Fee and Accounts Receivable Branch, a check in the amount due as of November 20, 1995, however an ensuing balance remained.

A telephone discussion was conducted with the owner on May 15, 1996 by the Director and Deputy Director, Division of Nuclear Materials Safety. The purpose of the call was to clarify the Order required suspended use of the gauge, since the NRC inspection identified that the gauge was used after the Order was issued. The owner disputed the finding that the gauge was used by Nelson Excavating, Inc. The owner indicated he thought the gauge was used, instead by another licensee. The owner stated that he and the users understood the gauge was not to be used because the Order was still in effect. The owner stated he still intended to use the gauge, after the Order was rescinded.

A Demand for Information was issued on June 11, 1996, to request information concerning the use of the gauge and the licensee's basis for continued use. The licensee did not respond to the Demand for Information as of the August 14, 1996 inspection. During the inspection, the inspector 1) determined the current status of the use of the portable gauge, ensured that the owner, office manager and gauge technician understood the conditions and restraints of the Order and Demand, 2) surveyed the storage location and the portable gauge, and reviewed the portable gauge use records and obtained copies, 3) reviewed the test results for leakage and/or contamination conducted since the previous inspection, 4) verified the acceptability of the recipient of the portable gauge, 5) verified that the portable gauge was transferred to an appropriate licensed recipient, 6) assisted the owner and office manager in contacting the License Fees and Accounts Receivable Branch by telephone, and 7) ensured that they understood the procedure for

answering the Order and submitting payment for the amount remaining as a result of the March 19, 1996 payment. The licensee submitted answers to the Order and the Demand by facsimile on August 15, 1996 and followed with mailing the originals.

5. Order Suspending License (Effective Immediately)

The Order Suspending License was issued October 24, 1995, directing, in part, that:

- a. The license is suspended with respect to receipt and use of licensed materials. The license remains in effect with respect to the possession, transfer, and storage of licensed materials remaining in the licensee's possession, until the licensee is notified in writing that the license is terminated;
- b. Until the licensee is notified in writing that the license is terminated, the licensee shall:
  - (1) restrict activity involving licensed material to decommissioning and safe, secure storage or transfer of material; and;
  - (2) continue to control entry into controlled areas until the licensee has determined and the NRC has confirmed that such areas are suitable for release for unrestricted use;
- c. The licensee shall dispose of any licensed nuclear material, acquired or possessed under the authority of License No. 47-24923-02, and shall take all actions required by 10 CFR 30.36 (Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas);
- d. The license shall be terminated upon satisfaction of the requirements of 10 CFR 30.36.

The licensee was provided 30 days (through November 24, 1995) from the date of the Order, during which a payment of the debt would cause the withdrawal of the Order. A payment, thought at the time to be the full payment, was transmitted to the License Fee and Accounts Receivable Branch on March 19, 1996.

6. Demand for Information

A Demand for Information was issued on June 11, 1996 to obtain from the licensee information related to the lack of response to the Order Suspending License dated October 24, 1996 and information clarifying licensee responses during the inspection period between March 19 and April 1, 1996.



No reply to the Demand for Information was received by August 14, 1996. An August 15, 1996 reply was received after prompting by the NRC onsite inspection. Failure to respond within the allotted time is an apparent violation of the Demand for Information.

7. Exit Interview

In an interview on August 14, 1996, the Inspector discussed in general terms the results of the inspection with the owner and the office manager. The violations were not discussed in detail. The Inspector and the Branch Chief have attempted unsuccessfully several times to contact the owner to convey the apparent violations with no response. They were conveyed to the Office Manager.

Persons Contacted

Nelson Excavating, Inc.

James C. Nelson, Owner, Nelson Excavating, Inc.  
Anna McVickers, Office Manager  
Paul M. Burns, Technician

State of West Virginia Department of Transportation

Craig Helmick, Engineer, West Virginia Division of Highways

"RECORD LOG"  
FOR

TROLLER GAUGE 3440

SERIAL NUMBER: 14664

OWNER: NELSON EXCAVATING

P.O. Box 298

THOMAS, WEST VIRGINIA

26292

(304) 463-4313

1	6-7-94	IN STORAGE @ QUAL RIDGE OFFICE
2	7-12-94	IN STORAGE @ QUAL RIDGE OFFICE
3	8-5-94	@ RH ARM STRONG JOB SITE RETURN TO STORAGE
4	9-8-94	IN STORAGE @ QUAL RIDGE OFFICE
5	10-3-94	IN STORAGE @ QUAL RIDGE
6	11-7-94	IN STORAGE @ QUAL RIDGE
7	12-13-94	IN STORAGE @ QUAL RIDGE
8	1-4-95	IN STORAGE @ QUAL RIDGE
9	2-3-95	IN STORAGE @ QUAL RIDGE
10	3-3-95	IN STORAGE @ QUAL RIDGE
11	4-3-95	IN CHARLESTON FOR EXAM (PARTICLE)
12	4-4-95	IN STORAGE @ QUAL RIDGE
13	4-6-95	on Petersburg job
14	4-7-95	on Petersburg job
15	4-7-95	RETURNED TO STORAGE @ QUAL RIDGE
16	5-22-95	IN CHARLESTON FOR EXAM (PARTICLE)
17	5-23-95	IN STORAGE @ QUAL RIDGE
18	11-6-95	taken to Rt 93 Grant Co. Job
19	11-7-95	IN STORAGE @ QUAL RIDGE
20	01-01-96	taken to Morefield (Drugs # U316-220-305)
21	01-04-96	IN STORAGE @ MOREFIELD
22	2-10-96	IN STORAGE AT MOREFIELD
23	04-22-1996	Break test performed @ Morefield
24	04-22-1996	IN USE ON Durgon # U316-220-305
25	04-22-1996	IN STORAGE @ MOREFIELD
26	07-12-96	USED @ Morefield Durgon # U316-220-305
	07-12-96	IN STORAGE @ MOREFIELD

1	7-13-96	IN Storage @ Morefield
2	7-14-96	IN Storage @ Morefield
3	7-15-96	IN Storage
4	7-16-96	USE on Durgon Curve
5	7-17-96	USE on Durgon Curve
6	7-18-96	USE on Durgon Curve
7	7-19-96	USE on Durgon Curve
8	7-20-96	IN Storage @ Morefield
9	7-21-96	IN Storage @ Morefield
10	7-22-96	IN USE on Durgon Curve
11	7-23-96	IN Storage @ Morefield
12	7-24-96	IN USE @ Morefield
13	7-25-96	IN USE @ Morefield
14	7-26-96	IN USE @ Morefield
15	7-27-96	IN Storage @ Morefield
16	7-28-96	IN Storage @ Morefield
17	7-29-96	IN Storage
18	8-8-96	IN USE @ Morefield
19	8-9-96	IN Storage @ Morefield
20	8-15-96	IN Storage @ Morefield
21		
22		
23		
24		
25		
26		