

ORIGINAL

UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 30-14821
(EA84-78)

REICH GEO-PHYSICAL, INC.
Billings, Montana
License No. 25-18304-01

Civil Penalty

EVIDENTIARY HEARING

LOCATION: BILLINGS, MONTANA

PAGES: 49 - 265

DATE: WEDNESDAY, JULY 24, 1985

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: :
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REICH GEO-PHYSICAL, INC. : Docket No. 30-14821
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Billings, Montana : (EA84-78)
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License No. 25-18304-01 :
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Civil Penalty :
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Room 2222
Federal Building
316 North 26th Street
Billings, Montana 59101

Wednesday, July 24, 1985

The hearing in the above-entitled matter convened at
9:00 a.m.

BEFORE:

HONORABLE IVAN W. SMITH
Administrative Law Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C.

1 APPEARANCES:

2
3 On behalf of the U. S. Nuclear
Regulatory Commission:4 LILLIAN M. CUOCO, ESQ.
Office of the Executive Legal Director
5 STEPHEN G. BURNS, ESQ.
Deputy Chief Enforcement Counsel
Office of the Executive Legal Director
6 Washington, D. C.7 EDWIN D. FLACK
Senior Enforcement Specialist
Office of Inspection and Enforcement
8 Washington, D. C.9 CHARLES A. HOOKER
U. S. NRC, Region V10 ROBERT J. EVERETT
11 U.S. NRC, Region IV12 On behalf of the Respondent Reich
13 Geo-Physical, Inc.:14 KEITH A. REICH, Pro Se
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C O N T E N T S

<u>WITNESS</u>	<u>EXAM</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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by Ms. Cuoco		64			
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LAY-IN - PREPARED TESTIMONY OF CHARLES A. HOOKER, Follows P. 75.

LAY-IN - PREPARED TESTIMONY OF EDWIN D. FLACK, Follows P. 144.

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E X H I B I T S

<u>NUMBER</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
Staff Exhibits 1 and 2	55	
Staff Exhibit 3	59	59
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1 JUDGE SMITH: This is the hearing authorized by
2 the Commission and its order of March 8th, 1985 and noticed
3 by me in an order earlier this spring in the matter of
4 Reich Geo-Physical, Inc., in a civil penalty proceeding.
5 Mr. Reich's license number or the Reich Geo-Physical
6 license number is 2518301-01.

7 Before we begin, I would like to invite the
8 parties to be as informal as we wish to be. There is only
9 a few participants.

10 Mr. Reich is not represented by counsel.
11 There is no need for formalities. I would like to see
12 Mr. Reich have a full opportunity to question the witnesses,
13 and even in the course of questioning, if it works out to
14 express his point of view right at the time,--

15 Do you intend to testify, yourself?

16 MR. REICH: I haven't decided yet, Your Honor. I
17 don't understand your proceeding as to whether I'm going to
18 be able to question the witnesses first, or I would be
19 called first.

20 JUDGE SMITH: That's what we're working on right
21 now. Normally, the witnesses would adopt their testimony,
22 and you would be given an opportunity to ask them questions.
23 And then after you completed that, you would decide then
24 whether you wanted to testify. You would then testify,
25 and then Ms. Cuoco would have a chance to ask you questions.

1 In the meantime, I would have the opportunity
2 to ask everybody questions. That would be the normal
3 procedure. We could make it even less formal than that,
4 and that is, as you ask the witnesses or the staff
5 questions, you can make comments at that time as to how you
6 differ from them and what you believe the case to be. I
7 think that might work out pretty well.

8 In any event, if you intend to testify and
9 if you intend to have me give any weight to your testimony,
10 it would have to be under oath. Do you understand that?

11 MR. REICH: Yes, Your Honor.

12 JUDGE SMITH: So what is your preference? I
13 would recommend that we administer the oath to you and to
14 the witnesses or the staff, and if you would like to
15 testify, well, that's fine. If you don't, that's fine, too.
16 But you realize that anything you say then will be testi-
17 mony under oath.

18 MR. REICH: Yes. And may I make that decision
19 at a later time as to whether I'm going to testify or not?

20 JUDGE SMITH: Okay. We'll do it that way.

21 MR. REICH: Thank you.

22 MS. CUOCO: Judge Smith, on behalf of the staff,
23 the only point I want to make at this time is we of course
24 would like to have an opportunity to cross-examine
25 Mr. Reich. As long as that works out, the staff has no

1 objection to that.

2 JUDGE SMITH: I don't know if you're going to
3 have that opportunity, if he decides not to testify.

4 MS. CUOCO: Will we have an opportunity to ask
5 him questions at all, or--

6 JUDGE SMITH: You subpoenaed his records. You
7 did not subpoena him to testify.

8 MS. CUOCO: That's correct.

9 JUDGE SMITH: I suppose that that can be remedied
10 quickly if you think that it is necessary to your case.

11 Would you object to answering questions?

12 MR. REICH: I don't know right now, Your Honor.
13 I would like the opportunity to question the witnesses and
14 make my decision then.

15 JUDGE SMITH: Okay. If the staff wishes to ask
16 you questions and you decide that you do not wish to answer
17 the questions, you may have a legal problem there in that
18 an inference could be made that the answers to those
19 questions would be detrimental to your case.

20 I can't go too far in giving you legal
21 advice. I'm not giving you any. But I'm telling you that
22 if the staff comes to a point in this case where they feel
23 that they need information from you, and you decline to
24 give it, then you may--not necessarily will--but you may
25 be subject to an inference, that the answers to those

1 questions would not be very helpful to you and would have
2 been helpful to the staff's case. Do you understand that?

3 MR. REICH: Yes, I think I do.

4 JUDGE SMITH: It's a pretty subtle point. If
5 you have any questions about it, I'll explain it.

6 MR. REICH: Okay.

7 JUDGE SMITH: Let's begin with at least administer-
8 ing the oath to your two witnesses and--is it two?

9 MS. CUOCO: Yes, there are two witnesses, Judge
10 Smith.

11 JUDGE SMITH: Would you introduce them, then?

12 MS. CUOCO: Yes. Before we do that, Judge Smith,
13 I just want to on the record raise one matter--two matters
14 in particular. The first has to do with the subpoena duces
15 tecum that the staff served on Mr. Reich last week.

16 Mr. Reich responded to that subpoena this
17 morning by providing me original records, the original
18 Utilization Logs. The staff has had an opportunity to
19 review those records.

20 Mr. Reich has represented to me that those
21 are the actual records as he takes them when he's conduct-
22 ing work in the field, and additionally, Mr. Reich has
23 represented to me that these are the same logs which were
24 available on June 20th, 1984 when Mr. Hooker conducted an
25 inspection.

1 The staff has no questions about the
2 authenticity of those documents. And I would like to offer
3 them into evidence at this time.

4 JUDGE SMITH: Do you object to those records
5 being put into evidence?

6 MR. REICH: No, Your Honor, I don't.

7 JUDGE SMITH: You agree that they are authentic
8 records and that they are relevant to the case?

9 MR. REICH: Yes.

10 JUDGE SMITH: All right, if there are no objec-
11 tions, if you would mark them and--

12 MS. CUOCO: Judge Smith, we would like to admit
13 them in two sets as Staff Exhibits 1 and 2. This was the
14 manner in which Mr. Reich gave them to me this morning.

15 The first set is a set of Utilization Logs
16 for--starting with the date, November 11th, 1981, and
17 going through 1982. And I have that marked as Staff
18 Exhibit 1.

19 The second are the logs that go from, I
20 believe it's from 1982 through 1984. And that would be
21 Staff Exhibit 2.

22 JUDGE SMITH: Would you mark them, please?

23 MS. CUOCO: Yes, I will.

24 (Marked.)

25 JUDGE SMITH: If there are no objections, I will

1 depart from the regular procedure of having the reporter
2 take custody of the exhibits, and I will take custody of
3 the exhibits and make them a part of the official record.

4 MR. BURNS: Your Honor, I will provide you three
5 copies of the records that will satisfy the requirements
6 under 2743, and also provide Mr. Reich with a copy of the
7 exhibits. That's Exhibit 1, the 1981 records, I believe.

8 MS. CUOCO: That's correct.

9 JUDGE SMITH: I'm providing you with three copies
10 of Staff Exhibit 2, and a copy to Mr. Reich.

11 Do you have copies of--

12 MR. REICH: Yes, Your Honor, I do.

13 JUDGE SMITH: Now, would you introduce your
14 witnesses and staff participants?

15 MS. CUOCO: I have one more matter, Judge Smith.
16 At this time, I would like to introduce another exhibit of
17 the staff, which would be Staff Exhibit 3 in this proceed-
18 ing. I offer it into evidence Staff Exhibit 3 in this
19 proceeding. It is the affidavit of Barbara J. Kay. She
20 is the Chief, Administrative Management Branch, in the
21 Division of Resource Management and Administration at
22 NRC in Arlington, Texas. Her branch is responsible for the
23 maintenance of the official NRC docket files for those
24 commission licensees holding nuclear material licenses.

25 Mr. Reich holds a license issued pursuant to

1 Region IV, Part 30. Attachment to her affidavit is a
2 listing of 12 documents which Ms. Kay in her affidavit
3 certifies that those documents, those 12 documents which
4 are also attached to her affidavit as Attachment 2, are
5 true and accurate copies of the records which are maintained
6 in the Region IV licensing file.

7 Ms. Kay's affidavit is submitted to
8 authenticate that these are true and accurate copies of
9 these documents from the NRC docket file. The staff offers
10 these 12 documents into evidence. They are material and
11 relevant to this proceeding, and the staff seeks to offer
12 this as Staff Exhibit 3.

13 JUDGE SMITH: What are they?

14 MS. CUOCO; I can certainly identify them for the
15 record. These are the same documents as were provided with
16 the staff's written testimony on July 10th.

17 JUDGE SMITH: Attached to the testimony?

18 MS. CUOCO: No, they were not at the time. At
19 the time the testimony was filed, the staff also filed a
20 list of proposed exhibits. And with your copy and
21 Mr. Reich's copy of that list were these 11 documents.

22 JUDGE SMITH: All right. They are attached as
23 Staff Exhibits 1, 2, et cetera.

24 MS. CUOCO: That's correct. Staff Exhibit 3, we
25 are offering this morning, has an additional document to it

1 that is the NRC Inspection Report, which is of the inspection
2 at Reich Geo-Physical, which is also attached to Mr. Hooker's
3 testimony as Attachment 2.

4 JUDGE SMITH: I would prefer with respect to the
5 attachments to Mr. Hooker's testimony, the inspection
6 report, that it remain just as that; as an attachment to
7 his testimony rather than as an exhibit, simply as a matter
8 of efficiency and to avoid confusion. It makes no
9 difference if it was an inspection report in which he
10 participated, and he adopts it as his testimony. So I
11 would prefer to do that as a better approach.

12 Now, with respect to the other 12 exhibits,
13 they will all be now Staff Exhibit 3?

14 MS. CUOCO: That's correct.

15 JUDGE SMITH: And how will you identify the
16 various 12 exhibits?

17 MS. CUOCO: The Attachment 1 to Ms. Kay's
18 affidavit lists the documents as Documents 1 through 12,
19 and I will--

20 JUDGE SMITH: All right. Let's refer to the
21 affidavit as Staff Exhibit 3, and the respective documents
22 as Attachments 1 through 12. As we proceed today, those
23 will be attachments 1 through 12, which are the same as
24 Exhibits 1 through 12, in your proceeding of July 10th,
25 notifying Mr. Reich and me of the proposed exhibits.

1 MS. CUOCO: That's correct, Your Honor. We are
2 today as you just said, we are deleting the last document
3 on this list, so, yes, the Attachment 1 to Ms. Kay's
4 affidavit conforms with the list of proposed staff exhibits
5 that was filed.

6 JUDGE SMITH: I guess I don't understand that
7 point. You went through 1 through 11 before. Now you have
8 how many documents?

9 MS. CUOCO: There are 12 documents.

10 JUDGE SMITH: And there is one that is added?

11 MS. CUOCO: That is correct. That is the NRC
12 Inspection Report.

13 JUDGE SMITH: I see.

14 MS. CUOCO: You have not taken that into evidence
15 yet, because it is attached to Mr. Hooker's testimony.

16 JUDGE SMITH: So that we will have then
17 attached 1 through 11 on Staff Exhibit 3?

18 MS. CUOCO: That's correct.

19 JUDGE SMITH: Okay. Very good.

20 Do you have any objections, Mr. Reich?

21 MR. REICH: No, Your Honor.

22 JUDGE SMITH: I will receive then Staff
23 Exhibit 3, with its Attachments 1 through 12.

24 (Marked and received.)

25 JUDGE SMITH: Do you have copies of these?

1 MR. REICH: Yes, sir.

2 JUDGE SMITH: Anything further?

3 MS. CUOCO: Judge Smith, with your permission, I
4 would like to make a short opening statement.

5 JUDGE SMITH: Would you introduce your witnesses
6 and participants, first?

7 MS. CUOCO: Yes, I will. To my immediate left
8 is Stephen G. Burns, who is Deputy Chief Enforcement Counsel,
9 Office of the Executive Legal Director. Next to him is
10 Charles A. Hooker, who is currently employed in NRC's
11 Region V. And when he conducted the inspection at Reich Geo-Physical,
12 he was then in NRC Region IV, as Inspector.

13 Edwin D. Flack is the next gentleman, next
14 to Mr. Hooker. He is the Senior Enforcement Specialist
15 with the Office of Inspection and Enforcement. Next to
16 Mr. Flack is Robert J. Everett, who is with the NRC
17 Region IV Office and Nuclear Material Licensing Plant.

18 JUDGE SMITH: And Mr. Reich?

19 MR. REICH: Yes.

20 MS. CUOCO: Judge Smith, Mr. Reich, as you both
21 know, this is a Civil Penalty proceeding. And in Civil
22 Penalty proceedings, the burden of proof rests with the
23 staff, meaning the staff has both the burden of going
24 forward with evidence, and has the burden of persuasion on
25 the issues.

1 There are two parts to the staff's affirma-
2 tive case, here. And the first part, the NRC staff will
3 establish through the testimony of its inspector that certain
4 practices conducted by Reich Geo-Physical in the 1981 to
5 1984 timeframe violated NRC requirements.

6 Further, the staff will demonstrate that the
7 licensee was put on notice at the time of his previous
8 inspection; that some of those same practices were considered
9 to be violations of NRC requirements.

10 In the second part of this case, the staff
11 will establish that the choice of a Civil Penalty is an
12 appropriate inspection in view of the safety significance
13 of the violation.

14 The staff will also establish the amount of
15 the penalty here. \$1600 is appropriate in view of the
16 past enforcement history of this licensee and the severity
17 of the violation. At the close of evidence, the staff will
18 have proven that there are violations of NRC requirements
19 that occurred as alleged in the Notice of Violation and
20 proposed as a Civil Penalty; and secondly, that possession
21 of a \$1600 Civil Penalty is appropriate here in view of
22 the circumstances of this case. This licensee apparently
23 has light regard for NRC requirements.

24 JUDGE SMITH: Mr. Reich, you will have an
25 opportunity now, if you wish, to make a statement. You

1 can wait and make an opening statement if at the time you
2 decide to testify. And each of you will be given an
3 opportunity to make a closing statement, if you wish.
4 So whatever is your pleasure.

5 MR. REICH: I would like to make an opening
6 statement, Your Honor.

7 JUDGE SMITH: All right.

8 MR. REICH: I understand that the six alleged
9 violations have been categorized under Severity Level 2,
10 and that they will be tried as six violations. And if
11 there is any cause to show where any of the violations
12 didn't occur, that the Civil Penalty should be suspended.
13 That's my opening statement.

14 JUDGE SMITH: Okay. Are you ready to proceed?

15 MS. CUOCO: Yes, I am, Judge Smith.

16 JUDGE SMITH: Mr. Hooker, Mr. Flack, would you
17 rise, please?

18 (Complying.)

19 JUDGE SMITH: Do each of you swear to tell the
20 truth, the whole truth and nothing but the truth in this
21 hearing?

22 MR. HOOKER: Yes, Your Honor.

23 MR. FLACK: Yes, Your Honor.

24 JUDGE SMITH: One other thing before we begin,
25 Mr. Reich. I noticed at the very beginning of this

1 dispute between you and the staff, and you've raised it
2 several times, that your interests had been to have your
3 case heard by an independent person. And I doubt whether
4 you've had much experience with Federal Administrative Law
5 judges, and I would like to tell you just a little about
6 who I am and what an Administrative Law Judge is.

7 There is a category of judges in the Federal
8 Government which is separate from the court judges. And
9 they are called Administrative Law Judges under the
10 United States Administrative Procedure Act.

11 We are appointed in a statutory way, outside
12 of the regular personnel practices of the agencies; that
13 is, we are appointed after an investigation and qualifica-
14 tion testing and experience requirements.

15 And we are appointed to the agency with
16 which we serve, and we cannot be removed by that agency
17 except upon a charge of misconduct of a hearing, just as
18 a regular judge might be impeached.

19 I have no relationship whatever with the
20 people who are investigating you and who are pursuing these
21 charges. As a matter of fact, I have never met Ms. Cuoco
22 until she came to the office for a subpoena. Mr. Flack,
23 I've seen from time to time, because he's been in the same
24 building that I have been. The other people are strangers--
25 Mr. Burns has been in previous enforcement cases, and I have

1 had some contact with him in that respect.

2 But none of the people involved here have
3 any managerial relationship to me. They report to a line
4 of officials that do not have any control over me. In fact,
5 there is nobody who can control my decision in this case.

6 That's not to say that my decision in this
7 case can never be disturbed. It can be reversed or modified.
8 But there is nobody who may influence my decision. And in
9 fact, it would be against the law and against regulations
10 for anybody to, except on the record openly, to even talk
11 to me about how the decision should be rendered.

12 And I might say to you that I simply have
13 no interest in the case myself, other than seeing that the
14 law is properly applied. Do you have any questions about
15 that?

16 MR. REICH: No, I don't, Your Honor.

17 JUDGE SMITH: You may proceed.

18 DIRECT EXAMINATION

19 BY MS. CUOCO:

20 Q Mr. Hooker, could you please state your name and
21 position with the NRC for the record?

22 A My name is Charles A. Hooker. I'm employed by
23 the United States Nuclear Regulatory Commission as a
24 radiation specialist. I'm currently employed with the NRC's
25 Region V office in the Division of Radiation Safety and

1 Safeguards and Radiological Protection. And I've been in
2 my present position since July 6th, 1985.

3 Prior to holding this position, I was
4 employed as a radiation specialist with the Nuclear
5 Materials Safety and Safeguards Branch, Division of
6 Radiation Safety and Safeguards in the Commission's Region IV
7 Office in Arlington, Texas, and held that position since
8 December 14, 1981, to July 5, 1985.

9 Q I'm handing you a document, and let the record
10 show that I'm also providing a copy to Judge Smith and to
11 Mr. Reich. Would you please identify this document for me?

12 A This is my testimony.

13 Q Are you familiar with this testimony?

14 A Yes.

15 Q Could you please turn to Attachment 1 of this
16 testimony?

17 A (Witness complying.)

18 Q It immediately proceeds Page 18. Would you
19 please identify that for me?

20 A That's my Statement of Qualifications.

21 Q Do you have any corrections to that statement?

22 A No.

23 Q Do you adopt that statement as your statement of
24 professional qualifications in this proceeding?

25 A Yes.

1 Q Could you please turn to Attachment 2 of the
2 testimony?

3 A (Witness complying.)

4 Q Could you please identify that for me?

5 A It's the inspection report. The inspection was
6 conducted on June 20th, 1984.

7 Q Are you familiar with that inspection report?

8 A Yes.

9 Q In what way are you familiar with it?

10 A I conducted the inspection.

11 Q Did you draft this report?

12 A Yes.

13 Q Now, Mr. Hooker, I turn your attention to the
14 18 pages of written testimony. Did you prepare this
15 testimony in consultation with Counsel?

16 A Yes.

17 Q Please turn to Page 4 of the testimony.

18 A (Witness complying.)

19 Q Do you have any corrections on Page 4?

20 A Yes. In Question 10, the first sentence to the
21 answer, there is a misspelled word.

22 Q What would that word be?

23 A "Review."

24 Q Could you please turn to Page 14 of your testimony?

25 A (Witness complying.)

1 Q Do you have--

2 JUDGE SMITH: How many of these do you have?

3 MS. CUOCO: Only two or three, Your Honor.

4 JUDGE SMITH: We'll just correct them. There is
5 no use having them on the transcript.

6 MS. CUOCO: I think this next matter, Your Honor,
7 we would like to have on the record.

8 JUDGE SMITH: Okay.

9 BY MS. CUOCO:

10 Q Mr. Hooker, could you please turn to Page 14 of
11 your testimony? Do you have any corrections in response to
12 Question 37?

13 A Yes. In the answer section, there is some dates
14 that--

15 MR. REICH: I object to that.

16 JUDGE SMITH: Let's here the--All right. What's
17 the basis of your objection?

18 MR. REICH: Your Honor, he's generalized his
19 inspection, which was given to Mr. Flack, and exaggerated
20 our dates of usage to the point that the severity level was
21 increased.

22 JUDGE SMITH: Well, that would not be a basis for
23 objection. However, it would be a basis for you to cross-
24 examine him and to try to establish that or to testify
25 yourself. But he's allowed now to testify as he sees fit.

1 Now, the thing that you have to bear in
2 mind is that if he offers his testimony in such a way that
3 you believe that you have not been given the notice that
4 you're entitled to, then we will have to look at that as a
5 separate problem. But he's entitled now to testify as to
6 his beliefs.

7 MR. REICH: Even when it involves changing his
8 prior testimony?

9 JUDGE SMITH: Well, that's the point I'm making.
10 Let's see what his change is, and if you believe that you
11 have been denied a fair notice of what his testimony is
12 today, you raise that point, and let's see where we are.

13 MR. REICH: Okay.

14 JUDGE SMITH: Do you understand?

15 MR. REICH: Yes.

16 JUDGE SMITH: All right. This is what I'm talking
17 about. I don't particularly like to have to go to the oral
18 transcript to find out what the corrections are in a
19 written transcript. It has a potential for mischief. I
20 would prefer to see the changes on the--you know, the
21 prepared--

22 MS. CUOCO: I can certainly provide that,
23 Judge Smith.

24 JUDGE SMITH: In the meantime, let's proceed as
25 you were, and let's see where we were. In fact, I will

1 begin to correct it.

