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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

In the Matter of)
) License No. 25-18304-01
REICH GEO-PHYSICAL, INCORPORATED) Docket No. 30-14821
1019 Arlington Drive) ASLBP No. 85-508-01-0T
Billings, Montana 59101) EA 84-78

NRC STAFF REPLY TO PROPOSED FINDINGS
OF REICH GEO-PHYSICAL, INC.

I. INTRODUCTION

It is apparent from the submittals filed in this proceeding that the fundamental dispute between the parties concerns whether the \$1600 civil penalty imposed by the Deputy Director ^{1/} of the Office of Inspection and Enforcement should be sustained. The Staff has adequately covered the arguments raised by the Licensee's proposed findings such that a point-by-point rebuttal is not necessary. However, the Staff is filing this Reply to emphasize that, for the reasons stated below, Reich Geo-Physical did not meet the responsibilities of a Commission licensee and a civil penalty is appropriate under the circumstances of this case.

II. DISCUSSION

In its proposed findings, the Licensee suggests that it conducted its activities openly, and did not conceal either its americium sources

^{1/} In its brief, the Staff erroneously refers to imposition of the civil penalty by the Director of the Office of Inspection and Enforcement, while in fact the penalty was imposed by the Deputy Director. See Staff Exhibit 3, Attachment 11.

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or its activities from NRC. The Licensee also argues that NRC was "well aware" that it possessed and used americium sources. See Findings of Fact and Conclusions of Reich Geo-Physical, Inc., and Proposed Order (Licensee's Findings) at 7-8 (September 9, 1985). Apparently, the Licensee views these circumstances as excusing its unauthorized possession and use of radioactive material.

There is no real dispute that the Licensee used radioactive material without proper authorization. Even a few instances of unauthorized use of radioactive material raise a serious regulatory concern, yet the Licensee engaged in numerous instances of unauthorized use over an extended period of time. ^{2/} See Staff Exhibits 1 & 2; NRC Staff Brief at 6-8, 28-31.

^{2/} The Licensee attempts to cast doubt on the extent of its unauthorized use by calling the accuracy of Mr. Hooker's inspection into question. See Licensee's Findings at 1-2, 5-6. While Mr. Hooker did make some changes to his written testimony at hearing, these changes were quite limited. See Transcript (Tr.) 67-70. The Licensee's own utilization logs, which provide the best evidence as to usage of radioactive material, substantiate the vast majority of dates of usage identified by Mr. Hooker during his inspection, and for the most part indicate more extensive use of the americium sources than recorded at the time of the inspection. Compare Staff Exhibits 1 & 2 with Hooker Testimony at 14 (following Tr. 75). In all events, Mr. Flack testified that the decision to impose a civil penalty would not have been affected by the now apparent differences between Mr. Hooker's inspection findings and the Licensee's utilization logs. See Tr. 157.

The Licensee also challenges the Staff on this point by arguing that the omission of any reference in the NRC inspection report to the Form NRC-241 filed in 1981 was a material omission which would have influenced the decision to impose a civil penalty. See Licensee's Findings at 5-6. It is of little significance that, at the time the Notice proposing imposition of a civil penalty was issued, certain members of the Staff may not have been specifically aware that the Licensee had filed a Form NRC-241 in 1981. In all events, the Staff was aware of the filing of the Form NRC-241 at the time the Order Imposing Civil Penalty was issued, but still determined that the violations alleged in the Notice had occurred and that the civil penalty was appropriate. See Staff Exhibit 3, Attachment 11.

By stating that NRC should have been aware that Reich Geo-Physical was in possession of americium sources, and could have conducted an inspection at any time, the Licensee seems to suggest that NRC was somehow delinquent in discharging its responsibilities. ^{3/} In making this statement, the Licensee misperceives its responsibilities as a Commission licensee. Culpability for violations of regulatory requirements does not turn on whether NRC could have discovered the violation at an earlier point in time. Reich Geo-Physical, as a Commission licensee, had an obligation to ensure that the activities it engaged in were authorized by its license and in conformance with NRC regulations. See 10 CFR §§ 30.3, 30.34, 150.20(b) (1985). Once Reich Geo-Physical began to possess and use its americium sources in NRC-regulated jurisdictions, it became responsible for obtaining the necessary authorization prior to conducting activities, either by filing a Form NRC-241, or by obtaining a license amendment for possession and use of americium. The Licensee was not relieved of these responsibilities by filing an incomplete Form NRC-241 in 1981, or by making two attempts, which it did not pursue, to obtain license amendment forms. Moreover, the Licensee failed to file NRC-241 forms in 1982, 1983 and 1984. To fulfill its responsibilities as a Commission licensee, Reich Geo-Physical must take whatever action is necessary to ensure it is in compliance with Commission requirements.