2 MS. CUOCO: Thank you.

3 BY MS. CUOCO:

4 Q Mr. Hooker, what was the nature of your correction
5 to the answer to Question 37?

6 A Evidently, during the inspection, I transposed
7 some dates incorrectly. And there are some date changes,
8 although it doesn't change the report. Changes were made
9 after reviewing the records Mr. Reich had submitted; a few
10 minor changes in the dates.

11 On Page 14, the third line, it should be
12 changed to May 10th instead of May 9th.

13 JUDGE SMITH: Wait a minute. It doesn't seem to
14 fit. Would you say that again? On Page 14,--

15 THE WITNESS: Page 14, on the third sentence, it
16 says, "Between May 9 and June 6th." It should be May 10
17 through June 6.

18 JUDGE SMITH: Okay.

19 THE WITNESS: In addition, on Question 39, the
20 fourth sentence, it says, "On July 2, 1982 in Lewistown,
21 Montana." That is incorrect, although it may have been my
22 report. It still is incorrect on this.

23 MR. REICH: Can I ask a question, Your Honor?

24 JUDGE SMITH: Well, let's clarify exactly what his
25 testimony is, and then you will have an opportunity to ask

1 virtually any kind of question you want in an organized way.

2 Now, what is your testimony? The records
3 do indicate--

4 THE WITNESS: That should be deleted. And "On
5 July 2, 1982 in Lewistown, Montana," that correction should
6 be deleted.

7 JUDGE SMITH: Do the records indicate that, how-
8 ever?

9 THE WITNESS: No, not for that particular person.

10 JUDGE SMITH: So we will delete, "On July 2, 1982."

11 THE WITNESS: Not for that particular person.

12 JUDGE SMITH: Do we delete "in Lewistown,
13 Montana"?

14 THE WITNESS: Yes. And then on the sixth line,
15 where it says "dates August 4th to August 14th," it should
16 be August 10th to August 14th. And that's all.

17 (Off-the-record discussion.)

18 BY MS. CUOCO:

19 Q Mr. Hooker, what is the reason that you are
20 making these changes in your answers to Questions 37 and 39
21 at this time?

22 A Well, these are changes in regard to making
23 testimony more correct in reviewing Mr. Reich's file.
24 During testimony, evidently, I transposed a few days that
25 were incorrect. However, this is after the fact. This is

1 just to make the testimony. And nothing changed as to the
2 inspection report.

3 Q Mr. Reich provided response to the staff's
4 discovery requests on July 3rd, 1985. Did you have a
5 chance to review those responses before your testimony was
6 filed?

7 A Yes.

8 Q Before your testimony was filed, did you have a
9 chance to review Mr. Reich's response as to the actual
10 Utilization Logs?

11 A Yes.

12 Q The logs that Mr. Reich provided in response to
13 the discovery requests, that the staff received approximately
14 July 3rd:

15 MR. REICH: The Utilization Logs were provided at
16 the time of the inspection.

17 BY MS. CUOCO:

18 Q Is that correct?

19 A Right. They were provided at the time of
20 the inspection.

21 Q Your testimony was filed on July 10th. Weren't
22 you unavailable for several weeks prior to July 10th, on
23 vacation?

24 A Yes.

25 MR. REICH: I don't see what that has to do with

1 it, if he was on vacation.

2 JUDGE SMITH: Well, you've indicated that you're
3 going to object to changes, and now she's trying, as I
4 understand it, to establish a reason why these changes were
5 necessary.

6 MS. CUOCO: That's correct.

7 JUDGE SMITH: I suggest that you listen more
8 carefully to her questions, rather than try to leap ahead
9 to see what you think we ought to know about here; just
10 listen more literally to her questions, and I think we'll
11 move along faster.

12 THE WITNESS: Okay.

13 BY MS. CUOCO:

14 Q Mr. Hooker, what was the last time that you had
15 an opportunity to review your testimony prior to when it
16 was filed?

17 A A week ago.

18 Q Prior to when it was filed,--It was filed on
19 July 10th, 1985?

20 A Somewhere along June 20th, or something like that;
21 it was prior to July 10th.

22 Q Wasn't it approximately June 28th or so?

23 A 28th, approximately.

24 Q And isn't it so that Mr. Reich responded to the
25 staff's Discovery Requests approximately July 3rd, 1985?

1 A Yes.

2 Q So isn't it true that you did not have an
3 opportunity to review Mr. Reich's response to your
4 Discovery Requests and compare it to your testimony prior
5 to July 10th?

6 A Yes.

7 Q And the reason, Mr. Hooker, was your making these
8 changes at this time was because subsequent to the filing
9 of your written testimony, you had an opportunity to review
10 Mr. Reich's Utilization Logs? Isn't that correct?

11 A Yes.

12 Q Mr. Hooker, do you have any other changes to
13 this testimony?

14 A No.

15 Q Is this testimony as corrected true and accurate
16 to the best of your knowledge and belief?

17 A Yes.

18 Q Do you adopt this as your testimony in this
19 proceeding?

20 A Yes.

21 Q Is this the same testimony you would provide
22 if you were called upon to testify at this hearing orally
23 today?

24 A Yes.

25 MS. CUOCO: Judge Smith, I move the testimony of

1 Charles A. Hooker into evidence at this time.

2 JUDGE SMITH: Mr. Reich, you can make your
3 objection.

4 MR. REICH: As I say, Your Honor, I'm not
5 familiar with a lot of procedures. Can I ask questions of
6 the witness?

7 JUDGE SMITH: Well, there are two approaches we
8 can take. You can try to establish that the testimony or
9 parts of it should not even be received into evidence, you
10 can try to, by questioning, extract explanations or
11 demonstrate that entries or changes or whatever, if you
12 think that the whole approach has been improper, ask
13 questions now.

14 If you feel that the approach has been all
15 right, understandable, but that the testimony is incomplete
16 or requires explanation of this witness, then ordinarily,
17 we would accept it into evidence, and give you a chance to
18 cross-examine the witness.

19 MR. REICH: Okay. I would like to say that the
20 original testimony, the dates that were documented are
21 wrong.

22 JUDGE SMITH: Okay.

23 MR. REICH: The reason I believe this was wrong
24 is the inspection was conducted in haste, and it wasn't a
25 thorough inspection.

1 JUDGE SMITH: Now, that is an area that I think
2 that you should be allowed to go into on cross-examination.
3 But unless his testimony is received, there is no cross-
4 examination you can have anyway. It has nothing to do with
5 whether the changes are improper. It has nothing to do
6 with whether he's incompetent to testify or any other
7 reasons why the testimony should not be received in the
8 first instance.

9 Your complaints go to the weight of the
10 testimony, the fairness of it and other things. So if
11 that's all you have to say on that point, I'm going to
12 receive the testimony into evidence and then allow you to
13 cross-examine him on those points that you wish to pursue.

14 MR. REICH: Okay.

15 JUDGE SMITH: And with that in mind then, at this
16 point, we will bind the testimony into the transcript as if
17 it had been read there.

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7/10/85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

In the Matter of

REICH GEO-PHYSICAL, INCORPORATED
1019 Arlington Drive
Billings, Montana 59101

)
) License No. 25-18304-01
) Docket No. 30-14821
) ASLBP No. 85-508-01-0T
) EA 84-78

TESTIMONY OF CHARLES A. HOOKER

Q1. Please state your name and position with the NRC.

A. My name is Charles A. Hooker. I am employed by the United States Nuclear Regulatory Commission as a radiation specialist in the Division of Radiation Safety and Safeguards, Facilities Radiological Protection Section in the Commission's Region V office in Walnut Creek, California. I have held my present position since July 6, 1985. Prior to holding this position, I was employed as a radiation specialist with the Nuclear Materials Safety and Safeguards Branch, Division of Radiation Safety and Safeguards in the Commission's Region IV office in Arlington, Texas. I held that position from December 14, 1981, when I joined the Commission, to July 5, 1985.

Q2. Mr. Hooker, please state your professional qualifications.

A. A statement of my professional qualifications is attached to this testimony as Attachment 1.

Q3. Mr. Hooker, when you were in Region IV, what were your responsibilities as a radiation specialist?

A. As a member of the inspection staff, I was responsible for conducting routine and special inspections of Commission licensees engaged in the use of byproduct material. My responsibilities included conducting inspections of well-logging operations to determine compliance with Commission requirements.

Q4. During your tenure in Region IV approximately how many inspections did you conduct?

A. During my three and one half years with the Region IV office, I conducted approximately 300 inspections.

Q5. What kind of facilities did you inspect?

A. The types of NRC licensees I inspected included radiographers, medical facilities and hospitals, universities and well-logging facilities.

Q6. What is the purpose of this testimony?

A. The purpose of this testimony is to describe the inspection I conducted at Reich Geo-Physical, Inc. on June 20, 1984.

Q7. How did you prepare for conducting the Reich Geo-Physical inspection?

A. As with other inspections I conduct, approximately one to two weeks prior to the scheduled inspection date, I reviewed the Reich Geo-Physical licensing file in detail. NRC Region IV has been authorized since 1984 to perform the Commission's licensing functions

for nuclear material licenses issued pursuant to 10 CFR Parts 30, 33, 35, 40 and 70. Reich Geo-Physical Inc., holds NRC License No. 25-18304-01, a byproduct material license issued pursuant to Part 30 of the Commission's regulations. In view of this licensing responsibility, the Reich Geo-Physical, Inc. file maintained by Region IV contains all NRC related records pertaining to this Licensee from the inception of the license to the present. To prepare for the upcoming inspection, I reviewed the current Reich Geo-Physical license to determine the activities and materials authorized by the license, and the particular license conditions. I also reviewed Reich Geo-Physical's application for its current license, dated August 8, 1978 and the supplemental information supplied in a letter dated January 29, 1979, which contained the working procedures Reich Geo-Physical had established. I also reviewed the results of Reich Geo-Physical's previous inspection, and the correspondence between the NRC and Reich Geo-Physical from the date of the previous inspection to the present time. At the time I reviewed the file, I took detailed notes to serve as reference materials during the actual inspection.

- Q8. What did your review of the Reich Geo-Physical file indicate with respect to activities authorized and required by NRC License No. 25-18304-01?
- A. From my review of the licensing file, I learned that under its NRC license then in effect, Reich Geo-Physical, Inc. was authorized to possess and use one cesium-137 sealed source of 125 millicuries to

conduct well-logging operations. The license permitted the use of licensed material at Reich Geo-Physical's location in Billings, Montana and at temporary job sites in the states of Montana and Wyoming. The only authorized user named on the license was Keith A. Reich. The license also required Reich Geo-Physical to conduct leak tests on sources in use at intervals not to exceed six months, and to calibrate survey meters every six months.

Q9. What did your review of the Reich Geo-Physical file indicate as to the results of Reich Geo-Physical's previous inspection?

A. From my review of the file, I learned that the initial NRC inspection of Reich Geo-Physical was conducted on April 14, 1981. The findings from this inspection resulted in the issuance of a Notice of Violation to Reich Geo-Physical on May 18, 1981. The May 18, 1981 Notice of Violation alleged that the Reich Geo-Physical possessed a 15.5 millicurie americium-241 source not authorized by its license and that it had failed to calibrate survey meters at the intervals required by its license.

Q10. What did your review of the correspondence between NRC and Reich Geo-Physical, Inc., indicate?

A. I noticed two letters in particular during my review of this correspondence. The first was a letter to Reich Geo-Physical from Karl V. Seyfrit, Director, NRC Region IV dated May 21, 1981 confirming the commitments made by Reich Geo-Physical in a telephone conversation on May 18, 1981. Mr. Seyfrit's letter indicated that Reich

Geo-Physical had agreed to undertake the following actions: 1) apply for a license amendment for possession of the 15.5 millicurie americium-241 source; 2) place the americium-241 source in safe storage and discontinue its use until either the Reich Geo-Physical license was amended to authorize its possession and use, or a completed Form NRC-241 was submitted by Reich Geo-Physical to the NRC. Mr. Seyfrit's May 21st letter also informed Reich Geo-Physical that should the planned actions as described not be in accordance with the actual plans and actions being implemented, Region IV was to be contacted immediately. I also noted a second letter, from Reich Geo-Physical dated August 11, 1981, which set forth the corrective action Reich Geo-Physical had taken or planned to take with respect to the violations identified by the NRC during the April inspection. According to the August 11th letter, the Licensee 1) had requested amendment forms from the Materials Licensing Branch of the NRC in Washington, D.C. to include its americium-241 source on its license; 2) had submitted a completed Form NRC-241, which had been acknowledged by NRC Region IV and 3) planned to have its survey meters calibrated by ICN Pharmaceuticals.

Q11. Did Reich Geo-Physical contact the NRC Region IV office to indicate disagreement with the actions described in Mr. Seyfrit's May 21, 1981 letter?

A. There was no indication from the Region IV file that Reich Geo-Physical had contacted the NRC to disagree with the May 21st letter.

Q12. In the months following the April 1981 inspection, did Reich Geo-Physical request that its license be amended to include americium-241 sealed sources?

A. There is no record in the Region IV file to indicate that Reich Geo-Physical either requested license amendment forms from the NRC in Washington, D.C., or applied for an amendment to its license in the 1981-82 time period for possession of americium-241 sources. I noted from the file that it was not until February 1984, when Reich Geo-Physical applied to the NRC for renewal of its license, that it requested authorization to possess and use americium-241 sealed sources.

Q13. What is a Form NRC-241 and its purpose?

A. Under 10 CFR 150.20, any person who holds an agreement state license for use of radioactive materials is also granted a general license to conduct those activities authorized under its agreement state license in jurisdictions where the NRC regulates the use of radioactive material for a time period not to exceed 180 days for any given calendar year. However, prior to conducting activities authorized by an agreement state license in NRC regulated jurisdictions, the agreement state licensee must file a Form NRC-241 with the NRC regional office where the radioactive material will be used at least three days prior to engaging in activities. The Form NRC-241 requires the following information to be provided: 1) name and address of the licensee; 2) name of person authorized to perform the activity; 3) description of the activities to be conducted; 4)

locations where activities will be conducted and dates activities are scheduled; and 5) the sources to be used. In addition, the agreement state licensee must submit a copy of its current agreement state license with the Form NRC-241. The purpose of filing a Form NRC-241 is to provide notice to the NRC as to the use of radioactive material within its jurisdictions so that the NRC may ensure through inspection that radioactive material is being handled safely and in accordance with the agreement state license.

Q14. Did the Region IV file indicate whether Reich Geo-Physical held an agreement state license?

A. Yes. Reich Geo-Physical held a license in the State of North Dakota.

Q15. Did Reich Geo-Physical submit a completed Form NRC-241 to the NRC as stated in its August 1981 letter?

A. Yes. According to the Region IV file, Reich Geo-Physical submitted a Form NRC-241 to the NRC dated June 12, 1981. The form indicated that Keith A. Reich, the only authorized user of material, would be using two americium-241 sealed sources of 15.5 millicuries under the provisions of North Dakota License No. 33-09909-01 at 1019 Arlington Drive, Billings, Montana from June 20 to December 20, 1981. NRC Region IV approved this request by letter dated June 25, 1981.

Q16. Did Reich Geo-Physical, Inc. file any other NRC-241 forms to conduct activities in NRC jurisdictions prior to your inspection?

A. There was no record in the Region IV file to indicate that Reich Geo-Physical had filed any Form NRC-241 requests other than the request submitted in June 1981.

Q17. Prior to your inspection at Reich Geo-Physical, approximately how many well-logging inspections had you conducted in Region IV?

A. I conducted approximately 37-38 inspections of well-logging operations prior to June 20, 1984.

Q18. What was the reason for conducting an inspection of Reich Geo-Physical on June 20, 1984?

A. Under the NRC's inspection program, well-logging operations are routinely inspected every three years. Reich Geo-Physical was due to be inspected in 1984, thus an inspection was scheduled for the next inspection trip into the Montana-Wyoming region.

Q19. Was the inspection announced?

A. No. In accordance with Commission policy, routine inspections such as that conducted at Reich Geo-Physical are unannounced.

Q20. What materials did you carry with you during the inspection?

A. I carried a survey meter, note pad, copies of the Reich Geo-Physical, Inc. license and other pertinent information from the licensing file, and the notes I had taken when I reviewed the Reich Geo-Physical file. I also carried a preprinted Region IV draft

inspection report indicating the areas to be covered during the inspection.

Q21. Please describe how you began the Reich Geo-Physical inspection.

A. On the morning of June 20, 1984, I drove to the address listed on the Reich Geo-Physical license -- 1019 Arlington Drive in Billings, Montana. I observed several vehicles, including two utility vans, and a mobile home residence at that address. I knocked on the door of the mobile home, which was answered by an individual who indicated in response to my inquiry that he was Keith A. Reich. From my review of the licensing file, I knew Mr. Reich to be the President and Radiation Safety Officer of Reich Geo-Physical, Inc. I identified myself as an NRC inspector there to conduct a routine inspection of activities under his license. Mr. Reich and I spoke briefly, and at my request to see where his radioactive material was stored, Mr. Reich and I walked over to the two parked vans.

Q22. What occurred next?

A. Mr. Reich opened the back door of one of the vans, and we went inside. I observed that a radioactive source encased in its mineral logging tool was secured on the left hand side of the van. The tool was approximately three feet long, with a diameter of several inches. In response to my question, Mr. Reich informed me that the mineral tool also served as the shipping container for the source. I observed a metal tag on the container which identified the source inside the container, the serial number of the source and its

activity level. A radioactive materials label was posted inside the van, in the vicinity of the source. While inside the van, I took radiation measurements of the transport container. I observed that there was very minimal radiation being emitted from the source.

Mr. Reich and I then went over to the second van and went inside. A second source was located inside this van in the same configuration as the other source. A metal tag was also located on this container identifying the source inside, its serial number and activity level. Like the other van, a label was posted indicating the presence of radioactive material. I observed from the metal tags on the containers, and Mr. Reich informed me, that the sources inside the vans were americium-241 sources of 15.5 and 25 millicuries each, serial numbers B-351 and B-085 respectively.

Q23. What did the Reich Geo-Physical, Inc. license in effect on the date of the inspection provide with respect to americium-241 sources?

A. The Reich Geo-Physical license then in effect did not authorize the possession and use of americium.

Q24. Did you ask Mr. Reich where the americium sources were stored when they were not in use at temporary job sites or being transported to and from job sites, and if so, what was his response?

A. Yes. Mr. Reich indicated that the americium sources were stored inside the vans just as I observed them at 1019 Arlington Drive, Billings, Montana.

Q25. What material was authorized under the Reich Geo-Physical license in effect on the date of the inspection?

A. On the date of the inspection, license condition 10 authorized the use of one cesium-137 source of 125 millicuries.

Q26. Did you observe any other label or distinctive markings on the source containers?

A. Other than the metal tags identifying the sources, I did not observe any distinctive markings or labels on either of the source containers.

Q27. Were you looking for particular labels or markings on the source containers and if so, what kind of labels or markings?

A. Yes. I was looking for the labels and markings required by U.S. Department of Transportation regulations to be on the shipping containers of sources with the activity level possessed by the Licensee.

Q28. In view of the activity level of the sources in the Licensee's possession, what labels or markings would you expect to see on these source containers?

A. I would expect that source containers for americium-241 in the amounts possessed by the Licensee (15.5 and 25 millicuries) be labeled with a "Radioactive White-I" label as required by 49 CFR 172.403. In addition, I would expect this type of radioactive material to have the marking "USA DOT 7A Type A" and "Radioactive

Material" on the outside of each package in conformance with 49 CFR 178.350-3.

Q29. Were these markings and labels present on the americium-241 sources you observed in the Licensee's vans?

A. No.

Q30. Did you ask Mr. Reich whether the source containers were marked or labeled in this manner prior to transport and if so, what was his response?

A. Yes. Mr. Reich informed me that when transported, the source containers looked exactly as I observed them in the vans.

Q31. What other matters did you and Mr. Reich discuss while you were outside?

A. I asked Mr. Reich where the cesium-137 source authorized by his license was located. Mr. Reich indicated that the cesium source was in storage in an underground bunker at the Airport Industrial Park in Billings. Mr. Reich informed me that the cesium source was secured in a locked storage area, to which only he had a key, and that the door to the storage area had a sign indicating the presence of radioactive material.

Q32. Did you see this storage area?

A. No. Mr. Reich asked if I was interested in going to this location, but in view of my tight inspection schedule I declined. I took

Mr. Reich's word that the source was secured and posted as he described.

Q33. What did the Reich Geo-Physical license in effect on the date of the inspection require with respect to storage of the cesium-137 source?

A. License condition 10 authorized use of licensed material at 1019 Arlington Drive, Billings, Montana and temporary job sites throughout the states of Montana and Wyoming only.

Q34. What occurred after you completed your inspection of the vans?

A. Mr. Reich and I returned to the mobile home where his office was located, and I asked to review Reich Geo-Physical's records.

Q35. What records did you review?

A. I reviewed four types of records retained by Reich Geo-Physical:
1) exposure reports (film badge vendor reports); 2) usage records for the radioactive sources possessed by Reich Geo-Physical; 3) leak test records for the radioactive sources; and 4) survey meter calibration records.

Q36. What did the exposure reports show?

A. The exposure reports indicated minimal exposure of personnel to radiation.

Q37. What did the usage records show?

A. These records indicated that the 15.5 millicurie americium-241 source had been used by the Licensee between August 12 and November 4, 1981 in Wyoming and Montana; between May ¹⁰ through June 6, 1982 in Rock Springs, Wyoming; on July 2, 1982 in Lewistown, Montana; and on November 18, 1983 in Colstrip, Montana. According to the Licensee's records, the 25 millicurie americium-241 source was used between the dates August 12 and November 4, 1981 in Wyoming; on October 19 and October 20, 1981 in Emery, Utah; and between October 20 and November 8, 1981 in Wyoming. In addition, the records indicated that one of the two americium sources was used between August 4 and August 14, 1982 in Kemmerer, Wyoming.

Q38. Did the usage records indicate any other information other than the place and date of use of the americium sources?

A. Yes. The records also listed the name of the individual who used the sources.

Q39. Were the sources used by any individual other than Keith A. Reich?

A. Yes. The Licensee's records indicated that the 15.5 millicurie americium-241 source had been used by an individual named J. Jarocki between the dates August 12 and November 4, 1981 in Wyoming and Montana, ~~and on July 2, 1982 in Lewistown, Montana.~~ The records also indicated that one of the americium-241 sources had been used by an individual named Terry Dowling between the dates August ¹⁰ and August 14, 1982 in Kemmerer, Wyoming.

Q40. What did the Reich Geo-Physical license in effect on the date of the inspection provide as to authorized users of radioactive material?

A. License condition 12 stated that material was to either be used by Keith A. Reich or used by others only under the supervision and in the physical presence of Keith A. Reich.

Q41. Did you ask Mr. Reich whether he was physically present when J. Jarocki and Terry Dowling used radioactive material?

A. Yes.

Q42. What was Mr. Reich's response?

A. Mr. Reich informed me he was not physically present when those two individuals used radioactive material.

Q43. What did the Licensee's survey meter calibration records show?

A. According to the records I reviewed, survey meter serial no. 11898 was calibrated on April 10, 1984. There were no other calibration dates in the records for this particular survey meter. The records also indicated that survey meter serial no. 8075 was calibrated on July 27, 1982 and April 10, 1984.

Q44. What did the Reich Geo-Physical license in effect on the date of the inspection require with respect to calibration of survey meters?

A. License condition 17 required the Licensee to comply with the statements contained in its application dated August 8, 1978. Item 11 of

that application stated that the Licensee would calibrate its survey meters every six months.

Q45. What did the Licensee's records as to leak rate testing of the sealed sources in its possession indicate?

A. According to the records I reviewed, the Licensee had leak tested the americium-241 sources of 25 and 15.5 millicuries and the cesium-137 source of 125 millicuries on January 20, 1981, November 20, 1981, January 12, 1983, and April 30, 1984.

Q46. What did the Reich Geo-Physical license in effect on the date of the inspection require with respect to leak rate testing?

A. License condition 13A(1) required each sealed source to be tested for leakage and/or contamination at intervals not to exceed six months. Under license condition 13A(2), periodic leak tests need not be conducted for sealed sources that are stored and not being used; however, such sources were to be tested for leakage prior to any use or transfer to another person unless a leak test was conducted within six months prior to the date of use or transfer.

Q47. In view of your earlier testimony concerning the dates on which the Licensee used the sources, what was the frequency with which Reich Geo-Physical was required to conduct leak tests on the sealed sources in its possession?

A. Since the americium-241 sources possessed by the Licensee were taken in and out of storage during the period April 15, 1981 to June 20,

1984, leak tests should have been conducted prior to any renewed use of a source, unless a leak test was conducted no more than six months prior to the date of renewed use.

Q48. From your comparison of the usage to leak test records, did the Licensee conduct leak tests as required?

A. No. The Licensee failed to conduct a leak test as required when it placed its americium-241 sealed source of 15.5 millicuries into service on August 12, 1981, May 9, 1982 and November 18, 1983. In addition, leak tests should have been conducted when the 25 millicurie americium-241 source was placed into service on August 12, 1981 and on August 4, 1982.

Q49. Did you discuss your inspection findings with Mr. Reich and if so, what did you tell him?

A. Yes. After completing the inspection, I outlined to Mr. Reich the apparent violations of NRC requirements I had identified during the inspection. I gave Mr. Reich a copy of the NRC Enforcement Policy in effect at the time of the inspection, and a copy of Region IV's guidance as to how to respond to a Notice of Violation. I discussed both of those documents with Mr. Reich. I informed Mr. Reich it was likely that enforcement action would be taken against Reich Geo-Physical, since it appeared two of the violations I had identified had been previously identified to him at the time of the last NRC inspection, and that Reich Geo-Physical appeared not to

have followed through on the corrective action it had agreed to implement following the previous inspection.

Q50. What was Mr. Reich's response?

A. Mr. Reich acknowledged that with the exception of the transportation matter, the apparent violations I had identified to him did occur; however he indicated that his business had been poor in recent months. With respect to the apparent transportation violations, Mr. Reich argued that it was the responsibility of the manufacturer of the source containers to ensure that the containers were labeled and marked in accordance with U.S. Department of Transportation regulations.

Q51. After concluding your inspection, did you document your findings?

A. Yes. Upon my return to the Region IV office, I reviewed my inspection notes, and based upon these notes, drafted an inspection report which documents my findings. A copy of this report, Inspection Report No. 30-14821/84-01 is attached to this testimony as Attachment 2.

Attachments:

Attachment 1 - Professional Qualifications of Charles A. Hooker
Attachment 2 - NRC Inspection Report No. 30-14821/84-01
dated August 23, 1984

PROFESSIONAL QUALIFICATIONS
OF CHARLES A. HOOKER

EDUCATION

Formal

U.S.A.F.I. (High School G.E.D.), Madison, Wisconsin, 1961

U.S. Naval Nuclear Power School, Mare Island, Vallejo, California,
1960

NRC Related Courses

Radiological Emergency Response (H-303) July 1982

Safety Aspects of Industrial Radiograph (H-305) October 1982

Transportation of Radioactive Materials (H-308) March 1983

Medical Use of Radionuclides (H-304) April 1983

Gas and Oil Well Logging for State Regulatory Personnel -
November 1983

Health Physics In Radiation Accidents - REAC/TS - September 1984

EXPERIENCE

1981-1985 Radiation Specialist (Health Physicist) - Responsible for specialized radiological and environmental inspections at facilities licensed to possess, use, and process nuclear materials. Observe, evaluate, and report the status of compliance with requirements of the Commission and the safety of licensee operations.

1976-1981 Supervisor, Radiological and Environmental Protection - Responsible for establishing radiation protection procedures, practices and guidelines to maintain compliance with state and federal regulatory agencies, training of radiation safety technicians, review of reactor operation and hot cell facility programs, develop and oversee radiological safety for uranium and plutonium production, in charge of in vivo counting. Supervised staff of eight at Vallecitos Nuclear Center, California (GE).

1975-1976 Supervisor, Industrial Sealed Source Manufacturing - Responsible for the production of iridium-192 radiography sources, cesium-137 and cobalt-60 thickness gauge sources, licensing of industrial sources, marketing, radiation safety programs, and training of employees. Supervised two employees at General Radioisotope Products, Inc., California.

- 1963-1975 Specialist, Nuclear Safety Operations - Responsible for radiation safety programs for hot cell facilities, isotope production, test reactors, plutonium labs, hot chem labs, assist with environmental programs, in vivo counting and training of employees at Vallecitos Nuclear Center, California (GE).
- 1957-1963 U.S. Navy/Mechanical (Engineman) E-5 Rating - Responsible for operating and maintaining mechanical propulsion and auxiliary systems, primary and secondary water chemistry, and radiological safety on nuclear submarines. Qualified AIW and S5W reactor plant operator.

AUG 23 1984

License: 25-18304-01

Reich Geo-Physical, Inc.
ATTN: Keith A. Reich, President
1019 Arlington Drive
Billings, Montana 59101

Gentlemen:

Enclosed please find NRC Inspection Report 30-14821/84-01 documenting the results of the inspection at your facility on June 20, 1984, of the activities authorized by NRC Byproduct Material License 25-18304-01. Also, enclosed is NRC Inspection Report 30-14821/84-02 documenting the results of the Enforcement Conference held at the NRC's Field Office in Golden, Colorado, on July 12, 1984. The Enforcement Conference was held to review the inspection findings and obtain your response to these findings. Enforcement correspondence concerning these matters has been sent to you under separate cover.

In accordance with 10 CFR 2.790 of the Commission's regulations, a copy of this letter and the enclosed inspection report will be placed in the NRC's Public Document Room. If this report contains any information that you believe to be exempt from disclosure under 10 CFR 9.5(a)(4), it is necessary that you (a) notify this office by telephone within 10 days from the date of this letter of your intention to file a request for withholding; and (b) submit within 25 days from the date of this letter a written application to this office to withhold such information. If your receipt of this letter has been delayed such that less than 7 days are available for your review, please notify this office promptly so that a new due date may be established. Consistent with Section 2.790(b)(1), any such application must be accompanied by an affidavit executed by the owner of the information which identifies the document or part sought to be withheld, and which contains a full statement of the reasons on the basis which it is claimed that the information should be withheld from public disclosure. This section further requires the statement to address with specificity the considerations listed in 10 CFR 2.790(b)(4). The information sought to be withheld shall be incorporated as far as possible into a separate part of the affidavit. If we do not hear from you in this regard within the specified periods noted above, the report will be placed in the Public Document Room.

NMSS *CH*
CHooker/vs
7/25/84
8/24/84

NMSS *CL*
JEverett
8/27/84

NMSS&SB
RHall
8/17/84

DRS&S
RBangart
8/23/84

Reich Geo-Physical, Inc.

-2-

Should you have any questions concerning this letter, we will be pleased to discuss them with you.

Sincerely,

"Original Signed by
R. E. HALL"

R. E. Hall, Acting Chief
Nuclear Materials Safety and
Safeguards Branch

Enclosures:

1. Appendix A - NRC Inspection Report 30-14821/84-01
2. Appendix B - NRC Inspection Report 30-14821/84-02

bcc: c/o DMB (IE-07)

J. Collins

R. Bangart

T. Westerman

Inspector

S. File

Lic. Fee File

Info Systems

RIV Files

✓TPB

APPENDIX

U. S. NUCLEAR REGULATORY COMMISSION

REGION IV

NRC Inspection Report: 30-14821/84-01

License: 25-18304-01

Docket: 30-14821

Licensee: Reich Geo-Physical, Inc.
1019 Arlington Drive
Billings, Montana 59101

Facility: Reich Geo-Physical, Inc.

Inspection At: Billings, Montana

Inspection Conducted: June 20, 1984

Inspector:

C. A. Hooker
C. A. Hooker, Radiation Specialist

7/25/84
Date

Approved:

R. J. Everett
R. J. Everett, Chief, Nuclear Materials
Safety Section

8/22/84
Date

Inspection Summary

Inspection Conducted June 20, 1984 (Report: 30-14821/84-01)

Areas Inspected: A routine, unannounced inspection of well logging operations and associated radiation safety program including organization, management, and training; facilities, equipment, and materials; independent measurements; and radiation exposure control.

The inspection involved two inspector-hours onsite by one NRC inspector.

Results: Within the four areas inspected, six violations were identified. Two of the violations were also identified as being repeated violations from the previous NRC inspection conducted on April 14, 1984. Violations identified are as follows:

1. Possession and use of byproduct material that was not authorized on the license (Section 3).

A repeat violation from the previous inspection

2. Licensed material being used by and under the supervision of individuals not authorized by the license (Section 2).
3. Failure to calibrate survey instruments at the required 6-month intervals (Section 3).

A repeat violation from the previous inspection

4. Storing licensed material at an unauthorized location (Section 3).
5. Failure to conduct leak tests of sealed sources at the required 6-month intervals (Section 3).
6. Failure to comply with transportation requirements as follows (Section 3):
 - a. failure to label shipping containers, and
 - b. transportation of radioactive materials in containers that were not marked as Type A packages.

DETAILS

1. Person Contacted

Keith A. Reich, President/Radiation Safety Officer (RSO)

2. Organization, Management, and Training

The license is under control of one individual who is the owner, President, RSO, and only authorized user of licensed material. The licensee is authorized to store and use licensed material at his mailing address in Billings, Montana, and the states of Montana and Wyoming. The licensee is also authorized to use materials at temporary job sites in North Dakota as authorized by a state of North Dakota license. The address noted on the North Dakota license was the same Billings, Montana, address indicated on the NRC license.

The NRC inspector noted that the licensee and an individual, who is occasionally employed by the licensee, attended a formal training class for radiation safety for well logging operations on March 16, 1984, presented by a consultant. The NRC inspector also noted that licensed material had been used by, and had been under the supervision of, this other individual during the period August 4 to August 14, 1982, prior to him receiving any formal training. Another individual, who also had not received any formal training, used the material during the period August 12 to November 4, 1981. Neither of these two individuals had ever been authorized on the license to use or supervise the use of licensed material. The use of materials by individuals who had not received any formal training and who had not been authorized on the license to use licensed material, was identified as a violation of License Condition 12.

3. Facilities, Equipment, and Materials

The licensee informed the NRC inspector that the 125-millicurie cesium-137 sealed source that he was authorized for and possessed had not been used since the previous inspection. The licensee also informed the NRC inspector that the source, in its shipping container, was being stored in a locked bunker at a location other than the licensee's address, in Billings, Montana. This was determined to be an unauthorized location and was identified as a violation of License Condition 10.

During the inspection, the NRC inspector observed that the licensee possessed two sealed sources of americium-241 including one source of 15.5 millicuries and one source of 25 millicuries that were being used for mineral logging applications. Possession of americium-241 sources is not authorized on the license. The NRC inspector also noted from the NRC license file that the licensee had been cited for possession of the 15.5-millicurie americium-241 source that was not authorized on the NRC

license when inspected April 14, 1981. On May 18, 1981, the licensee, by telephone, agreed to have his license amended to include the possession and use of the 15.5-millicurie americium-241 source (reference: letter to the licensee dated May 21, 1981, confirming this agreement). The licensee response dated August 11, 1981, to the NRC's letter and attached Notice of Violation dated May 21, 1981, indicated that he was in the process of having his license amended to include authorization of the americium-241 source. The licensee informed the NRC inspector that he had not submitted a request to the NRC to include the use of americium on his license until he submitted a request to have his license renewed February 24, 1984. The NRC inspector also determined that the licensee had used the sources in the states of Montana, Wyoming, and Utah during the calendar years 1981, 1982, and 1983. The licensee performs most of his logging operations in North Dakota; however, the sources are maintained in Billings, Montana, since the North Dakota license only authorizes use at temporary job sites. The continued possession and use of the unauthorized americium-241 sources was identified as a repeated violation of License Conditions 6, 7, 8, and 9.

The NRC inspector observed that the americium-241 sources were being stored in the licensee's logging vehicles within their respective mineral logging tools, which were also the shipping containers. The NRC inspector observed that the storage areas within the vehicles were properly posted and provided adequate security of materials. However, the NRC inspector observed that the transport containers (logging tools) were not marked or labeled and could not be identified as DOT Type A transport containers. This was identified a violation of 49 CFR 178.350-3. The NRC inspector also observed, and was informed by the licensee, that radioactive material shipping labels were not being affixed to the containers when transported on the public highways. This was identified as a violation of 49 CFR 172.403.

The NRC inspector observed that the licensee maintained two survey meters and had conducted the radiation surveys required for his mineral logging operations. However, the NRC inspector determined that survey meter, Serial Number 11898, had not been calibrated during the period April 14, 1981, to April 10, 1984, and survey meter, Serial Number 8075, had not been calibrated during the period July 27, 1982, to April 10, 1984. Failure to have the survey meters calibrated at 6-month intervals was identified as a violation of License Condition 17. This was also noted to be a repeated violation identified during the previous inspection conducted on April 14, 1981.

The NRC inspector reviewed the licensee's sealed source leak test records and determined that the 15.5-millicurie americium-241, 25-millicurie americium-241, and 125-millicurie cesium-137 (in storage) sealed sources had been wipe tested for leakage on November 20, 1981, November 12, 1983, and April 30, 1984. The failure to conduct leak tests on sealed sources at

6-month intervals was identified a violation of License Condition 13.A(1) for the americium-241 sources only, since the cesium-137 source had been in storage and had not been used.

4. Independent Measurements

The NRC inspector obtained radiation measurements of the containers used to transport the two americium-241 sources, which were also used as the storage containers. Each of the two containers read <0.1 mR/h at their surfaces.

5. Radiation Exposure Control

The NRC inspector reviewed the vendor monthly film badge reports from March 15, 1981, to April 15, 1984. The NRC inspector noted that film badges were being supplied to all individuals who worked with licensed material and that they had indicated minimal exposure on each report (zero exposure).

6. Exit Briefing

On June 20, 1984, the NRC inspector summarized the purpose, scope, and findings of the inspection. The NRC inspector also informed the licensee of potential enforcement actions that may be taken by the NRC due to the apparent repeated violations identified during the inspection and his failure to comply with the committed actions he had agreed to undertake for having possession of unauthorized americium-241 sources during the April 14, 1981, NRC inspection.

APPENDIX B

U. S. NUCLEAR REGULATORY COMMISSION
REGION IV

NRC Inspection Report: 30-14821/84-02

License: 25-18304-01

Docket: 30-14821

Licensee: Reich Geo-Physical, Inc.
1019 Arlington Drive
Billings, Montana 59101

Conference Conducted: July 12, 1984

Report Prepared by:

C. A. Hooker
C. A. Hooker, Radiation Specialist

8/22/84
Date

Approved:

R. J. Everett
R. J. Everett, Chief, Nuclear Materials
Safety Section

8/22/84
Date

Conference Summary

Conference held on July 12, 1984 (Report 30-14821/84-02)

An Enforcement Conference was held at the NRC's Uranium Recovery Field Office in Golden, Colorado, to discuss six violations identified during the NRC inspection conducted on June 20, 1984. Two of these violations were also identified as repeated violations from the previous NRC inspection conducted on April 14, 1981. The violations were detailed by the Region IV staff and the licensee responded to each item.

Results: The licensee stated that the violations occurred because of neglect and in order to cut costs due to poor business as a result of reduced industry activities. The licensee also stated that he had not realized that the NRC viewed such violations as being a serious matter. The licensee informed the NRC staff that he now understands the seriousness of the violations and presented corrective actions taken and those planned to maintain compliance with NRC requirements. In addition, the licensee expressed a desire to continue his licensed operation and that he would make every effort available to ensure that compliance would be maintained in the future.

The NRC staff emphasized the seriousness of the violations and summarized the enforcement options available. The NRC staff stated that a decision would be made as to the appropriate enforcement action and that the licensee would then be notified.

Persons Participating in the Conference

A. Licensee

Keith A. Reich, President

B. NRC-RIV

R. E. Hall, Acting Chief, Nuclear Materials Safety and Safeguards Branch
T. F. Westerman, Enforcement Officer
C. A. Hooker, Radiation Specialist

1 JUDGE SMITH: I've corrected one of the three,
2 and the other two, I believe you will correct with any
3 corrections of that nature and pass it onto Mr. Reich to
4 proof, please.

5 Now, you may proceed.

6 CROSS-EXAMINATION

7 BY MR. REICH:

8 Q Mr. Hooker, I don't think we have to go through
9 all the details of your qualifications and everything. I
10 would like to know if you've ever conducted an inspection
11 of a well-logging company in the field; not at their place
12 of business; at a well site.

13 A At a well site?

14 Q Yes.

15 A No.

16 Q No? So then you're not familiar with procedures
17 then in the field with actual use of radiation?

18 A I am.

19 Q Now, you just said you never conducted a field
20 inspection.

21 A Right.

22 Q Then how can you be familiar with procedures?

23 A From the schools I would have attended, and also
24 the general procedure as written by each of the licensees
25 who submit it with their license applications.

1 Q Have you ever seen a well-logging tool in use in
2 the field?

3 A No.

4 Q Have you ever seen a well-logging tool loaded with
5 the source?

6 A Yes, I've loaded them myself.

7 Q So then if you've never made a field inspection
8 of well-logging procedures, then you don't know how the
9 tool is handled in the field. Is that right?

10 A I've never seen it handled, but I know how they
11 are handled by procedures.

12 Q Out of the book?

13 A Out of the book.

14 Q And that qualifies you to be an inspector? Do
15 you consider yourself as an inspector, having never observed
16 an actual well-logging operation?

17 A Yes.

18 Q I don't agree with that.

19 JUDGE SMITH: All right. There's where your
20 first problem is. That is testimony. Moreover, it's
21 argumentative testimony. But you have a right to say that
22 you don't agree and explain it. But it is testimony.

23 If you're going to do that, you'll have to
24 do it under oath. So there is your first thing. Are you
25 going to testify, or not?

1 MR. REICH: No, not at this point.

2 JUDGE SMITH: Then we will disregard your state-
3 ment that you don't agree with Mr. Hooker.

4 MR. REICH: Okay.

5 JUDGE SMITH: Now, you can make it by way of
6 argument later on, you know. You can argue to me that you
7 disagree with his conclusion, that he doesn't have to be
8 in the field. That's perfectly appropriate.

9 BY MR. REICH:

10 Q Mr. Hooker, the dates you recorded when you
11 observed my Utilization Logs, could you give me an excuse
12 of why you recorded them wrong; why the dates were recorded
13 wrong? Was it an honest oversight, or was it just a
14 mistake?

15 A I just believe it was a mistake from reviewing
16 quite a few records that were available, transposing the
17 dates.

18 Q Quite a few records--

19 A The Utilization Logs.

20 Q They are all the same type of records, aren't
21 they?

22 A Yes.

23 Q And were they all dated?

24 A They were all dated.

25 Q Were they legible?

1 A At the time of the inspection, yes.

2 Q Then I don't understand why you recorded them
3 wrong. Do you have an excuse for recording the dates wrong?

4 A No, they were just mistakenly transposed wrong.

5 Q The dates you recorded, did they exaggerate the
6 actual usage that you allege were illegal at that time?

7 A No. Actually, I record less dates than the
8 materials were actually used, if you compare them.

9 Q Excuse me. The dates you have in your testimony
10 say August 4th to August 14th. You just changed your
11 testimony from August 10th to August 4th. That indicates to
12 me that that's less usage.

13 A Right. But there are more dates indicated--There
14 are also more dates in the logs that were not even recorded
15 when the materials were being used.

16 Q To the best of your knowledge, are the rest of
17 the dates correct?

18 A Some of the dates do not include the full use.
19 But during the time period, it is correct.

20 Q So the rest of your testimony, we can be assured
21 that the dates you recorded are correct and that we were
22 in noncompliance.

23 A To the best of my knowledge.

24 Q Does that include July 2nd, 1982?

25 A In what part?

1 Q On the Utilization Log, under July 2nd, 1982,
2 we're accused--or alleged to have conducted operations
3 in Lewistown, Montana.