^{3/} The Licensee makes a similar argument with respect to the Department of Transportation (DOT) violations. According to the Licensee, NRC should have notified it at the time of the 1981 NRC inspection that certain practices violated DOT requirements. See Licensee's Findings at 2, 4; Tr. 103-05 (Testimony of Keith A. Reich).

Instead, the Licensee persisted in practices it knew to be unauthorized by its license. It was this knowledge of regulatory requirements, imputed to the Licensee by virtue of a prior enforcement action in 1981, which demonstrates the Licensee's careless disregard for Commission requirements. ^{4/} See NRC Staff Brief at 34-36.

The Licensee's casual attitude toward compliance is also evident in its findings. The Licensee attempts to minimize the significance of its activities by arguing that "in fact it was only a matter of days throughout that period of time" when unauthorized usage occurred. Licensee's Findings at 6. The Commission, however, "requires meticulous attention to detail to assure the adequate protection of the public health and safety...." X-Ray Engineering Co., CLI-60-11, 1 AEC 553, 555 (1960). Furthermore, "a licensee who regards [NRC requirements] as trivial demonstrates a lack of understanding of the Commission's, and the Licensee's own, obligation with respect to the public health and safety." Id. Accord Atlantic Research Corp., CLI-80-7, 11 NRC 413, 425 (1980);

^{4/} The Licensee refutes the Staff by arguing, inter alia, that it had filed a timely application for renewal of its license which requested authorization for possession and use of the americium sources. See Licensee's Findings at 4. The Licensee's renewal application, however, has little relevance to judging the Licensee's compliance with regulatory requirements or the Licensee's attitude toward compliance. The mere filing of a renewal application does not authorize the activities described in the application, and the Licensee's application was not granted until after the NRC inspection. A timely renewal application merely permits a licensee to continue previously authorized activities under an existing license that would otherwise expire by its own terms. See 10 CFR §§ 2.109 & 30.37 (1985). In any event, the Licensee's unauthorized possession and use of the americium sources occurred in 1981, 1982 and 1983, prior to the time the Licensee sought to renew its license. See also Tr. 230.

Radiation Technology, Inc., ALAB-567, 10 NRC 533, 553 (1979). Meticulous attention to detail most certainly includes engaging in only those activities authorized by an NRC license or by complying with the procedures for recognition of an agreement state license in NRC jurisdictions.

The responsibility to comply with regulatory requirements lies in the first instance with the licensee. Under the circumstances of this case Reich Geo-Physical failed to fulfill its obligations as a Commission licensee. This failure, evidenced by the Licensee's careless disregard for Commission requirements, justifies imposition of a civil penalty.

One final matter merits discussion. When the submittal of findings was discussed at the hearing, the parties were cautioned that any new information raised in their submittals would not be considered in rendering a decision. Tr. 262. The Licensee has, however, provided new documentary evidence and introduced new testimony in its findings which it apparently wishes to be considered, even though it had ample opportunity to raise this information on the record. ^{5/} The new evidence should not now be considered. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227, 230 (1980); Public Service Company of Indiana, Inc., (Marble Hill Generating

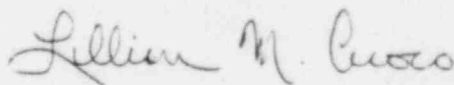
^{5/} The new evidence raised by the Licensee consists of its representations that it did not recall receiving a notice from NRC informing it of DOT requirements for shipment of radioactive material, and that the Licensee's customary practice is to take sources out of service when radiation readings reach one millirem per hour. See Licensee's Findings at 4, 7. The Licensee also attached to its findings the results of tests and certificates obtained from a radiation training course attended by Mr. Reich and another employee.

Station, Units 1 and 2), ALAB-459, 7 NRC 179, 191 (1978); Administrative Procedure Act § 7(d), 5 U.S.C. § 556(e).

III. CONCLUSION

The record in this proceeding amply demonstrates that the Licensee committed six violations of NRC requirements. These violations, which can be attributed to the Licensee's careless disregard for compliance, are exacerbated by the potential hazards to public health and safety associated with the use of americium. Accordingly, for the reasons stated above and in its brief of August 30, 1985, the NRC Staff requests that a civil penalty of \$1600 be imposed against the Licensee.

Respectfully submitted,



Lillian M. Cuoco
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 20th day of September, 1985.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF REPLY TO PROPOSED FINDINGS OF REICH GEO-PHYSICAL, INC." in the above captioned proceeding have been served on the following by U.S. mail first class, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 20th day of September, 1985.

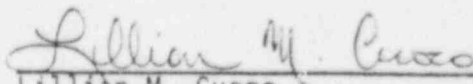
Keith A. Reich, President
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Atomic Safety and Licensing Appeal
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Ivan W. Smith, Administrative Law
Judge
Atomic Safety and Licensing
Board Panel
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