4 A That's correct. You conducted them, I believe,
5 on the log. That's what you did.

6 MS. CUOCO: Judge Smith, I think that Mr. Hooker
7 is confused as to which part of the testimony Mr. Reich
8 is referring to.

9 MR. REICH: It's Mr. Hooker's testimony.

10 MS. CUOCO: Which question are you referring to;
11 the answer to which question?

12 MR. REICH: I'm sorry, I didn't address the actual
13 question.

14 BY MR. REICH:

15 Q Question 39.

16 A Oh, that was misrepresented in my testimony, and
17 we corrected that awhile ago.

18 Q That's true. So far, we have found two errors
19 that you made in your inspection. Is that right?

20 A Two errors in dates I had logged in, yes.

21 Q Well, I wonder if dates would have an effect on
22 what Mr. Flack's decision was on the imposition of Civil
23 Penalty.

24 A No.

25 Q You feel that you can answer for him?

1 A You asked me. Mr. Flack is not up here.

2 Q Did you note in your inspection report that
3 there was an NRC-241 Form file?

4 A In 1981.

5 Q Well, that covered your period of inspection, did
6 it not?

7 A You'll have to qualify that.

8 Q To qualify it. What were the dates that your
9 inspection covered?

10 A From the previous inspection, to the 1984
11 inspection.

12 Q Do you know what day it was?

13 A I believe it was 8/14/1981, to June 20th, 1984.

14 Q Did you know that I was given permission to work
15 on the form of a--of an NRC-241 Form from the date 6/20/1981?

16 A Yes.

17 Q Did you note that in your inspection?

18 A Yes.

19 Q Did you report it in your inspection?

20 A I have to look back to my note.

21 Q Well, would you please find that? I couldn't
22 find it.

23 A (Witness complying.) There is nothing noted that
24 I can observe right now.

25 Q Well, do you consider that to be an important

1 factor as to--

2 A Not for the violations identified.

3 Q Well, through this period of time, Mr. Hooker,
4 wasn't I legal to operate with an NRC-241 Form?

5 A Clarify the period of time, please.

6 Q 6/20/1981 - 12/20/1981. It's on the NRC.

7 A I still don't know the--It authorized you to
8 conduct activities in the State of Montana.

9 Q Right. Did it?

10 A The 241?

11 Q Yes.

12 A Yes.

13 Q Why didn't you note that in your inspection
14 report?

15 A It wasn't material to the violations.

16 Q Pardon me?

17 A It was not material to the violations.

18 Q Well, you've cited me for illegal use through
19 those dates, when in fact I had an NRC-241 Form.

20 A Illegal use, where?

21 Q In the State of Montana.

22 A Had you illegal use, or for unauthorized users.
23 Your 241 Form only has you as an authorized user, if that's
24 what you're getting at.

25 Q What I was originally getting at is, why wasn't

1 the NRC-241 Form noted in your inspection report? That's
2 a very relevant question in this case; that I did request
3 permission to work.

4 A I think you still need to clarify.

5 Q I asked, why wasn't it noted in your inspection
6 report?

7 A It was not material to the violation.

8 Q It is material. It's very relevant, in the fact
9 that for six months, we were legal to operate.

10 JUDGE SMITH: You're testifying again.

11 THE WITNESS: You were legal to operate yourself;
12 you, only.

13 BY MR. REICH:

14 Q Was I authorized to possess those sources?

15 A Under your North Dakota license for the six-month
16 period, yes.

17 Q How about under the NRC license, after making
18 that request and being granted the NRC-241 Form for the
19 dates I indicated?

20 A Under your North Dakota license.

21 MR. REICH: Your Honor, I have an NRC-241 Form,
22 which authorized me to conduct operations between the
23 dates of 6/20/1981, to 12/20/1981, within the States of my
24 general NRC license. He's not responding to it.

25 MS. CUOCO: Objection, Your Honor. Mr. Reich is

1 testifying again with respect to what his license--his
2 North Dakota license and the 241 provided.

3 MR. REICH: I haven't referred to my North Dakota
4 license.

5 MS. CUOCO: The 241 Form, excuse me. The 241 Form
6 has been placed into evidence. If Mr. Reich is going to
7 continue this, I ask that he be sworn in and that he
8 testify. This is testimony.

9 JUDGE SMITH: Let's look at it. Where is it?
10 Which one is it?

11 MS. CUOCO: I believe it was Attachment 5. Let
12 me just --

13 MR. REICH: Attachment 7.

14 MS. CUOCO: Excuse me. It's Attachment 7, Your
15 Honor.

16 JUDGE SMITH: I think that the attachment number
17 somehow did not survive my copy. We're speaking now of an
18 Attachment 7 to--

19 MS. CUOCO: Ms. Kay's affidavit.

20 JUDGE SMITH: Staff Exhibit 3. And as I look at
21 my copies of them, none of them are numbered, which is a
22 great confusion; at least none that I can see.

23 What does this thing look like?

24 MS. CUOCO: It is a single page form, Your Honor.

25 JUDGE SMITH: Yes. We'll have to correct that.

1 We'll have to get these attachments.

2 MS. CUOCO: Yes, we will number these attachments
3 accordingly.

4 JUDGE SMITH: Okay. I have here Reported Proposed
5 Activities in Non-agreement States. It's signed by
6 Mr. Reich, dated 6/12/81, and it says that he will conduct
7 activities--and this is a question I had myself--at 1019
8 Arlington Drive, from 6/20, to 12/20, 1981, I would assume,
9 or 180 days. I think that's pretty much what it says. And
10 you're saying that any use in Montana of those sources from
11 6/20, to 12/20 should not be a part of the allegation
12 against you, or are you saying that the fact that you were
13 covered should have been considered by Mr. Flack in assess-
14 ing the reasonableness of the penalty?

15 MR. REICH: That's right, Your Honor. That's what
16 I'm saying.

17 JUDGE SMITH: The latter?

18 MR. REICH: The latter. Actually, both, Your
19 Honor.

20 JUDGE SMITH: You seem to dangle, here.

21 THE WITNESS: May I say something?

22 MS. CUOCO: Judge Smith, my only point was that
23 Mr. Reich seems to be testifying here. If he's going to
24 continue to do so, the staff would like to see him sworn and
25 testify.

1 JUDGE SMITH: Well, I don't know if it's testimony
2 or not. But he's bringing--as he has every right to bring
3 to my attention, the contents of a staff exhibit, and argue
4 from it. I don't regard that as testimony. It's argument.
5 In any event, the document is here and it's in evidence, and
6 we can read it. But more importantly, while we're all
7 oriented to the dates and to the point, what's involved
8 here? I mean, how does this--Does this change your testi-
9 mony?

10 THE WITNESS: No. Because he requested use in
11 Montana. The materials were being used in Wyoming. As a
12 matter of fact, he specified Billings, Montana. He didn't
13 even specify whether it was Butte or anywhere else.

14 The date on here was 6/12, and the sources
15 were still in Billings, Montana prior to submittal of the
16 241 Form, still makes--Since the last inspection, it was
17 not corrected on the license up through that period of time.
18 It did not specify in there where it was being used. It
19 specified the time period that it was used when not being
20 authorized--in the unauthorized location.

21 JUDGE SMITH: You don't actually use this source
22 at Arlington Drive?

23 MR. REICH: No, that's where a lot of confusion
24 is, Your Honor. And that's the reason I asked Mr. Hooker
25 if he's familiar with well-logging operations.

1 THE WITNESS: Yes, I'm familiar with--

2 BY MR. REICH:

3 Q Do you understand that? We do not use those
4 sources at this place, this office address. Do you under-
5 stand energy exploration is not conducted within a city?

6 A Yes.

7 Q Then why do you keep referring to my residence or
8 my office?

9 A This form indicates, for use in Montana under a
10 North Dakota license. It did not indicate use in Wyoming
11 from that date.

12 Q It was under a general NRC license. Is that right?
13 Which I'm authorized to work in Montana and Wyoming?

14 A Your request specified Montana.

15 Q My question is, at this residence--You know, we
16 just established the fact surely we're not going to be
17 drilling oil wells at my office. Do you agree with that?

18 A I know you're not going to be drilling. Yes,
19 I agree.

20 Q Okay. So then is this a form to give me permission
21 to work through the period of 6/20 to 12/20 of 1981?

22 A For what's indicated on the form.

23 Q What? At 1019 Arlington Drive?

24 A In Montana.

25 JUDGE SMITH: Your point, Mr. Reich, is that your

1 own form is so observed that it should not have been
2 believed. Is that it?

3 MR. REICH: The point I'm trying to make, I
4 guess, is that Mr. Hooker has referred back several times
5 now to illegal use in certain areas, and it always seems
6 to go that--they seem to think we're using this just at
7 this single place. And I'm trying to get the point across
8 that energy exploration is not conducted at a business
9 residence or a business address.

10 JUDGE SMITH: I think everybody understands that.
11 I at least understand it. I had a question myself. One of
12 my notes was to ask why in this very form and references to
13 it, you did not give locations which the activities would
14 be conducted and dates scheduled, but you give your business
15 address and Billings, Montana.

16 MR. REICH: Right.

17 JUDGE SMITH: And even I knew that you were not
18 going to be doing any well-logging there, and that was one
19 of the questions I had. And that is I think probably a
20 relevant question. Why is that?

21 MR. REICH: Okay. I used this address, Your
22 Honor, because that's the place, the residence of the
23 license. Now, I assume that filing an NRC-241 Form, already
24 having an NRC license, that this would allow me to use the
25 two americium sources that I indicated on here, in the

1 jurisdiction of the NRC license that I have here.

2 JUDGE SMITH: Which was Wyoming, too?

3 MR. REICH: Yes.

4 JUDGE SMITH: So your point is that you figure
5 that 180 days, you extended your cesium license, which you
6 possessed at that time.

7 MR. REICH: That's right.

8 JUDGE SMITH: Which allowed you to use it in
9 Montana and Wyoming. You extended that to include
10 americium to the same extent that you were already licensed
11 to use cesium.

12 MR. REICH: Right.

13 JUDGE SMITH: Now, that's testimony.

14 MR. REICH: Okay.

15 JUDGE SMITH: Do you want to testify to that?

16 MR. REICH: I testified to that, yes.

17 JUDGE SMITH: All right. I'm going to have to
18 administer you the oath. Now, if you're going to make
19 points like that, that's testimony. This is not an interpre-
20 tation that is obvious, that somebody would pick up just
21 from reading it. It requires explanation from you if you
22 want me to consider it. And if you want me to consider it,
23 you'll have to testify to it. You'll have to testify that
24 this--under oath, that this is what you intended and this
25 is what you believed. Now, do you want to testify in this

1 case?

2 MR. REICH: I don't mean to do this out of
3 disrespect, and I hope that you'll guide me through this.
4 Yes, I do want to testify to that.

5 JUDGE SMITH: Do you have any problems, any
6 ethical or religious problems of taking an oath, of testify-
7 ing under oath?

8 MR. REICH: No.

9 JUDGE SMITH: If you want me to consider why you
10 did certain things and facts that you want to bring to my
11 attention, you'll have to do it as testimony under oath.
12 So I suspect as the day unfolds, you will have other things
13 of that nature that you want me to consider. So then I
14 recommend to you, either I'm going to disregard your
15 explanation, or you'll have to testify.

16 MR. REICH: Yes, I'll testify.

17 JUDGE SMITH: Stand and raise your right hand.

18 (Complying.)

19 JUDGE SMITH: Do you swear to tell the truth,
20 the whole truth and nothing but the truth in this hearing?

21 MR. REICH: Yes, Your Honor, I do.

22 JUDGE SMITH: Now, you have just testified to me
23 as to your understanding that you believed that the Form
24 241 extended your license to use two americium sources,
25 co-extensive with your NRC license. Is that your testimony?

1 MR. REICH: Yes.

2 JUDGE SMITH: And your previous statement to that
3 effect is the truth.

4 MR. REICH: Yes.

5 MS. CUOCO: I'm sorry, Your Honor. I was
6 distracted. Could the Reporter read back Mr. Reich's
7 response to your question?

8 (Whereupon, the previous
9 question and answer were read
10 back by the Court Reporter.)

11 MS. CUOCO: Judge Smith, I ask you at this time,
12 may I ask questions of Mr. Reich, or would you prefer for
13 me to save that?

14 JUDGE SMITH: I think that--I want to grant
15 Mr. Reich the greatest of latitude to testify in the
16 context of your witness. But I do believe that it would be
17 a better organized record if you would save all your
18 questions.

19 MS. CUOCO: I will, Judge Smith.

20 JUDGE SMITH: I realize it's not the usual
21 procedure, but I think, functionally, it probably is all
22 right. You may proceed.

23 BY MR. REICH:

24 Q Mr. Hooker, you still haven't answered my
25 question as to why you didn't enter in your inspection report

1 that the NRC-241 Form was filed. I feel it to be very
2 relevant.

3 A I didn't think it was material to the violation.

4 JUDGE SMITH: I do think that we've covered that
5 now two, perhaps three times.

6 BY MR. REICH:

7 Q So you didn't think it was relevant. That's
8 your answer?

9 A Right, to the violation.

10 Q But your violation, Mr. Hooker, that you're
11 citing me for, is invalid. I have an NRC-241. You proposed
12 and recommended to Mr. Flack that a Civil Penalty be
13 imposed because I used radio active material through those
14 dates. That's relevant, the way I see it.

15 JUDGE SMITH: Still after you heard him, his
16 explanation, you've heard him suggest to you that it is
17 relevant. Do you still believe that? Do you still believe
18 that you omitted a material statement to Mr. Flack or to
19 headquarters?

20 THE WITNESS: No, I did not omit it. The idea
21 was for working in Montana. The work was being done in
22 Utah and Wyoming.

23 MR. REICH: And was the work under non-agreement
24 statements--

25 JUDGE SMITH: Did you interpret Attachment 7,

1 the Form 241, to extend Reich's NRC license to use
2 americium sources in Montana and Wyoming?

3 THE WITNESS: No, it's for Montana, under the
4 North Dakota license.

5 MR. REICH: Okay. I'll leave that line of
6 questioning for right now. I have some more questions to
7 ask Mr. Hooker about his inspection.

8 JUDGE SMITH: All right.

9 BY MR. REICH:

10 Q When you made the inspection, Mr. Hooker, did
11 I cooperate with you and give you all the material you
12 requested?

13 A Yes.

14 Q And did you inspect my trucks?

15 A Yes.

16 Q Did you observe the sources?

17 A I observed the container that the sources were in.

18 Q Could you describe them?

19 A Chemical with a Comp-Probe tube with, like, a
20 clam shell type of shield around the probe which is, to
21 the integral part of the shipping container.

22 Q Did you observe any tags on it?

23 A There was a small aluminum type tag identifying
24 the material.

25 Q Was it colored?

1 A It may have been a yellow and orange color on it.

2 Q Was there anything written on it?

3 A It identified the date and the source and the
4 material.

5 Q Material number?

6 A I don't recall.

7 Q Was it a legal tag? Was it a required tag to be
8 on there?

9 A There was a tag that identified the material, yes.

10 Q So you were satisfied with the tag?

11 A With that specific tag.

12 Q Now, you refer in my inspection reports here to
13 "transport container," and in parenthesis "logging
14 container." Do you consider a logging material to be a
15 transport container?

16 A That probe is a container, is a transport
17 container.

18 Q The tool itself?

19 A The tool with the shelling device around it,
20 together, they make up a type of container.

21 Q So it's not specifically just a tool, is that
22 correct? You have to have a container?

23 A The shell thing goes around.

24 JUDGE SMITH: Excuse me. For my information, the
25 shell thing, is that what you refer to as the clam shell?

1 THE WITNESS: It's a clam shell type thing that
2 you lock.

3 JUDGE SMITH: Is that on the tool when the tool
4 is being used?

5 THE WITNESS: No, it's a device used during
6 transport.

7 JUDGE SMITH: Is that right?

8 MR. REICH: Yes, Your Honor.

9 BY MR. REICH:

10 Q Did you notice any other signs within the general
11 area as to radiation marking signs?

12 A We had a sign that was marked as "Radio active
13 material storage."

14 Q About what size was it?

15 A I believe probably like three by three or four by
16 four or something like that. It was a very visible sign.

17 MS. CUOCO: Mr. Hooker, when you answer
18 Mr. Reich's questions, could you please speak up? I've
19 even having a difficult time hearing.

20 BY MR. REICH:

21 Q Were there any locks on those sources?

22 A Yes.

23 Q Were they locked?

24 A Yes.

25 Q Was the vehicle locked?

1 A Yes.

2 Q Did you take any measurements with the survey
3 meter?

4 A Yes.

5 Q Could you tell me what you observed off those
6 measurements?

7 A No detectable readings.

8 Q None whatsoever?

9 A None with the instrument that I had.

10 Q Was your instrument calibrated?

11 A Yes.

12 Q So then there wasn't any detectable radiation off
13 of those sources, is that right?

14 A Not off the container.

15 Q Off of the sources, did you detect any radiation
16 at all?

17 A Not off the container that it was in, no.

18 JUDGE SMITH: I don't think you're answering his
19 question.

20 THE WITNESS: No.

21 BY MR. REICH:

22 Q Okay. In your testimony, you insinuate that there
23 is some tags, appropriate tags that weren't attached.
24 Could you tell me what those tags are?

25 A DOT shipping label and DOT container identification

1 label.

2 Q And what's the requirement for shipping a source
3 as far as the DOT tags are concerned?

4 A The container has to be marked as appropriate to
5 the material within.

6 Q So it requires a DOT tag?

7 A It requires the container, if you're shipping
8 specific--a certain amount of activity, and it qualifies
9 for that and has to be a container, it's a DOT Type A, and
10 also marked as a DOT container.

11 Q What's the limits of the activity that requires
12 this?

13 A The minimum?

14 Q The maximum. The maximum and minimum that require
15 DOT tags.

16 A For what--I mean there is--

17 Q Was this source, did it require a DOT tag?

18 A The container did, yes.

19 Q Did the source--the activity of the source was--

20 A Excuse me a minute. You'll have to--Yes.

21 Q Do these tags have to be attached when a transfer
22 is made?

23 A Please clarify that.

24 Q Say for instance in transport or transfer from
25 one customer to another, do these tags have to be attached?

1 A According to the DOT regulations, yes.

2 Q Did you observe my first inspection report? Did
3 you review it?

4 A Yes.

5 Q Did you notice the area there where the inspector
6 noted that all appropriate tags were affixed?

7 A I would have to look back.

8 MR. REICH: Do you have the copy of that,
9 Ms. Cuoco?

10 MS. CUOCO: Yes, Mr. Reich, I do have a copy of
11 the 1981 inspection report.

12 MR. REICH: Could you produce it?

13 MS. CUOCO: If you could give me a minute to see.
14 Are you referring to an attachment to Staff Exhibit 3,
15 which is the letter and notice of violation, or are you
16 referring to the actual inspection report?

17 MR. REICH: I'm referring to the inspection report.
18 I'll have to look for a reference number.

19 MS. CUOCO: Judge Smith, it is not the--The
20 inspection report that Mr. Reich is referencing is not one
21 of the attachments or one of the exhibits in this proceed-
22 ing.

23 JUDGE SMITH: Do you have the report?

24 MS. CUOCO: I do have the--It's a draft inspection
25 report, handwritten notes from 1981. I do have a copy of

1 it with me.

2 JUDGE SMITH: What are you trying to establish,
3 Mr. Reich?

4 MR. REICH: I'm trying to establish that on my
5 first inspection, the inspector accepted all the markings
6 on those containers and didn't cite me or make me aware
7 that they were required to have DOT tags.

8 JUDGE SMITH: Can that be stipulated?

9 MS. CUOCO: I would like to have an opportunity to
10 take another look at the inspection report. Can I have an
11 opportunity to do so now?

12 JUDGE SMITH: Certainly, yes.

13 MS. CUOCO: Judge Smith, if you could endone for
14 just a minute while I consult.

15 JUDGE SMITH: Sure.

16 (Off the record.)

17 MS. CUOCO: Judge Smith, the staff is ready to go
18 back on the record. The staff has no objection to stipulat-
19 ing to the document that Mr. Reich is referring to. We
20 would like to make copies of the document from the original
21 Region IV file, which is here with us today. Mr. Reich was
22 provided a copy of this document at an earlier time in this
23 proceeding, when two of us were negotiating.

24 I would note for you that when you receive
25 a document, you will see that it is very different from the

1 inspection report that was submitted with Mr. Hooker's--as
2 Attachment 2 to Mr. Hooker's testimony. I would offer it
3 back Mr. Robert Everett of the Region IV office be sworn in
4 as a witness at this time to explain to you why the document
5 is in the different format than--

6 JUDGE SMITH: I understood it was draft notes.

7 MS. CUOCO: It is an inspection--handwritten
8 inspection report.

9 JUDGE SMITH: Let's see if we can't get to the
10 point of what is relevant about the inspection report. As
11 I understand, Mr. Reich was going to argue from information
12 that is not on the report; that in the 1981 inspection, the
13 inspector saw the tags and was silent about it, said nothing
14 about it.

15 MR. REICH: He wrote down that it was acceptable.

16 JUDGE SMITH: He wrote down that it was acceptable?

17 MR. REICH: Yes.

18 MS. CUOCO: Judge Smith, the staff asserts that the
19 1981 inspection report is immaterial. The fact is that
20 Mr. Hooker conducted the inspection on June 20th of 1984,
21 and found a violation of Transportation Department regula-
22 tions. I don't see why the fact that in 1981, DOT regula-
23 tions did not appear to be violated, irrelevant to the
24 question before you, which is whether the violation occurred
25 as alleged in the Notice of Violation of proposed imposition

1 of Civil Penalty.

2 JUDGE SMITH: You're accusing Mr. Reich of
3 accumulation of Category III violations, which demonstrate
4 an attitude of careless disregard for regulations. Once
5 you've taken that course, he can demonstrate that his
6 attitude has not been a careless disregard of regulations.
7 If the NRC inspector in 1981 said or wrote things or by
8 inference communicated to Mr. Reich that the tagging was
9 acceptable, he is allowed to establish that and have me
10 consider it.

11 I think we can probably go quickly to the
12 point, however, and you certainly can make your argument,
13 if you wish, that the DOT regulations in '84 are the essence
14 of the violation. But his point is relevant for my
15 consideration, and I want to hear about it.

16 But I don't believe we need a lot of
17 formality on it. You can dispute that the inspector said
18 that or whatever. But I'm simply asking that we get to the
19 point rather directly.

20 The way it is right now, Mr. Reich's testimony
21 to that effect remains unreputed. So it's up to you, you
22 know, what you want to do about it. Do you understand my
23 point?

24 MS. CUOCO: I'm not sure I do, Judge Smith.

25 JUDGE SMITH: Well, right now, the only evidence

1 that I have is the sworn testimony of Mr. Reich that in
2 1981, the inspector examined the tags on the shipping
3 containers, noted the Department of Transportation, the
4 aluminum tags you're talking about, the same tags that were
5 on there when Mr. Hooker inspected it.

6 MR. REICH: No, that's not true. At the time he
7 inspected the sources,--

8 JUDGE SMITH: Who?

9 MR. REICH: The inspector of 1981. I don't recall
10 his name. He inspected for proper markings. And he wrote
11 down under that category that all--don't quote me as this--
12 in other words, that that area was acceptable. The proper
13 markings were there.

14 JUDGE SMITH: Were the proper markings that you
15 referred to the same markings that were on the containers
16 when Mr. Hooker inspected it?

17 MR. REICH: Yes. Yes, they were.

18 JUDGE SMITH: I'm missing something, then. As I
19 take it then from your testimony, you're telling me that the
20 inspector in 1981 saw markings which are the same markings
21 that Mr. Hooker saw.

22 MR. REICH: Yes.

23 JUDGE SMITH: And he told you and he wrote in his
24 report that those markings were acceptable.

25 MR. REICH: That's right, and Mr. Hooker disagreed,

1 saying that there was markings missing, and they haven't
2 been changed. They are both the same.

3 JUDGE SMITH: All right. So we have your
4 testimony then to the effect that the markings are the
5 same then and now, I mean, in '81 and '84, that the inspector
6 in '81 saw them, told you that they were acceptable, and
7 reported that they were acceptable.

8 MR. REICH: Yes, that's right.

9 JUDGE SMITH: And now the dispute seems to be, as
10 you understand that, that Mr. Hooker believe that the
11 markings were not the same as those that the inspector in
12 '81 saw.

13 MR. REICH: No, he said there were additional tags
14 required.

15 JUDGE SMITH: All right. Additional tags
16 required. Okay.

17 MR. REICH: Other than the tags that that--

18 JUDGE SMITH: That's clear from his testimony.

19 MR. REICH: All right. Fine.

20 JUDGE SMITH: Now, that is his testimony. Now,
21 this goes--He's asking us to look at that for mitigation
22 for his state of mind, was there a careless disregard of
23 the regulations, which is an element of your case.

24 MS. CUOCO: That's correct, Your Honor.

25 JUDGE SMITH: Okay. It's relevant.

1 MS. CUOCO: I'm unclear, Your Honor, as to the
2 status of this 1981 inspection report. I think that the
3 staff will stipulate that upon examination of Mr. Reich's
4 copy, that it is a true and accurate copy of what is from
5 the Region IV file.

6 JUDGE SMITH: I would say from right now, as you
7 recognize in your burden of evidence, that the preponderance
8 of the evidence in this case as of this moment is
9 Mr. Reich's testimony; not his opinion that no additional
10 tags are required, but his testimony that the inspector
11 in 1981 saw the same tags that existed, and during the 1981
12 inspection noted that they were satisfactory in his
13 inspection notes and told Mr. Reich that they were satis-
14 factory. That's the only evidence that I have.

15 And it is necessarily the preponderance of
16 the evidence. If you have evidence that you wish to offer
17 to refute that or say to concede it or support it, that's
18 up to you, Ms. Cuoco. Right now, all I have is his
19 testimony.

20 MS. CUOCO: May I have an opportunity, Judge Smith,
21 to consult with Mr. Hooker for a moment?

22 JUDGE SMITH: Certainly.

23 MS. CUOCO: Thank you.

24 (Off-the-record discussion.)

25 MS. CUOCO: Judge Smith, with respect to

1 Mr. Reich's question to me several minutes ago, whether
2 the staff would be willing to stipulate to this document or
3 not, I assume he was saying stipulate into evidence. And
4 the staff will not agree to stipulate this document into
5 evidence.

6 JUDGE SMITH: You understand where the evidence
7 stands right now?

8 MS. CUOCO: Yes, I do.

9 JUDGE SMITH: Not only do I have preponderance of
10 the evidence, but if you are in possession of the document,
11 that may or may not have the report to which Mr. Reich
12 eludes, you have elected not to come forward with it. That
13 just about nails it down.

14 MS. CUOCO: Judge Smith, the staff feels that it
15 can rebut Mr. Reich's testimony in this area.

16 JUDGE SMITH: All right. Go ahead, Mr. Reich.

17 MR. REICH: So that this document won't be
18 produced, and I'll express my view in this matter as far as
19 the previous inspection, in that I felt that all the
20 appropriate markings were on that container.

21 JUDGE SMITH: For that reason?

22 MR. REICH: Yes, because of his previous inspec-
23 tion, and that I wasn't cited and that it was marked
24 "acceptable." There wasn't any improvements that I knew of
25 that had to be made.

1 BY MR. REICH:

2 Q If you remember, on this,--I'm getting back to
3 the line of questioning--When you're referring to the DOT
4 tags that were required, Mr. Hooker, do you recall our
5 conference in Denver?

6 A Yes.

7 Q Did I display some tags there at that time?

8 A You brought in tags that you obtained and put
9 them on the container.

10 Q Were they DOT tags?

11 A They referenced that the container was a DOT
12 tagged container.

13 Q The tag I brought there, did it satisfy DOT
14 requirements and NRC requirements?

15 A As best as I can recall, yes, for that one
16 particular--

17 Q So then from the time that you made this
18 inspection, until this conference, we're talking about
19 approximately 30 days? Is that right?

20 A I think so.

21 Q And I produced these tags from the manufacturer,
22 brought them to the conference for your inspection, and
23 they were the kind you require, is that right?

24 MS. CUOCO: Objection, Your Honor. I'm not sure
25 where Mr. Reich is leading with this line of questioning.

1 He's saying that--

2 MR. REICH: I'm trying to establish the fact
3 that the violations they cited me with were also promptly
4 corrected.

5 MS. CUOCO: Thank you, Mr. Reich. That answers
6 my question.

7 BY MR. REICH:

8 Q But in fact what they did there was because of
9 the markings, which was actually Severity Level 5 Violation,
10 it's been elevated since to Violation Severity Level 2.
11 And I produced the tags within 30 days, attached them to
12 the containers, was unaware that they were required at the
13 time of the inspection. And I've been accused of not
14 complying promptly and things like that. This is a matter
15 of 30 days. Would that be prompt, Mr. Hooker; 30 days?

16 A To put the label on the container?

17 Q Right, to make this necessary request to the
18 company which I feel was responsible to start with for
19 supplying them.

20 A Yes.

21 Q And we can go a little farther, here, that I was
22 on the line as to questioning as to referring to sources
23 and containers. In the process of transferring a source
24 and container, is it a regulation that all appropriate tags
25 need to be affixed, including DOT tags?

1 A Yes.

2 Q Then do you have any idea how I could have
3 legally received that from another shipper without the
4 appropriate tags?

5 A He may be in violation, also.

6 Q He may be in violation, but you want me to pay the
7 violation. Is that right?

8 MS. CUOCO: Objection, Your Honor. That question
9 is argumentative.

10 JUDGE SMITH: Okay. Who was the shipper?

11 MR. REICH: One was shipped by Comp-Probe, Incor-
12 porated.

13 JUDGE SMITH: The manufacturer of it?

14 MR. REICH: Yes--Not of the source, Your Honor.
15 It's who I acquired the shipping containers from.

16 JUDGE SMITH: They manufactured a tool.

17 MR. REICH: That's right. They also at the time
18 I took receipt of my truck had this container fastened in
19 the truck.

20 JUDGE SMITH: What is the relevance of that, do
21 you think?

22 MR. REICH: I believe that when a container was
23 purchased, which it was purchased by me, that it should
24 have all the appropriate tags required to be released to a
25 consumer.

1 JUDGE SMITH: Assuming that that's the case.

2 MR. REICH: Yes. I believe that the manufacturer
3 is required to attach all the appropriate tags to make it
4 legal to the consumer.

5 JUDGE SMITH: All right. Let's say that
6 Mr. Hooker agrees with you as he indicates. He believes
7 they may have been in violation. Let's assume that that is
8 established.

9 MR. REICH: Mm-hmm.

10 JUDGE SMITH: What do I do with that information?

11 MR. REICH: If he agrees that they were in
12 violation, then it relieves me of the violation.

13 JUDGE SMITH: Why does it relieve you?

14 MR. REICH: Because I bought it in good faith and
15 expected every fixing that I paid for or attachment to be
16 on that container to make it legal.

17 JUDGE SMITH: Your testimony then, as I understand
18 it, is that one of the reasons why you believed that you
19 were in good faith, compliance with the law, one of the
20 reasons, one out of two so far, is that when you purchased
21 it from the people whose expertise in the business you
22 depended upon, they did not have any other tags on it, too.
23 So that entered into your opinion?

24 MR. REICH: Once I was cited with the violation,
25 yes, it did.

1 JUDGE SMITH: What I mean is, what weight did you
2 give the fact that you purchased that equipment without--
3 with only the tags that you use? Did that influence your
4 mental state?

5 MR. REICH: (No response.)

6 JUDGE SMITH: Let's say that the manufacturer
7 of the source or the manufacturer of the probe was in
8 flat-out violation of the law. They are not being accused
9 today. You are.

10 MR. REICH: Right.

11 JUDGE SMITH: It would be irrelevant to me that
12 they are in violation of the law or the regulation, unless
13 you can show that it's relevant to you. And as I under-
14 stand, your testimony is that one of the reasons that you
15 believed that you were in compliance with the regulation
16 is that that is how you received the source.

17 MR. REICH: That's right.

18 JUDGE SMITH: And is it further your testimony
19 that you had reason to believe that the people who sold
20 it to you knew what the regulation was?

21 MR. REICH: That's exactly right.

22 JUDGE SMITH: Okay. And this is relevant, because
23 you're being charged with a mental attitude of careless
24 disregard for the regulation. It is relevant?

25 MR. REICH: (Nods head.)

1 JUDGE SMITH: Okay. Continue.

2 MR. REICH: Okay, Your Honor. I contend, as we
3 have just established, that I bought the container in good
4 faith. And to use an example, if I were to buy a car, I
5 would expect it to have an engine in it. That's what I
6 expected; this container to come complete with all the
7 appropriate fixings, tags, whatever is required for them
8 to legally offer it to a consumer. I have no control over
9 what tags they put on.

10 I bought this with those intentions. If
11 there was tags missing, I was unaware of them.

12 JUDGE SMITH: I understand your point.

13 MR. REICH: Okay. I don't have anymore to comment
14 on that particular part.

15 JUDGE SMITH: All right.

16 BY MR. REICH:

17 Q The next area I would like to talk to
18 Mr. Hooker about is, he cited me with storing material in
19 a place other than the address on my license. When he
20 asked me where the cesium source was, I told him that I
21 was--that I recently, very recently had acquired a new
22 storage facility. This facility--The reason for acquiring
23 it is, it's originally a National Guard fallout shelter.
24 It's an earth-filled bunker. They are secure.

25 I felt it was a more secure place than using

1 vehicles as storage, since we hadn't used our cesium source
2 for three years.

3 He said it was a violation. And I believe
4 I told him at that time, and it's also in my responses,
5 that I felt that in the best interests of myself, of the
6 public in general and of the NRC, to acquire a more secure
7 place.

8 At that time, I told him where this was
9 stored. I gave him the address. I asked him to inspect it.
10 He said, "No, it's a violation, and I won't accompany you
11 to inspect it because I have--" I don't remember the exact
12 words, but--

13 JUDGE SMITH: His testimony is that he simply
14 didn't have time?

15 MR. REICH: Right, he didn't have time.

16 JUDGE SMITH: But I also understand the testimony
17 to be that they do not question the airport bunker as being
18 a more suitable storage place. That is not an element of
19 the Notice of Violation.

20 MS. CUOCO: Judge Smith, at this time, Mr. Reich
21 hasn't asked Mr. Hooker a question. If Mr. Reich is going
22 to be presenting testimony in this manner, you know, I
23 think it would be easier if he would ask Mr. Hooker questions
24 and then present it in some other manner at some other point.

25 MR. REICH: Okay.

1 JUDGE SMITH: That's right. What he's trying to
2 do is put his position in context, and then having done that,
3 ask Mr. Hooker to agree with him, is what he is approaching.
4 And I don't know how productive that is going to be, but
5 we're proceeding all right, I think.

6 BY MR. REICH:

7 Q Mr. Hooker, is there a fee for your inspection?

8 A Yes.

9 Q Do you know what it is?

10 A Not currently, no, I don't know what the fee is.

11 MR. REICH: Can I ask any of the other staff if
12 they would know what it is; the fee?

13 JUDGE SMITH: Fine with me.

14 MR. BURNS: I don't know what they are, Your
15 Honor, but I think they are specified in a portion of
16 10CFR, I think they are.

17 MR. FLACK: 4 or \$500, something like that.

18 MR. BURNS: It's specified in Part 170. You could
19 determine by an examination from Part 170 and the knowledge
20 of what his license is or what the various fees are.

21 BY MR. REICH:

22 Q Would you agree--Let's put it that way--that the
23 inspection fee was 4 to \$500?

24 A I don't know what was billed.

25 MS. CUOCO: Judge Smith, as we've just pointed

1 out, and I think you can take judicial notice of the fact
2 that there is a schedule of fees in 10CFR, I believe
3 Part 170 is what Mr. Burns referred.

4 JUDGE SMITH: Let's proceed on the assumption it
5 is somewhere in the neighborhood of 4 or \$500, and then
6 when we take a break, which we will, we'll look in the book
7 and find out, and then we'll know.

8 MR. REICH: Your Honor, the actual amount is
9 immaterial. If we can agree 4 or \$500, it will help me with
10 my line of questioning.

11 JUDGE SMITH: It's a matter of some hundreds of
12 dollars.

13 MS. CUOCO: Judge Smith, I also ask, what is
14 material about this line of questioning?

15 JUDGE SMITH: One might wonder, but I think he
16 will come to it.

17 BY MR. REICH:

18 Q We've established that the fee is between 4 and
19 \$500, approximately. How long did the inspection take you?

20 A Two hours.

21 Q Two hours. Did I ask you to come and inspect
22 that new facility?

23 A Yes.

24 Q What was your reaction to it? What was your
25 answer?

1 A That I did not have time.

2 Q Because of?

3 A I had other inspections scheduled.

4 JUDGE SMITH: How have you been prejudiced by
5 him not inspecting the airport bunker?

6 MR. REICH: I felt that I deserved the time, since
7 I am paying a fee for the inspection. I wanted to use the
8 facility as my new storage facility, and I wanted
9 Mr. Hooker to inspect it so that it would comply with NRC
10 regulations. I wanted him to look at this new facility.

11 JUDGE SMITH: Okay. I really question whether
12 that's relevant to what is helpful to you today, inasmuch
13 as the staff seems to concede that the place and the
14 quality of the new storage is not an issue. It is a--As I
15 understand your position, they are apparently willing to
16 concede that the airport bunker is a better place. And I
17 would imagine we have accepted that in a licensed amendment,
18 as I understand to be the case.

19 MS. CUOCO: Judge Smith, I'm not sure if the staff
20 would concede.

21 JUDGE SMITH: Well, there are papers that you
22 have filed that would allow me to infer that the airport
23 bunker location as described by him is not disputed by the
24 staff as being an inferior place.

25 MS. CUOCO: That's correct.

1 JUDGE SMITH: I do not read anyplace in which the
2 quality of the bunker is a portion of your charge.

3 MS. CUOCO: That's correct, Judge Smith.

4 BY MR. REICH:

5 Q Mr. Hooker, if you agree that this bunker--which
6 you did--is safer than storage in the trucks, doesn't
7 indicate to you that I'm trying to improve my program to
8 make it safer?

9 A It would give an indication, yes.

10 Q You agree that I'm trying to improve my program?

11 A Yes.

12 Q The violation that I've been cited for is
13 disregard, negligence and everything. Would negligence
14 be involved in this?

15 MS. CUOCO: Objection, Your Honor. I'm not sure
16 what timeframe we're talking about here; if we're talking
17 about the period of time during which the violations
18 occurred, or some efforts that Mr. Reich may have taken
19 since the beginning of this enforcement action to improve
20 his program.

21 MR. REICH: I'm talking about prior to the
22 inspection. This has been before enforcement action was
23 taken. I had good intent. I was improving my program,
24 is my way of thinking. This was before the inspection that
25 this facility was acquired.

1 MS. CUOCO: Thank you, Mr. Reich.

2 MR. REICH: I don't think I have anymore questions
3 on that particular thing, Your Honor. I do have another
4 area I would like to question him in.

5 JUDGE SMITH: Okay, go ahead.

6 BY MR. REICH:

7 Q This goes back to the area when I was first
8 notified that there was going to be a Civil Penalty imposed
9 on me. I received a phone call from the Region--is it IV?
10 I don't know. It's the office in Arlington, Texas. They
11 informed me that they were going to impose a Civil Penalty
12 and that I had "X" number of days to inform them that I
13 was going to contest it or otherwise. I was out on the
14 location working at that time.

15 This was sent to me, I believe, Federal
16 Express, and it was received by someone other than myself.
17 When I was notified, I did notice in there that it was
18 going to be released to the press.

19 And I felt that this being released to the
20 press was going to be bad publicity for me, so I responded
21 right then at that present time. I believe I got in touch
22 with Mr. Hooker. I think there was another man by the name
23 of Mr. Kane in a phone conversation.

24 I'm trying to look through the information
25 here, Your Honor, if you would give it to me, please.

1 I believe it's the Notice of Violation and Proposed
2 Imposition of Civil Penalty that I'm referring to.

3 JUDGE SMITH: And your response was a letter dated
4 September 8th? Is that the response you referred to?

5 MR. REICH: No, this is October 2nd, is the one
6 I have right here.

7 MS. CUOCO: Judge Smith, I would note for the
8 record that the letter of Notice of Violation and Imposed
9 Civil Penalty Mr. Reich has just referred to is attached
10 to Staff Exhibit 3 as Attachment 9.

11 JUDGE SMITH: Well, I have a Notice of Violation
12 and Proposed Imposition dated August 22nd. Then the
13 actual imposition dated October 31st, 1984 is Attachment 9
14 to Exhibit 3.

15 MS. CUOCO: Attachment 11 is the Imposition Order,
16 Judge Smith. Attachment 9 is the August 22nd document.
17 It's just before Mr. Reich's response.

18 JUDGE SMITH: I was looking at the file that
19 Mr. Burns had sent over at the beginning of the case. And
20 it's all recreated here. All right. I have it.

21 What is the August 22nd, 1984 Attachment 9?

22 MS. CUOCO: That was Attachment 9, yes.

23 JUDGE SMITH: Mr. Reich's letter of September 6th,
24 1984 is Attachment 10?

25 MS. CUOCO: That's correct, to Staff Exhibit 3.

1 JUDGE SMITH: And as you noted before, the letter
2 of October 31st, forwarding the penalty and Notice of
3 the Order Imposing Penalty is 11.

4 MS. CUOCO: That's correct.

5 JUDGE SMITH: Okay. Mr. Reich.

6 MR. REICH: Your Honor, I'm referring to this,
7 because when notified that the Civil Penalty was going to be
8 assessed against my company, I noted that I had a chance to
9 review this before it could be released to the press, and
10 I had a number of days to do this. I was notified by
11 telephone, I believe it was by Mr. Hooker and Mr. Kane,
12 about the number of days that I had.

13 I also told them at that time that I
14 personally hadn't received the order, and within this order,
15 it states that there is not enough time to properly review
16 the violations before its release to the press, that I
17 could make a verbal request, which I did at that time.

18 MS. CUOCO: Judge Smith, excuse me. I'm confused
19 as to which document Mr. Reich is referring to. Mr. Reich,
20 could you identify that for me?

21 MR. REICH: Notice of Violation and Proposed
22 Imposition of Civil Penalty.

23 MS. CUOCO: What is the date of that document?

24 MR. REICH: The date is August 22nd.

25 MS. CUOCO: Thank you.

1 BY MR. REICH:

2 Q The question I have here, Your Honor, is I made
3 a verbal request--First of all, Mr. Hooker, was that phone
4 conversation on the day you notified me of the Civil
5 Penalty, was it recorded?

6 A There is a memo file to the telephone conversa-
7 tion.

8 Q Was the conversation recorded?

9 JUDGE SMITH: Electronically recorded?

10 MR. REICH: Yes.

11 THE WITNESS: No.

12 BY MR. REICH:

13 Q Did you place the call to me, or did I call you?
14 Do you remember that?

15 A I would have to read the memo. It's been a year.

16 Q Okay. You know, if it's all right, I can--

17 A I believe you were contacted in North Dakota.

18 Q And then I returned the call. Is that the way it
19 was?

20 A I think.

21 Q I guess that's immaterial. The fact is that the
22 reason this phone call was made was because I was to be
23 notified that I had ten days to respond to either admit or
24 deny these violations before it would be released to the
25 press, and that a time extention could be granted if I

1 requested it. The request was made,--Was it made in that
2 conversation?

3 A There was one conversation that the package was
4 coming to you. There was a later conversation at a time
5 after you requested additional information, at a later time,
6 for a response to the package.

7 Q I guess the response is the one I'm referring to.

8 A Yes, the response is your written response to
9 the package that was presented to you.

10 Q No, that's not what I'm referring to. I'm refer-
11 ring to the call. When you notified me that I was being
12 imposed with a Civil Penalty. Do you notify people that--
13 of their rights when they are imposed with a Civil Penalty?

14 A There was some wording as to the effect that's
15 in the memo. You're told--It's paraphrased to what your
16 rights are.

17 JUDGE SMITH: I wonder if we can't get to the
18 point a little bit more directly.

19 MR. REICH: Okay.

20 JUDGE SMITH: I think it's been Mr. Flack's
21 testimony where it is explained--and this is consistent with
22 my understanding too, that you were given a five-day period
23 not to respond to the Notice of Penalty--I mean the Notice
24 of Violation and Imposed Order, not for that purpose. You
25 were given much more time than that.

1 MR. REICH: Yes.

2 JUDGE SMITH: He's given a five-day notice so
3 that you will be prepared, you will not be surprised as
4 happens sometimes when a newspaper reporter calls you up
5 and he knows before you do that an action has been taken
6 against you. It is a courtesy, as I understand it. And as
7 I understand from Mr. Flack's testimony, a courtesy, and not
8 a legal requirement. Because the law does require that
9 the agencies of the Federal Government publish as fast as
10 they possibly reasonably can, the official business.

11 This is an open government, and they are
12 required to make that information public. Now, you seem
13 to, in your comments, you seem to be confusing the period
14 of time which you were given to take a legal answer or a
15 legal response, to the five-day courtesy notification.
16 What I would like for you to do is get to the point, tell
17 me whether you understand the distinction, and come directly
18 to the point as to why you think that you have been
19 prejudiced in this case.

20 MR. REICH: Okay. I will. It was my understand-
21 ing that before they released this to the press, that I had
22 to be notified before these violations were released to the
23 media; that I had to be notified, which I was, and that I
24 also had the right to oppose that and to ask for an
25 extention before it be released to the press.

1 JUDGE SMITH: Well, I can't find that in any of
2 the papers, and I'm wondering if you'll drill in on that
3 point and tell us first, how have you been prejudiced by the
4 five-day notification, five-day delay?

5 MR. REICH: For the fact that I wasn't there to
6 receive the actual Civil--the Notification of the Civil
7 Penalty.

8 JUDGE SMITH: Okay.

9 MR. REICH: And I was off on a job site. I was
10 notified by telephone. I had no way of actually reading it.

11 In the phone conversation, they told me the
12 penalty was going to be imposed. And I didn't want this
13 released to the media because of adverse publicity. And at
14 that time, they said that if I denied violations, that I
15 had a chance to respond before it was released to the media.
16 It was a certain amount of time that I had to respond.

17 JUDGE SMITH: Who told you that?

18 MR. REICH: This was in the conversation with
19 Mr. Hooker. And I believe the other person was Mr. Kane.

20 JUDGE SMITH: All right. Then go on from there.

21 MR. REICH: Okay. At that time, I made a verbal
22 request for a time extension.

23 JUDGE SMITH: A time extension for what?

24 MR. REICH: To evaluate the--

25 JUDGE SMITH: A time extension in the time before

1 they released it to the press?

2 MR. REICH: To the press, yes, Your Honor.

3 JUDGE SMITH: Not an extension of the time in
4 which you may make your legal answer, your legal response
5 to the Notice of Violation?

6 MR. REICH: Right. It was to the time before it
7 be released to the press.

8 JUDGE SMITH: All right. Now, you asked for that.

9 MR. REICH: Yes.

10 JUDGE SMITH: And you didn't get that?

11 MR. REICH: No.

12 JUDGE SMITH: How have you been hurt?

13 MR. REICH: By adverse publicity, I wasn't able to
14 respond to defend myself in the violations that they
15 alleged I committed.

16 JUDGE SMITH: Respond to who?

17 MR. REICH: To the NRC. They were going to
18 release adverse publicity, what I felt was adverse
19 publicity.

20 JUDGE SMITH: I think the proper person would be
21 Mr. Flack to answer these questions. As I read his
22 testimony, I don't think you really understand the procedure.

23 MR. REICH: Okay.

24 JUDGE SMITH: In any event, how on the last
25 analysis, how have you been hurt? In the case that I am now

1 hearing, how have you been hurt?

2 MR. REICH: Adverse publicity.

3 JUDGE SMITH: Adverse publicity.

4 MR. REICH: Right.

5 JUDGE SMITH: And how could that adverse publicity
6 have been avoided?

7 MR. REICH: By not being publicized.

8 JUDGE SMITH: You just can't win on that. The
9 law requires that the actions of the Nuclear Regulatory
10 Commission and all Federal agencies, unless it falls within
11 a very, very specific category of exceptions, must be
12 released.

13 MR. REICH: Okay.

14 JUDGE SMITH: It has to go out. This is an open
15 government. The actions of the government have to be made
16 available to the public. I really think that we can cut
17 short this. You understand that, don't you, that the actions
18 of the government must be released?

19 MR. REICH: Right, I do understand. I guess what
20 I'm looking at there is their allegations, I didn't agree
21 that they were completely true, and it was going to be
22 released to the press. And yet, they weren't true. That
23 was my reasoning behind it.

24 JUDGE SMITH: Okay. I really think--You can
25 pursue it if you wish, to a limited degree. But let me

1 advise you of this, that people are accused of horrible
2 crimes, and they are made public, and the law requires that,
3 before they have had an opportunity to defend it. That is
4 just the nature of the government's business. The Federal
5 Government and local government must make public their
6 public business. And I don't think that you have much that
7 you can do along that line.

8 MR. REICH: Okay. I'll drop that line of
9 questioning.

10 JUDGE SMITH: I just don't think you understand
11 it. Okay?

12 MR. REICH: Okay.

13 MS. CUOCO: Judge Smith, at this point, do you
14 have anymore questions for Mr. Hooker, because he's been
15 here as a witness for quite some time.

16 MR. REICH: Yes, I do have several more questions.

17 BY MR. REICH:

18 Q Mr. Hooker, this was probably omitted in my
19 questioning earlier. You're an inspector, and do you know
20 what the legal limits of radiation dosage is to a person in
21 one quarter?

22 A Yes.

23 Q What is it?

24 A In your case, 1250 miligrams.

25 Q 1250 miligrams. Did you inspect my dosimeter

1 records?

2 A Yes.

3 Q What did you find on that?

4 MS. CUOCO: Objection, Your Honor. I'm not sure
5 why this line of questioning is relevant to the violation.

6 JUDGE SMITH: I think it is, because it's in
7 your testimony.

8 MR. REICH: I'm trying to establish the fact
9 that we were very safe.

10 BY MR. REICH:

11 Q So 1250 is the legal limit per quarter. And on
12 our dosimeter records, what did you say you observed?

13 A Minimal or essentially zero.

14 Q Zero? Was it zero?

15 A (Witness nods head.)

16 Q For all people that are concerned here?

17 A Yes.

18 JUDGE SMITH: I did have a question along that
19 line. Were you satisfied that those records were properly
20 maintained?

21 THE WITNESS: Yes.

22 MR. REICH: Can I--I don't think I have anymore
23 questions at this time. Can I reserve the right to recall
24 questions of Mr. Hooker, later, if they arise?

25 JUDGE SMITH: If other information is developed

1 which we haven't covered, or if you legitimately have
2 forgotten something, then we might. But the better thing
3 for you now to do is to ask him what you want to ask him
4 now. I'll have some questions myself of him that might
5 suggest others to you.

6 MR. REICH: Okay. If I can reserve that right
7 to recall him, I would rather do that and--

8 JUDGE SMITH: If you have questions in mind right
9 now, you can--

10 MR. REICH: I don't right now, Your Honor.

11 JUDGE SMITH: I have a few questions I would like
12 to ask.

13 MS. CUOCO: Judge Smith, the staff of course
14 would like to redirect. Would you prefer to ask your
15 questions first?

16 JUDGE SMITH: I think it would be better if I
17 had mine, and then you'll have your redirect.

18 MS. CUOCO: Thank you.

19 EXAMINATION

20 BY JUDGE SMITH:

21 Q You stated someplace in your testimony that with
22 the device that you took with you to Arlington Drive, that
23 you noted minimal activity. And I believe your testimony
24 now is--

25 A Well, it's minimal,--essentially minimal, zero,

1 minimal detected on the instrument that was being used.

2 Q Did the instrument detect any activity?

3 A No.

4 Q So that was what you contended by that.

5 A Mm-hmm.

6 Q What significance did you give to the fact that
7 there are two vans in which the sources were stored?
8 Do I understand that correctly?

9 A There were two vans.

10 Q And one source was stored in each van?

11 A Yes.

12 Q Did you inquire into that phenomenon, how it
13 might infer from that is that it was regular rather than
14 unusual practice, that the two sources are used at
15 different places?

16 A No.

17 Q You don't get that from--at least by different
18 people?

19 A The sources were used by different people.

20 Q You don't infer that from the fact that there were
21 two vans, though?

22 A I have read just by way of background information--
23 and I would like to tell the parties this--the Commission's
24 proposed rule on logging regulations, because I just
25 happened to come across it, and I wanted to understand what

1 was happening here. And from that, it seems to me we're
2 dealing with a very low activity level. Is that the case?

3 A Correct.

4 JUDGE SMITH: Is that right, Mr. Flack?

5 MR. FLACK: When you say radioactivity level,
6 the amount of radioactivity?

7 JUDGE SMITH: Yes.

8 MR. FLACK: The real problem with the sources is
9 not the external radiation. The real problem is when you
10 get into, you have leaks from the sources. They are
11 ruptured in some way, and you have contamination. Because
12 this material is material similar to plutonium, and if you
13 get the material inside of your body, then it can be a real
14 hazard that can add problems with calibration of his survey
15 instrument and other sorts of things. This is the area
16 that you would be worried about. It's not the external
17 radiation. It's the internal, when you rupture the source
18 and you have contamination and you also have problems with
19 the leak testing.

20 JUDGE SMITH: Okay. I did not understand that.
21 That was one of the things I had hoped to hear from you,
22 was the actual scientific significance of the facts here.
23 BY JUDGE SMITH:

24 Q Did you understand the license to permit storage
25 of the--any source in the vehicles?

1 A Yes. That's a mode of transportation, also;
2 mode of storage.

3 Q That's acceptable?

4 A Yes.

5 Q I notice one of your violations, your dates on
6 Page 14, you refer to a use in Utah. Does any aspect of
7 his license or his 241 extension cover the State of Utah?

8 A No.

9 JUDGE SMITH: I'll ask you to comment on that,
10 then, Mr. Reich.

11 MR. REICH: No, it doesn't, Your Honor.

12 BY JUDGE SMITH:

13 Q I think you indicated earlier that the clam shell
14 device is regarded as an acceptable shipping container. It
15 is an extra container, not a part of the tool. Is that
16 also suitable for a storage container?

17 A Yes, a transport container is also suitable for
18 a storage container.

19 JUDGE SMITH: Okay. That's all I have.

20 MS. CUOCO: Judge Smith, I would like to conduct
21 some redirect. May I have a few moments to review my notes?

22 JUDGE SMITH: Sure. Let's see, it is 11:30,
23 local time. This might be--Would you like to take a lunch
24 break, or--

25 MS. CUOCO: Perhaps. I don't have a great deal

1 of redirect for Mr. Hooker, so I would suggest we could
2 finish with Mr. Hooker, and then we could take a lunch
3 break and pick up with Mr. Flack after that. Could I have
4 five or ten minutes, then?

5 JUDGE SMITH: Well, if you're going to take ten
6 minutes or so, we might as well just go ahead and--

7 MS. CUOCO: Let me take a very short period of
8 time to review my notes and consult with Mr. Burns, and
9 it will be very brief.

10 (Off the record.)

11 REDIRECT EXAMINATION

12 BY MS. CUOCO:

13 Q Mr. Hooker, was your testimony prepared on the
14 basis of your recollections of field notes?

15 A Yes.

16 Q Did you have a chance to compare your testimony
17 after its filing in early June to Mr. Reich's Utilization
18 Logs as you were preparing for this hearing?

19 A No.

20 Q You didn't have a chance to compare--After your
21 testimony was filed in July, did you have a chance to
22 compare your testimony to Mr. Reich's Utilization Logs?

23 A Yes.

24 Q Yes?

25 A Yes.

1 Q Does the information that you observed when you
2 had a second opportunity in July to review Mr. Reich's
3 Utilization Logs, does that substantially conform with
4 dates that are in your inspection notes as to usage of the
5 material?

6 A Relative, yes.

7 Q Let me ask you about the Form 241 issue. Let
8 me ask you this, what kind of material did the Reich
9 Geo-Pgysical license in effect in June, 1984,--

10 A CZM-137 Source.

11 Q What kind of material did you observe when you
12 conducted your inspection at Reich Geo-Physical?

13 A The location of the americium 241 sources.

14 Q And the location of that, of those sources, was
15 where?

16 A At the address in Billings, Montana, listed on
17 the license.

18 Q Mr. Hooker, the NRC-Form 241 filed by Mr. Reich
19 in 1981, do you recall the address listed on that form,
20 where material was going to be used?

21 MR. REICH: Excuse me, Your Honor. I think we
22 already established the fact that that material is not used
23 at that address.

24 JUDGE SMITH: She has a right to make her point,
25 whatever it is.

1 Do you mean that it's established by you?

2 MR. REICH: Well, it's been established that
3 well-logging operations are done in the field, and not at
4 the address of business.

5 JUDGE SMITH: Let's let Ms. Cuoco make her point.

6 BY MS. CUOCO:

7 Q Did you notice the address on the form 2--

8 A Billings, Montana.

9 Q From your review of the Utilization Logs held
10 by Mr. Reich for the period 1981, where did you observe
11 that material was used in 1981? What locations?

12 A It was used in Wyoming and Montana.

13 Q Could you speak up?

14 A And in Utah.

15 Q And was there usage in Utah?

16 A To be sure, I've got to look at the notes. I
17 believe, yes, in Utah.

18 Q Mr. Hooker, let me refresh your recollection.
19 This is Staff Exhibit 1. This is the copy of the Utiliza-
20 tion Logs of Reich Geo-Physical for the 1981 time period.
21 What locations was there usage in; did Mr. Reich use
22 material in in 1981?

23 A Wyoming and Decker, Montana, Emory, Utah.

24 Q What material did he use in those locations?

25 A Americium 241 sources.

1 Q Did Mr. Reich file a Form NRC-241 in 1982?

2 A No.

3 Q Did Mr. Reich file a Form NRC-241 in 1983?

4 A No.

5 Q Mr. Hooker, how were NRC inspections of transpor-
6 tation regulations conducted in 1981?

7 A The NRC was just starting to conduct transporta-
8 tion regulations during that period of time.

9 Q The NRC was--

10 A They were getting involved with conducting DOT
11 regulations. They were not fully--At that time, they were
12 not fully implemented for the full inspection for the DOT
13 inspection.

14 Q When was the inspection program for the DOT regu-
15 lations fully implemented?

16 A It was probably toward the end of 1981, 1982.
17 In 1982, the program got off in more full swing of
18 inspecting DOT regulations.

19 Q Were NRC licensees ever notified of DOT require-
20 ments that are placed upon them?

21 A There are bulletins that were published in
22 November of '82. They went to all the licensees in the form
23 of the DOT requirements for transporting of licensed
24 material.

25 Q Would this type of bulletin been provided to

1 Mr. Reich?

2 A It went to all NRC licensees.

3 Q Do you recall what that bulletin contains with
4 respect to the kind of labels that had to be on radioactive
5 sources of the type possessed by Mr. Reich?

6 A The bulletin informed the licensee of the
7 required labeling and marking for the type of container.

8 Q What kind of labels should have been on
9 Mr. Reich's sources?

10 A DOT Type A.

11 Q Was there any other kind of marking that should
12 have been on there?

13 A Well, DOT Type A radioactive material. Transport
14 radioactive material is labeled.

15 Q Was there a specific label that should have been
16 on in addition to the USA Type 1? Was there some other
17 requirement?

18 A The DOT radioactive transport label.

19 Q And what would that label have said?

20 A The label would have indicated the transport
21 group or the transport--the color of the label, which is
22 a white one, two or three, that is identified by the
23 radiation level of the material in the container, and it
24 would have the activity, the quantity of the material on
25 the label. It's a diamond-shaped label.

1 Q And what kind of label would you have expected
2 to see on americium sources like that possessed by
3 Mr. Reich?

4 A A white one.

5 Q Mr. Hooker, do you gain any personal financial
6 benefit from conducting NRC inspections?

7 A No.

8 MS. CUOCO: That's all I have, Your Honor.

9 JUDGE SMITH: What is the regulatory foundation
10 for your charge that the improper labeling or inadequate
11 labeling was on the material, the sources?

12 THE WITNESS: There is a license requirement that
13 tells the licensee to transport under the DOT Part 71.

14 JUDGE SMITH: That's in the license?

15 THE WITNESS: That's in the license. 71 notifies
16 the licensee to transport under DOT regulations.

17 JUDGE SMITH: And DOT regulations changed after
18 the license was issued.

19 THE WITNESS: There are some changes, only in
20 numbers. The requirements were still the same.

21 JUDGE SMITH: What was the purpose of the ANA
22 Bulletin?

23 THE WITNESS: To further inform licensees of
24 transportation requirements, because the NRC was identifying
25 a large number of violations and DOT requirements, and there

1 was an information notice that was put out to assist the
2 licensees in fully understanding what was required of them
3 under the DOT requirements of the transporting Type A
4 quantities of material.

5 JUDGE SMITH: What is your understanding as to
6 americium, of the sources that they are allowed to have
7 under the North Dakota license? I'll put it in context.
8 I notice that the Form 241 filed in 1981 eludes to 250.5
9 millicuries of americium with a reference to the North
10 Dakota license. But your inspection demonstrates a
11 continued use of 125 millicuries source. Am I correct in
12 that observation?

13 THE WITNESS: That was a 25 millicuries source.

14 JUDGE SMITH: What is your understanding as to
15 the North Dakota license?

16 THE WITNESS: The North Dakota license itself
17 at that time authorized him to operate in North Dakota.

18 JUDGE SMITH: At what? What would he use in
19 North Dakota?

20 THE WITNESS: Americium 241 sources.

21 JUDGE SMITH: And what activity level?

22 THE WITNESS: I would have to read over--I think
23 it was two sources, not enough to exceed 50 millirems, I
24 believe.

25 JUDGE SMITH: Is that right?

1 THE WITNESS: Mm-hmm.

2 JUDGE SMITH: So there is no violation there.

3 RECROSS EXAMINATION

4 BY MR. REICH:

5 Q Now, it looks as though--Do you feel that we
6 neglected to comply with the DOT regulations; that it was
7 our fault?

8 A Well, yes. That was one reason the information
9 was put out, to try to further inform everybody of the
10 requirements.

11 Q But yet in the inspection, we weren't cited for
12 not--you know, I don't see how you can say it was
13 neglect on our part.

14 A It was cited as a violation that was--

15 Q It wasn't cited as a violation of the 1981
16 inspection.

17 A I also said that in 1981, the inspection program
18 was just getting started for DOT regulations. The NRC
19 was not inspecting violations--was not to the extent that
20 they have done in later years.

21 Q I notice that you commented on our 1981 activities.
22 And we're getting back into the same thing. I don't know
23 if things have been established there, that we were licensed
24 to use those americium sources. Has that fact been
25 established?

1 JUDGE SMITH: The evidence I have is that you
2 have taken your 241 Form, filed in 1981, as a belief that you
3 have extended your NRC non-agreement state license to that
4 extent.

5 MR. REICH: Yes.

6 JUDGE SMITH: Now, you're asking if I have ruled?

7 MR. REICH: Not if you have ruled; if it's clear
8 to everyone that--

9 JUDGE SMITH: I think that's very much a dispute.
10 I don't want to speak for Ms. Cuoco, though.

11 MR. REICH: I don't have any questions right now,
12 Your Honor.

13 JUDGE SMITH: Do you have anything further?

14 MS. CUOCO: No, I don't, Judge Smith.

15 JUDGE SMITH: It's seven minutes until 12. How
16 much time do you need for lunch? Shall we make it rather
17 brief? 45 minutes, and then we'll return here, say, at
18 20 until one?

19 MS. CUOCO: Judge Smith, that's fine with me.

20 (Whereupon, the hearing was recessed until the
21 hour of 1:00 p.m.)

22 . . .

23 . . .

24 . . .

25

AFTERNOON SESSION.

MS. CUOCO: Judge Smith, at this time I would like to note for the record that during the recess the staff had an opportunity to label the attachments to Staff Exhibit 3, and each of those attachments is labeled Attachment 1 through 11 as appropriate. We have also labeled a copy of Staff Exhibit 3 which was provided to Mr. Reich in that manner, and Mr. Reich should be able to find it with the materials over there at his area.

We have also corrected the -- made the corrections in the testimony of Charles A. Hooker, and we have provided them to you as well.

JUDGE SMITH: You may proceed.

EDWIN D. FLACK

was examined and testified as follows:

DIRECT EXAMINATION

Q (By Ms. Cuoco:) Also for the record, Edwin D. Flack is sitting in the witness chair. Mr. Flack, could you please state your position with the NRC?

A Yes, I'm a senior enforcement specialist of the enforcement staff in the office of Inspection and Enforcement, and I have been in that position since January 1982.

Q I am providing to you a document and also at the same time providing three copies of that document to Judge

1 Smith and a copy of that document to Mr. Reich. Could you
2 please read the title of the document for me?

3 A Testimony of Edwin D. Flack.

4 Q Did you prepare this testimony in consultation with
5 counsel?

6 A Yes.

7 Q Let me direct your attention to the Attachment 1 of
8 this testimony, which immediately precedes page 20. Could
9 you please identify Attachment 1?

10 A These are my professional qualifications.

11 Q Do you have any corrections or additions to those
12 professional qualifications?

13 A No.

14 Q Do you accept those professional qualifications as
15 your professional qualifications in this proceeding?

16 A Yes, I do.

17 Q Let me direct your attention to the written
18 testimony, particularly to page 3 of that testimony. Do you
19 have any corrections on page 3?

20 A Yes. As indicated on the copies, I wish to delete
21 the sentence which reads, "Escalated enforcement action
22 includes notice of violation for severity levels I, II, and
23 III, civil penalties and orders."

24 Q What is the reason for making that --

25 MR. REICH: Excuse me, could you tell me where you

1 are at?

2 THE WITNESS: It should be marked on page 3 of your
3 copy.

4 MR. REICH: Question number or answer number?

5 THE WITNESS: Question No. 9, answer to question
6 No. 9 should be crossed out. Just the words, "Escalate
7 enforcement action..." Do you see it, Mr. Reich?

8 MR. REICH: Yes.

9 Q (By Ms. Cuoco:) What is the reason for making that

10 A During redrafting we noted we had left that in, and
11 it better clarifies the answer without that sentence in it.

12 Q Let me direct your attention to page 11. Do you
13 have any corrections on that page?

14 A Yes. As indicated on page 11, question 27, the
15 answer to it in the fourth line, the next to the last word,
16 "then" should be changed to "be." It was a typographical
17 error.

18 Q Do you have any other changes to your testimony?

19 A No, I do not.

20 Q Is this testimony as written true and accurate to
21 the best of your knowledge and belief?

22 A Yes.

23 Q Do you adopt this testimony as your testimony in
24 this proceeding?

25 A Yes, I do.

1 Q Is this same testimony you would provide if you
2 were called upon to testify orally at this hearing today?

3 A Yes, I would.

4 MS. CUOCO: Judge Smith, I move the testimony of
5 Edwin D. Flack into evidence.

6 JUDGE SMITH: Do you have any objections?

7 MR. REICH: No, Your Honor.

8 JUDGE SMITH: The testimony is received and will be
9 bound into the transcript at this point.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

In the matter of

REICH GEO-PHYSICAL, INC.
1019 Arlington Drive
Billings, Montana 59101

Docket No: 030-14821
License No: 25-18304-01
EA 84-78
ASLBP No. 85-508-0107

TESTIMONY OF EDWIN D. FLACK

Q1. Please state your name and position with the NRC.

A. My name is Edwin D. Flack. I am employed by the United States Nuclear Regulatory Commission as a senior enforcement specialist in the Enforcement Staff of the Office of Inspection and Enforcement. I have held this position since January 1982.

Q2. Mr. Flack, please state your professional qualifications.

A. A statement of my professional qualifications is attached as Attachment 1 to this testimony.

Q3. Mr. Flack, what are your responsibilities as a senior enforcement specialist?

A. I report to and assist the Director of the Enforcement Staff in developing and implementing NRC's enforcement program. This assistance includes preparing criteria, instructions and guidance for carrying out the NRC's enforcement objectives, especially in the area of health

physics. My duties include reviewing escalated enforcement actions originally prepared by the NRC regional offices to ensure technical adequacy and conformance with established policy and criteria.

Q4. What is the purpose of this testimony?

A. The purpose of this testimony is to describe the rationale for imposing a civil penalty of \$1600 against Reich Geo-Physical, Inc.

Q5. Where are the NRC's enforcement practices set forth?

A. 10 CFR Part 2, Appendix C (1985), which was published in the Federal Register on March 8, 1984, sets out the Commission's "General Statement of Policy and Procedure for NRC Enforcement Actions."

Q6. What NRC offices are responsible for implementation of the Enforcement Policy?

A. The Office of Inspection and Enforcement (IE) is responsible for implementation of the Enforcement Policy. In addition, certain enforcement actions are delegated to the regional offices.

Q7. How are enforcement responsibilities allocated between IE and the regional offices?

A. The regional offices conduct inspections and make an initial determination whether enforcement action is appropriate for violations of NRC requirements, and if so, what type of action is appropriate. The regional offices also refer certain enforcement matters to IE for review and concurrence.

Q8. How did you first become involved with the Reich Geo-Physical case?

A. I was assigned by the Director of the Enforcement Staff to review and process this case, which was referred to IE for review by the NRC Region IV office.

Q9. Why was the Reich Geo-Physical case referred to the Office of Inspection and Enforcement?

A. Under the guidance provided to the regional offices by IE on implementation of the Enforcement Policy, all enforcement actions involving severity level III or higher violations are to be forwarded to IE for review. ~~Escalated enforcement action includes notices of violation for severity levels I, II and III, civil penalties and orders.~~ The Region IV enforcement proposal regarding Reich Geo-Physical met these criteria.

Q10. Is IE bound by an enforcement proposal from a regional office?

A. No. IE independently evaluates each case referred to it and, in consultation with the regional office, determines what enforcement action is most appropriate for the situation.

Q11. How did you go about your review of the Reich Geo-Physical enforcement action as proposed by Region IV?

A. My approach to the proposed Reich Geo-Physical enforcement action was essentially the same approach I use in all cases. I reviewed the proposed action against the findings contained in the inspection report and other background information forwarded to IE by Region IV with the enforcement proposal. I conducted this evaluation to ensure that

sufficient information was identified during the inspection and documented in the inspection report to support the enforcement proposal. I also evaluated Region IV's enforcement recommendation to ensure that the proposed action was appropriate in accordance with the Enforcement Policy, consistent with similar cases, and commensurate with the significance of the violations.

Q12. What did your review of the inspection report and background documentation forwarded to IE by Region IV indicate?

A. From my review, I determined that an inspection was conducted by Region IV inspector Charles A. Hooker on June 20, 1984, at the Reich Geo-Physical facility in Billings, Montana. My review of the inspection report describing that inspection indicated that Mr. Hooker had discovered six apparent violations of NRC requirements, two of which were repeat violations from the last NRC inspection.

Q13. What were the six violations identified during the NRC inspection?

A. The six violations identified were: 1) possession and use of byproduct material not authorized by the license, 2) use of radioactive material by individuals not listed as authorized users on the license, 3) failure to calibrate survey meters at the required interval, 4) storage of material at an unauthorized location, 5) failure to conduct leak tests of sources at the required interval, and 6) failure to comply with transportation requirements.

Q14. Which apparent violations were identified as repeat violations?

A. The possession and use of material not authorized by the license and the failure to calibrate survey meters were identified as repeat violations from the last NRC inspection.

Q15. From your review of the inspection report and other background information, were you satisfied that each of the requirements identified during the inspection had been violated by Reich Geo-Physical?

A. Yes.

Q16. What are the enforcement options available under the Enforcement Policy?

A. Under the Enforcement Policy, there are three principal enforcement sanctions: 1) the notice of violation, 2) the civil penalty, and 3) the order. The notice of violation is a written notice setting forth one or more violations of a legally binding requirement. It is the standard method for formalizing the existence of a violation and is normally the only enforcement action taken unless the criteria for a civil penalty or order are met. The civil penalty is a monetary penalty imposed for violations of legally binding requirements. The decision to impose a civil penalty is tied to the categorization of the associated violation.

Section V B. of the Policy provides that, in general, civil penalties are imposed for Severity Level I violations, imposed absent mitigating circumstances for Severity Level II violations, are considered for Severity Level III violations and may be imposed for Severity Level IV violations similar to previous violations for which the licensee did not take effective corrective action.- An order is a written NRC directive

which may modify, suspend or revoke an existing license in a manner which is considered appropriate in view of the circumstances. Under the policy, orders may be issued in lieu of or in addition to civil penalties.

Q17. How are violations categorized under the Enforcement Policy?

A. The Enforcement Policy categorizes violations in terms of five levels of severity representative of their relative importance and safety significance within each of eight activity areas. Within a given activity area or "supplement" of the policy, examples are provided for the five severity levels of violations. Severity Levels I and II are of very significant regulatory concern. Severity Level III violations are of significant concern. Severity Level IV violations are of more than minor concern since, if left uncorrected, these violations could lead to more serious concerns. Severity Level V violations are of minor concern.

Q18. Under which supplements do the violations identified during the Reich Geo-Physical inspection fall?

A. Five of the six violations identified during the inspection involve practices associated with the Licensee's conduct of well-logging operations and are properly categorized under Supplement VI of the Enforcement Policy, "Fuel Cycle and Materials Operations." A sixth violation involving the transportation of well-logging sources is properly categorized under Supplement V of the Policy, "Transportation."

Q19. Considered individually, what would be the severity level for each violation identified during the Reich Geo-Physical inspection?

A. Of the six violations, two fit within examples provided in Supplement VI for Severity Level III violations. The Licensee's unauthorized possession and use of americium-241 sealed sources fits example C(2) of Supplement VI of the Enforcement Policy, which is the "possession or use of unauthorized equipment or material in the conduct of licensee activities which degrades safety." The use of licensed material by individuals not listed as authorized users on the Reich Geo-Physical license falls within example C(4) of Supplement VI of the Enforcement Policy, which is "the conduct of activities by a technically unqualified person." Under the Enforcement Policy, each of these examples is representative of a Severity Level III violation for which a civil penalty may be imposed. The other violations identified during the inspection concerning failure to calibrate survey instruments at the required interval, failure to conduct leak tests of sealed sources at the required interval, and storage of licensed material at an unauthorized location, could each be considered separately as Severity Level IV violations under Supplement VI of the Enforcement Policy. The Licensee's failure to comply with transportation requirements also constitutes a Severity Level IV violation under Supplement V of the Policy.

Q20. What are the safety concerns associated with Reich Geo-Physical's possession of material not authorized by its NRC license?

- A. The possession and use of unauthorized material is a significant safety concern because of the possibility that the Licensee's radiological controls may be inadequate to protect against unnecessary radiation exposures to either the individual user of the material or members of the public. NRC, through its licensing function reviews a licensee's radiation safety program prior to permitting use of radioactive material to ensure that this program is adequate.

Although Reich Geo-Physical held a license in the state of North Dakota for the americium-241 sealed sources during the time period covered by the NRC inspection, the NRC has a substantial interest in ensuring that radioactive material authorized by agreement states is properly used in NRC jurisdictions. Accordingly, NRC requires agreement state licensees to make a notification of activities they plan to conduct in NRC jurisdictions under the auspices of an agreement state license at least three days prior to initiation of those activities. The NRC inspection indicated that Reich Geo-Physical conducted activities without NRC approval in the NRC regulated states of Wyoming and Utah in 1981, 1982 and 1983, and in Montana in 1982 and 1983. The failure to notify the NRC is more than an administrative oversight. The reason for the notification is to provide the NRC with an opportunity to inspect agreement state licensees to ensure that radioactive material is being handled in a safe manner. By failing to provide notice to the NRC of activities it planned to conduct in NRC jurisdictions, Reich Geo-Physical prevented NRC from monitoring its activities to ensure that proper radiological controls were implemented when radioactive material was used.

Q21. What are the safety concerns associated with the use of radioactive material by individuals not listed on the Reich Geo-Physical license?

A. Use of radioactive material by unauthorized users is of significant concern to the NRC because inadequate training and knowledge of the hazards and procedures for use of radioactive material could result in unnecessary radiation exposure to either the user or members of the public. By approving authorized users, who are then named on the license, the NRC ensures that only those individuals with the requisite training, knowledge and experience are authorized to use radioactive material.

Q22. What are the safety concerns associated with the other violations identified during the Reich Geo-Physical inspection?

A. The remaining violations identified during the June inspection are of concern to the NRC because if left uncorrected they could result in more serious problems such as erroneous radiation readings, undetected leakage of radioactive material and improper emergency actions during a transportation event.

Q23. Does the Enforcement Policy require that every identified violation be assigned a separate severity level?

A. No. Section III of the Enforcement Policy provides that violations may be evaluated in the aggregate and a single severity level assigned.

Q24. Were the violations identified during the Reich Geo-Physical inspection assigned a single severity level, and if so, why?

- A. Yes. The violations identified during the Reich Geo-Physical inspection were attributable to a common cause--the Licensee's failure to exert sufficient control over licensed activities to ensure compliance with regulatory requirements. Accordingly, the six identified violations were aggregated together as one problem area, categorized at a single severity level, and assessed one civil penalty.

Q25. What was the severity level assessed for this problem area?

- A. The violations were assessed at a Severity Level II.

Q26. How was a Severity Level II reached?

- A. Assignment of this severity level was based on several factors. As I previously testified, two of the violations could stand alone as separate Severity Level III violations under Supplement VI of the Enforcement Policy and separate civil penalties could have been assessed. In addition, two of the violations had been identified to the Licensee as violations during the last NRC inspection and although enforcement action was taken at that time, the Licensee failed to take adequate corrective action to prevent reoccurrence. The Licensee was thus placed on notice that the continued use of its americium-241 sealed sources in NRC jurisdictions without amending its license or filing a Form NRC-241, and its continued failure to calibrate survey meters, violated its NRC license. The continuation of these practices over the three-year period between NRC inspections indicated that the Licensee had acted in careless disregard of NRC requirements. Section III of the Enforcement Policy provides that under circumstances

of careless disregard of Commission requirements, deception or other indications of willfulness, the severity level of a violation may be increased. In view of these circumstances, the six violations identified during the Reich Geo-Physical Inspection were evaluated as a Severity Level II problem.

Q27. Why was a civil penalty selected as the enforcement sanction?

A. Under the Enforcement Policy, civil penalties are generally imposed, absent mitigating circumstances, for Severity Level II violations, are considered for Severity Level III violations, and may even ~~be~~^{be} assessed for Severity Level IV violations. In view of this guidance, and the significance of the identified violations, both individually and when considered as one problem area, a civil penalty was assessed:

A civil penalty is particularly important in this case to emphasize the importance of compliance with NRC requirements which this Licensee seems to lightly regard. A civil penalty also provides notice to other similarly situated licensees to take whatever measures necessary to prevent similar noncompliance.

Q28. How was the civil penalty amount derived?

A. The civil penalty amount was derived using Tables 1A and 1B of the Enforcement Policy. Reich Geo-Physical falls in the category of "other materials licensees" under Table 1A. Table 1B specifies a base penalty of \$800 for a Severity Level II violation for such licensees. However, the Enforcement Policy also provides that the base civil penalty amount may be increased or decreased depending upon a consideration of the

relevant circumstances. A base penalty may be escalated for, among other things, poor prior performance and the duration of a violation. In this case, the base civil penalty was escalated by the maximum amount of 100 per cent, resulting in a penalty of \$1600 in view of Reich Geo-Physical's poor enforcement history and the length of time over which the noncompliance occurred. When the NRC last inspected Reich Geo-Physical in 1981, a Notice of Violation was issued for the unauthorized possession and use of byproduct material and the failure to calibrate survey meters at the required intervals. The Licensee agreed at that time to discontinue use of the unauthorized sources. This commitment was confirmed to Reich Geo-Physical in a letter from the NRC Region IV dated May 21, 1981. Shortly thereafter, in a letter dated August 11, 1981, Reich Geo-Physical indicated that it had requested license amendment forms to include its americium-241 sealed source on its NRC license. However, the license was not amended and the inspection revealed that americium-241 sealed sources had been used throughout the three-year period between NRC inspections. In addition, the inspection revealed that the Licensee had continued its practice of failing to calibrate its survey meters at the required intervals.

Q29. When and in what manner was the Licensee made aware of the NRC's enforcement decision?

A. On August 22, 1984 a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$1600 was issued by the NRC Region IV Administrator to Reich Geo-Physical, Inc. In addition, it is standard practice for the NRC to notify a licensee by telephone when a proposed

civil penalty is about to be issued. I understood that the NRC Region IV office notified the Licensee in this case.

Q30. Did Reich Geo-Physical respond to the Notice of Violation, and if so, in what manner?

A. Yes. On September 8, 1984, Reich Geo-Physical responded to the Notice of Violation and Proposed Imposition of Civil Penalty in a written response to the NRC.

Q31. Did you review the Reich Geo-Physical response?

A. Yes.

Q32. What arguments did the Licensee make in its response with respect to the violations?

A. With respect to whether the violations occurred, the Licensee admitted that: 1) some unauthorized use of radioactive material occurred; 2) use of radioactive material by unauthorized personnel had occurred; and 3) survey meters were not calibrated at the intervals required by the NRC license. The Licensee provided an explanation for each violation. With respect to unauthorized use, the Licensee stated that it had filed an NRC-241 form that was approved and although it had requested license amendment forms from the NRC, these were not sent. Regarding the use of radioactive material by unauthorized personnel, the Licensee indicated that Mr. Reich was often present when material was used and that Mr. Reich trained those individuals in the use of radioactive material. The Licensee attributed the failure to calibrate survey meters to a cost

cutting measure. The Licensee also acknowledged that its cesium source was not stored at its Arlington Drive location, and that leakage tests were not conducted for certain sources. However, the Licensee contested the transportation violations, arguing that at the time of purchase, it was the manufacturer's responsibility to supply the purchaser with the labels and markings necessary for compliance with Department of Transportation requirements.

Q33. Did the Licensee protest the civil penalty in its response, and if so, on what basis?

A. Yes. The Licensee requested complete mitigation of the civil penalty for the following extenuating circumstances: (1) the violations were promptly corrected, (2) the Licensee had suffered from harsh publicity, (3) the Licensee had been financially penalized through a loss in revenue, and (4) inadequate time was allowed to review the Notice of Violation and Proposed Imposition of Civil Penalty before the media was notified.

Q34. Did either the Licensee's explanations concerning the violations or the extenuating circumstances it raised persuade the NRC to withdraw or otherwise mitigate the civil penalty?

A. No.

Q35. What is NRC's response to the Licensee's argument regarding the unauthorized possession of radioactive material?

- A. Although it is true, as the Licensee stated, that a Form NRC-241 had been filed by Reich Geo-Physical, the authorization granted by NRC for Reich Geo-Physical to conduct activities under its North Dakota license extended only to activities conducted in Montana for the period June 20 to December 20, 1981. NRC inspection indicated that activities were conducted in Wyoming and Utah in 1981, 1982 and 1983, and in Montana in 1982 and 1983 without NRC approval.

The significance of the failure to file a Form NRC-241 is more than an administrative oversight. NRC's purpose in requiring the filing of these forms is to ensure that radioactive material is being used in a manner which does not pose an undue risk to the public health and safety. The NRC is concerned that adequate radiological controls not only exist, but are being implemented when an agreement state licensee is working in NRC jurisdictions. It is for this reason that the NRC requires agreement state licensees to file NRC-241 forms at least three days prior to working in NRC jurisdictions. The filing of a Form NRC-241 puts the NRC on notice that radioactive sources will be used in NRC states, which provides the NRC with an opportunity to inspect these licensees to ensure that radioactive material is being handled in a safe manner. By failing to file NRC-241 forms for activities conducted in NRC jurisdictions, Reich Geo-Physical prevented the NRC from monitoring its use of radioactive material. Thus, the NRC had no way of ensuring that Reich Geo-Physical implemented proper radiological controls when using the radioactive material. In its response, the Licensee also asserted that the NRC had failed to forward the license amendment forms

it had requested. The Licensee's continued use of unauthorized material, particularly since this activity had been emphasized to the Licensee as a serious matter, and was the subject of previous enforcement action, is inexcusable. At a minimum, the Licensee should have followed up on its request for amendment forms. There is no indication from the Licensee that it did so.

Q36. What is NRC's response to the Licensee's argument that it had trained those individuals who used radioactive material and that the authorized user was often present when material was used?

A. Reich Geo-Physical's license does not permit the authorized user to train individuals to qualify them as authorized users. Thus, allowing individuals whose kind and quality of training was unknown to the NRC to be unsupervised, independent users of radioactive material was inexcusable. Moreover, Reich Geo-Physical's license requires that licensed material be used in the physical presence of the authorized user. This license condition requires more than attendance at the work site by the authorized user. The authorized user must be physically with the individual when the radioactive material is used. It is my understanding that in response to questioning during the NRC inspection, the Licensee indicated that the authorized user did not always accompany the unauthorized individuals when radioactive material was used.

Q37. What is NRC's response to the Licensee's explanation that it failed to calibrate its survey meters in order to save money?

- A. The Licensee's explanation for failing to calibrate its survey meters cannot be condoned by the NRC. Cost cutting measures by NRC licensees which affect compliance with NRC requirements are considered serious violations.

Q38. What is the NRC's response to the Licensee's argument regarding storage of its cesium source in a more secure location?

- A. The Licensee's decision to find a more suitable location for its cesium source was not questioned by the NRC. However, the NRC's decision to authorize the Licensee to possess that source was based in part on the storage specifications the Licensee provided in its original license application. Departing from those specifications without prior approval resulted in the NRC not reviewing the new storage location. Review by NRC is necessary to ensure that the cesium source was properly stored in order to minimize the radiation risk to licensee personnel and members of the public.

Q39. What is NRC's response to the Licensee's explanation regarding its failure to leak test certain of its sources at the required intervals?

- A. Contrary to its assertion, the Licensee was not cited for failing to test its cesium source for leakage. The cesium source was not in use during the period April 15, 1981 to June 20, 1984, and the NRC agrees with the Licensee that the cesium source was not required to be leak tested. However, the americium-241 sources were placed in and taken out of use during that period and thus were required to be leak tested. The fact that leakage had never been detected from the americium sources and that misuse had not occurred does not excuse the failure to conduct

leak tests. The purpose of the testing is to ensure that the source has not been damaged in some way and radiation is not leaking.

Q40. What is NRC's response to the Licensee's argument that supplying the marking and labels required by Department of Transportation regulations is the responsibility of the manufacturer of the source containers, and not the Licensee?

A. The Licensee's argument does not consider the requirement placed on it and all NRC licensees by 10 CFR 71.5(a)--that each licensee is responsible for complying with applicable Department of Transportation (DOT) regulations. Thus, Reich Geo-Physical, as an NRC licensee, was independently responsible for ensuring that its sources were labeled and marked as required by DOT regulations.

Q41. What is NRC's response to the extenuating circumstances raised by the Licensee in requesting mitigation?

A. In response to the Licensee's argument that its prompt corrective action should be considered, it should be noted that corrective action is always required to meet regulatory requirements. Mitigation is only to be considered where the corrective action is unusually prompt and extensive. Factors to be considered in mitigating a penalty for this reason include timeliness of the corrective action, the degree of licensee initiatives and the comprehensiveness of the corrective action. Reich Geo-Physical's actions did not meet these criteria for the following reasons. A significant violation, possession of unauthorized material was brought to its attention in 1981, and enforcement action

taken. Despite its representations, the Licensee did not seek to correct the problem until 1984, when it applied for renewal of its license. The other grounds for mitigation raised by the Licensee--harsh publicity and inadequate time to review the enforcement action before media notification--are not grounds for mitigation under the Enforcement Policy, and the Licensee did not demonstrate why such factors justified mitigation in this case. In fact, the NRC customarily notifies the media when a civil penalty is proposed.

Q42. Was the Licensee made aware of the decision not to mitigate the civil penalty, and if so, in what manner?

A. Yes. On October 31, 1984, an Order Imposing Civil Penalty was issued to the Licensee. Enclosed with the Order was an Appendix setting out each of the Licensee's arguments, and the NRC's response to those arguments.

Q43. Was imposition of a \$1600 civil penalty the most severe enforcement sanction that could have been taken against Reich Geo-Physical, and if not, what other enforcement sanctions could have been taken?

A. The \$1600 civil penalty amount was not the most severe sanction that could have been taken. For example, the penalty amount could have been higher. The Enforcement Policy expresses the Commission's policy that in cases involving willfulness, flagrant NRC-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls, the Commission can apply its full enforcement authority assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of \$100,000 per violation per day.

The Licensee was made aware in 1981 that its continued possession and use of the americium sources was in violation of its license, and agreed to take certain corrective actions, yet did not alter its activities. This careless disregard for Commission requirements could have resulted in a significantly higher civil penalty than that assessed.

The NRC might have chosen not to aggregate the six identified violations into one problem area but could have considered each of the violations individually and assessed separate civil penalties for each. As I previously testified, the Licensee's activities comprise two Severity Level III violations and four Severity Level IV violations. Using Tables 1A and 1B of the Enforcement Policy, the Severity Level III violations could each have been assessed a base penalty of \$500, and escalation proposed based on the Licensee's enforcement history. This history could also have justified a penalty for the Severity Level IV violations. Daily civil penalties could also have been imposed.

The NRC might also have exercised its discretion and issued an order to show cause why the Reich Geo-Physical license should not have been revoked. In view of the Licensee's continued noncompliance over a three-year period, the most drastic enforcement sanction of license revocation may have been justified, and was considered.

PROFESSIONAL QUALIFICATIONS OF EDWIN D. FLACK

EDUCATION

FORMAL

- . A.B. Biology and Chemistry, Transylvania University, 1964
- . M.S. Health Physics, Colorado State University, 1968

OTHER

- . The Manager and Program Planning and Evaluation
- . Transportation of Radioactive Material
- . Pressurized Water Reactor Course
- . Boiling Water Reactor Course
- . Environmental Impact of Energy Generation, Nuclear and Fossil
- . Medical Use of Radionuclides
- . Calibration of Teletherapy Machines
- . Safety Aspects of Industrial Radiography
- . Health Physics Course
- . Evaluation of Laser Hazards
- . Fundamentals of Non-Ionizing Radiation

EXPERIENCE

1982 - Present

Senior Enforcement Specialist

Develops enforcement policy for implementation by IE and Regional Offices. Prepares criteria, instructions, and guidance for carrying out the enforcement policy. Reviews and processes proposed escalated enforcement actions to assure conformance to established policy and criteria. Appraises the enforcement program as carried out by Regional Offices. (NRC, IE)

1981 - 1982

Senior Health Physicist

Performed as IE appraisal expert for all Regional Offices for matters relating to radiation protection programs at reactors, fuel facilities, and material licensees. Responsible for: (1) evaluating results of inspections and investigations conducted by the Regions to determine whether there were weaknesses in the inspection program, and provided the technical expertise for changes in the inspection requirements as indicated by the evaluations; (2) evaluated inspections, investigations Regional Office activities, documentation of the inspection results, records of modules and manpower expended, and to a limited extent licensee records, to

EXPERIENCE (Cont.)

determine whether the program is adequate. This is done on a national basis to appraise the effectiveness of inspection requirements, uniform treatment of licensees and the application of enforcement sanctions. (NRC, IE)

1980 - 1981

Senior Health Physicist

Served as a senior IE staff specialist and was the NRC expert in inspection of radiation protection programs at operating reactor facilities. Planned and developed the program for inspection of radiation protection programs of operating reactors. This work encompassed the diverse areas of occupational radiation exposure programs and ALARA controls, management of control of radioactive effluents and radioactive wastes, environmental monitoring programs, and radiological emergency planning and preparedness programs of licensees. (NRC, IE)

1975 - 1980

Health Physicist

Served as a member of the radiological and environmental protection staff of the branch. Assisted in the development and improvement of inspection programs for environmental protection and effluent control activities of NRC licensees, and provided staff assistance and technical advice to the Inspection and Enforcement staff. Evaluated results of investigations, inspection, and enforcement cases. Reviewed, evaluated and provided recommendations on NRC regulations and license requirements and regulatory guides, rules, and standards as they applied to the inspection program. (NRC, IE)

1973 - 1975

Health Physicist

Analyzed and evaluated from the radiological safety and environmental protection standpoint specific portions of license applications, safety analysis reports, and environmental reports for assigned fuel cycle plants to assess the adequacy of the applicant's protection program. (NRC, NMSS)

1969 - 1973

Health Physicist

Provided radiation protection services in departments and associated labs. Massachusetts Institute of Technology, Cambridge, Massachusetts.

1965 - 1966

Laboratory Instructor

Conducted laboratories for short courses on application of radiation and radioisotopes in all disciplines of science. Oak Ridge Associated Universities, Oak Ridge, Tennessee.

1 MS. CUOCO: Judge Smith, at this time, with your
2 permission, I would like to engage in some short additional
3 direct examination of Mr. Flack.

4 JUDGE SMITH: Yes.

5 Q (By Ms. Cuoco:) Mr. Flack, are you familiar with
6 the transportation regulations which are contained in the --
7 transportation violations which are contained in the notice
8 of violation?

9 A Yes, I am.

10 Q Those violations, how important were they to
11 considering the decision to impose a civil penalty in this
12 case?

13 A They were of very little significance.

14 Q Could you expand upon that?

15 A Yes. The primary violations that we relied upon
16 for the civil penalty were the violations concerning the
17 unauthorized use and possession, the unauthorized users, and
18 the failure to calibrate the survey meters, and another
19 kind, just lower than that, would be the failure to leak
20 test his sources.

21 Q So the transportation violations, then, were not
22 the determining factor in the decision to assess a civil
23 penalty?

24 A That is correct. I also might add, the
25 unauthorized storage was also a violation which was not of

1 much significance.

2 Q Of the six violations identified during the June
3 20, 1984, NRC inspection, which violations were taken into
4 account most strongly in deciding to impose a civil penalty?

5 A The unauthorized use and possession, the
6 unauthorized users, the failure to calibrate the survey
7 instruments. Two of those violations were repeat
8 violations. The unauthorized use and possession is a repeat
9 violation from 1981 the unauthorized -- the failure to
10 calibrate the instrument is also a repeat violation.

11 Q Were these violations that you just identified in
12 your response, were these the important violations in
13 determining the severity level II violation as well?

14 A They were part of the factor in it. I could
15 explain that answer further, if you would like me to at this
16 point.

17 Q Yes, please go ahead.

18 A In raising it to a severity level II, we had two
19 violations under the enforcement policy which are considered
20 severity level III violation, and in accordance with the
21 enforcement policy, they are examples that are used under
22 supplement 6. These two violations are the unauthorized use
23 and possession, which was a repeat violation. The other
24 violation, that is a severity level III violation, in
25 accordance with the enforcement policy, is the unauthorized

1 users.

2 Now, these violations could be considered separate
3 violations and could incur separate civil penalties under
4 the enforcement policy.

5 The other factors we considered were that there
6 were repeat violations. Under the enforcement policy, you
7 are allowed to escalate enforcement action because of
8 failure to correct violations, which he had those two
9 violations back in 1981, which were the unauthorized
10 possession and use and unauthorized failure to calibrate his
11 survey instrument.

12 The other things that added to -- that were used in
13 escalating the civil penalty to a severity level II, there
14 are a number of things we can do under the enforcement
15 policy. You can give separate civil penalties, as I
16 indicated. The unauthorized use and possession, the
17 unauthorized users, the calibration, the failure to
18 calibrate the survey meters, that was a severity level IV in
19 the 1981 inspection. Because that was failed to be
20 corrected, that could easily be a separate violation. Under
21 the enforcement policy, you could give a \$500 civil penalty
22 for each of those.

23 Now, since he failed to -- his past enforcement
24 history because he failed to do that, and because of the
25 duration, you could also increase it.

1 In addition, in our case, as we pointed out in the
2 proposed civil penalty, Mr. Reich we felt showed careless
3 disregard during the time period 1981 to 1984. The reason
4 we consider it careless disregard is because in 1981 those
5 two violations, the unauthorized use and the failure to
6 calibrate the survey instruments, there were a number of
7 times --

8 MR. REICH: Excuse me, could I ask a question?

9 A I would like to finish.

10 JUDGE SMITH: Not yet.

11 A There were a number of times we warned him about
12 this. First Mr. Hooker warned him these were violations
13 when he inspected him. Second, we issued -- there was a
14 phone call made to Mr. Hooker and it was agreed that he
15 would correct these violations, and we issued a piece of
16 paper called a confirmatory action letter.

17 Thirdly, he was notified in 1981, in a notice of
18 violation issued to him from Region 4, which stated that
19 these were the violations. He failed to correct these
20 during this period of time.

21 In addition to this showing careless disregard, we
22 have also noted from North Dakota, which inspected him in
23 1982, that the similar violations, failure to calibrate
24 survey instruments, was also a violation among 13 other
25 violations, which he incurred in 1982.

1 He also at that time failed to leak test his
2 sources, which was a violation which occurred in 1984.

3 Also, in --

4 JUDGE SMITH: Too fast. He's giving us important
5 testimony here, and I have some question that it is going
6 too fast.

7 THE WITNESS: Excuse me.

8 JUDGE SMITH: You are giving us quite a bit of
9 information here that does not appear any place in the
10 evidence yet, does it? First first he heard about the North
11 Dakota violations.

12 THE WITNESS: Yes, we did not put that in. But we
13 do have records of that here, if you would like to see that.
14 We picked up that after we -- we didn't put it into the
15 formal testimony. I can ask my counsel what she would like
16 to do regarding that.

17 JUDGE SMITH: I'm trying to put this in its proper
18 position in the case. That was a consideration that you
19 took into account in assessing the severity of the
20 violations that were issued in 1984?

21 THE WITNESS: I did not have the information at
22 that time, but when we imposed the civil penalty, I may have
23 seen that document. I can't recall.

24 JUDGE SMITH: What I'm troubled with is what
25 relevance is the North Dakota finding.

1 THE WITNESS: When we did go further into what Mr.
2 Reich has done, it shows further careless disregard in that
3 he was inspected by North Dakota and that he had the same
4 violation, the failure to calibrate his survey instruments,
5 in 1982, when we looked into this in more depth.

6 JUDGE SMITH: When did you do that?

7 THE WITNESS: When did we do that?

8 JUDGE SMITH: Yes.

9 THE WITNESS: Preparing this testimony.

10 JUDGE SMITH: Preparing the testimony.

11 MS. CUOCO: Judge Smith, I would like to add at
12 this point with the exception of the North Dakota
13 information that Mr. Flack has just testified to, all the
14 other information that Mr. Flack has testified to is in
15 evidence.

16 JUDGE SMITH: I thought it was, but this North
17 Dakota -- I don't know what to do with that information. It
18 is not fair to have Mr. Reich have to defend himself against
19 North Dakota violations as to which he has not been given
20 notice.

21 THE WITNESS: He was given notice in a notice of
22 violation from North Dakota.

23 JUDGE SMITH: But I mean not in this proceeding.

24 THE WITNESS: Yes, sir, that's correct.

25 JUDGE SMITH: He has not been required to respond

1 to it nor has he had a chance.

2 However, it also relevant as rebuttal to Mr.
3 Reich's testimony, testimony that he's been careful and law
4 abiding in North Dakota. I don't know, I guess that's why
5 it is offered. I think you better explain why you are
6 offering it, Ms. Cuoco.

7 MS. CUOCO: I think, Judge Smith, Mr. Flack was
8 just mentioning that was one of the factors that we became
9 aware of in preparing the case. I think Mr. Flack's
10 testimony, and written testimony, of course, speaks for
11 itself, that with respect to why the NRC chose a severity
12 level II violation here, the important factors that the NRC
13 considered was, one, the significant violations as the NRC
14 staff sees them, is the unauthorized possession of
15 americium-241, and secondly, the use of material by
16 individuals not authorized by license. As Mr. Flack just
17 stated, two violations were repeat violations from 1981, and
18 those are also important factors in assessing the a severity
19 level II violation here and the civil penalty.

20 The North Dakota violations pertain to some
21 evidence of careless disregard, apart from the violations,
22 apart from whether the violations occurred and whether the
23 civil penalty was appropriate.

24 JUDGE SMITH: The only basis upon which I can
25 consider the North Dakota violation would be if Mr. Reich

1 has testified, and I don't recall for sure, that he had a
2 good record in North Dakota. I know that he alluded to that
3 in his pre-hearing conferences, but I don't believe he's
4 testified to it today, in his general testimony that his
5 enforcement program has been improving since '81, and that
6 his general practice is not to have a careless disregard.
7 But even then, I'm wondering about the quality of your
8 testimony.

9 How did you learn about the North Dakota
10 violations?

11 THE WITNESS: Ms. Cuoco also contacted North Dakota
12 and has talked to them, and our regional people, I have had
13 discussions with them. They are in constant contact with
14 the agreement states, particularly when people are working
15 in our jurisdiction and have a license in another
16 jurisdiction, and we keep close tabs on it.

17 JUDGE SMITH: You did it not in the regular course
18 of your inspection work, or your enforcement work, but in
19 the course of preparing for this very hearing?

20 THE WITNESS: Yes, sir.

21 JUDGE SMITH: I think you have big troubles with
22 that.

23 MS. CUOCO: Judge Smith, if I could expand upon
24 that. As Mr. Flack just mentioned, the Region 4 office, as
25 all NRC regional offices do, maintain close contact with the

1 agreement states, and regularly follow the conduct of
2 agreement state licensees when they come into NRC
3 jurisdictions. The NRC Region 4 official file, a portion of
4 that file pertains, for Mr. Reich's file, pertains to his
5 activities in the agreement states, and independent of
6 preparing this case, Region 4 and the State of North Dakota
7 have been in contact over several years sharing information
8 with one another.

9 THE WITNESS: They might have considered it, you
10 might have to ask them, in their -- when they were
11 considering a civil penalty. As explained in my testimony,
12 what occurs is the Region goes out and does an inspection--

13 MR. REICH: Excuse me.

14 THE WITNESS: The inspection is then written up by
15 the Region. They also prepare an enforcement package which
16 is sent into headquarters, where I work. I was the one that
17 was mainly concerned with evaluating this. We come up with
18 an agreed upon position, and that is the position that goes
19 out as the proposed civil penalty that he received.

20 JUDGE SMITH: But the North Dakota experience was
21 not a part of it.

22 THE WITNESS: It could have been in their
23 consideration. I don't know whether Mr. Hooker, the other
24 people, were aware of it is what I'm saying at the time.

25 JUDGE SMITH: I have made two points here. They

1 may have been overlooked in their subltly. One is that he
2 has never been charged with a North Dakota violation in any
3 proceeding over which I have jurisdiction.

4 MS. CUOCO: That's correct.

5 JUDGE SMITH: That was not a part of the notice of
6 violation issued in 1984 and it is not a part of the case
7 today.

8 However, it is not, as I indicated, without
9 relevance, and would be something that could be considered
10 by me under two circumstances. One is that if Mr. Reich
11 should testify that he had a good enforcement experience in
12 North Dakota, then you could use that information to refute
13 that. If he were to testify, I believe, that he has a
14 generally good attitude about compliance with regulations
15 and a generally good record, then you could confront him
16 with the North Dakota information to refute that.

17 I'm not sure that he has done either of those
18 things so precisely as to allow you to do it. All that, as
19 much as that is, is only one point.

20 The second point is, if this information was
21 developed not as a consequence of the regular course of
22 enforcement business, but by telephone conferences by Mr.
23 Mr. Flack solely as preparation for this case, then you have
24 another matter. Then you have a question of serious hearsay
25 problems as compared to reports routinely generated and

1 preserved in the course of the regular enforcement business.
2 I just want to caution you that's how I will be looking at
3 it.

4 MS. CUOCO: I appreciate that, Judge Smith. I
5 would just like to note that, of course, we are not bound by
6 the federal rules of evidence, and hearsay is generally
7 admissible in administrative proceedings.

8 JUDGE SMITH: Well, thank you very much. But I'm
9 telling you unreliable evidence is unreliable evidence no
10 matter what rules we are using, and I don't know where he
11 got this information. I mean, to come in at the very last
12 minute in a hearing and tell us about all the accounts in
13 North Dakota, you are going to have to do something more
14 than just tell us about it to overcome that second obstacle?

15 THE WITNESS: Can we submit the documents? Would
16 that be evidence?

17 JUDGE SMITH: In the first place, why have you
18 waited until this afternoon to do this to bring this to our
19 attention?

20 MS. CUOCO: Judge Smith, at this time we were just
21 having some limited additional testimony.

22 JUDGE SMITH: And has Mr. Reich been informed that
23 you intended to bring this information?

24 MS. CUOCO: We had not intended to bring the North
25 Dakota issue as part of our direct case, but it certainly,

1 if Mr. Reich had raised it, we intended to use it as
2 impeachment evidence.

3 JUDGE SMITH: Right. That's appropriate.

4 Well, proceed. But you still have the problem,
5 unless you establish the bonafideness of how he collected
6 this information from North Dakota, you still have a problem
7 there. It was not, apparently, something that was routinely
8 generated in routine enforcement activity and enforcement
9 record keeping and enforcement reports.

10 So you better work on that if you want me to
11 consider it.

12 MS. CUOCO: I have no additional direct for Mr.
13 Flack at this time.

14 JUDGE SMITH: In that event, I will disregard his
15 North Dakota testimony. Do you understand what my point is?

16 MS. CUOCO: Yes, I do.

17 JUDGE SMITH: The only thing I know from him is
18 somehow preparing for his testimony he learned about a North
19 Dakota experience. So I will disregard that testimony.

20 MR. REICH: Can I ask questions, Your Honor?

21 JUDGE SMITH: Yes.

22 CROSS-EXAMINATION

23 Q (By Mr. Reich:) Mr. Flack, did you have inspection
24 records when you evaluated my alleged violations or did you
25 use the inspection report?

1 A I used the inspection report.

2 Q Okay. From Mr. Hooker's testimony this morning, he
3 had to strike -- he suggested that he wanted to strike some
4 of that information. Would that have influenced your
5 decision?

6 A What particular information are you referring to?

7 Q On usage dates.

8 A No, because there were so many different times that
9 you had unauthorized use and possession of the material,
10 that a couple dates would not have influenced me. It was
11 this use over the period 1982, 1983, and in 1981 in the
12 states of Utah and Wyoming that you used it, unauthorized
13 use and possession.

14 Q Okay. Going to a year you just referred to, you
15 referred to unauthorized use in 1983?

16 A Yes, sir.

17 Q Could you tell me the dates in 1983 that were
18 unauthorized use?

19 MS. CUOCO: Objection, Judge Smith. Mr. Flack is
20 here primarily to testify as to the enforcement policy and
21 its application in this proceeding. Mr. Hooker has
22 testified as to specific dates --

23 MR. REICH: Ms. Cuoco--

24 JUDGE SMITH: Let her finish.

25 MS. CUOCO: Mr. Hooker conducted the inspection.

1 In addition, the utilization records of Reich Geo-Physical
2 are in evidence as Staff Exhibits 1 and 2. Those records
3 speak for themselves as to the dates of usage of americium
4 as 241 sources.

5 JUDGE SMITH: Well, Mr. Flack testified on page 15,
6 in answer to question 35, that he was taking into account
7 the activities that were conducted in Wyoming and Utah and
8 in Montana without NRC approval. Though he didn't specify
9 the dates, he did rely upon that type of information, and,
10 therefore, your objection is overruled.

11 THE WITNESS: Okay. If we go to page 14 of Mr.
12 Hooker's testimony, if you look down there --

13 MR. REICH: I just want the question answered if he
14 knows the dates of illegal use.

15 THE WITNESS: October 19 and 20, 1982.

16 MR. REICH: I asked '83.

17 JUDGE SMITH: Wait a minute. What is your
18 difficulty now with his response?

19 MR. REICH: I asked him if he knew the actual dates
20 of illegal use of 1983.

21 JUDGE SMITH: In 1983. Did you appreciate that
22 limitation?

23 THE WITNESS: No, sir, I did not.

24 JUDGE SMITH: I had not either.

25 THE WITNESS: Okay. We have here a date in 1983,

1 November 18, 1983, in Colstrip, Montana, that you -- that
2 the sources were used.

3 MR. REICH: Sources or source?

4 THE WITNESS: I don't know. It is the 15.5
5 millicurie source.

6 Q (By Mr. Reich:) That would be one or two sources?

7 A Understand, Mr. Reich, I may be a little bit
8 confused, on your 241 you put down two 15 millicurie
9 sources. It is confusing in my mind. Also, we have got an
10 indication there is a 15.5 and --

11 Q Would you answer the question?

12 JUDGE SMITH: He's answering. Let him finish.

13 A Now, the date, if you look at page 14, and I have
14 to take the information the inspector gives me to make my
15 judgment, and you asked me specifically about 1983, it says
16 on his testimony, Mr. Hooker's, on November 18, 1983, you
17 used a 15.5 millicurie americium source on that day; is that
18 true?

19 Q You are asking me?

20 A I guess I can't ask you.

21 Q I asked you the date of usage for 1983. I didn't
22 ask you any other question. I asked you usage dates for
23 1983.

24 JUDGE SMITH: He's answered.

25 MR. REICH: Was it true --

1 JUDGE SMITH: Wait a minute. I want both of you to
2 relax the tenor of your questions and answers. Don't argue.
3 Just ask questions.

4 MR. REICH: Okay.

5 MS. CUOCO: Judge Smith, may I have a moment to
6 confer with my witness?

7 JUDGE SMITH: Not in the middle of a particular
8 cross-examination you might not. If you want to confer with
9 him some other time as to redirect testimony, fine, but not
10 in the process of a cross-examination.

11 Q (By Mr. Reich:) Mr. Flack, will you agree --

12 JUDGE SMITH: Unless you perceive an obvious
13 miscitation to a wrong page or a -- unless you see there has
14 been a flat out mistake made. I'm sorry. Go ahead.

15 Q (By Mr. Reich:) Mr. Flack, will you agree,
16 according to my usage records, which you have accepted as
17 authentic, that in the year of 1983 there was one date and
18 only one date--

19 A In 1983? But 1982 --

20 Q I'm not finished.

21 JUDGE SMITH: Let him finish.

22 Q (By Mr. Reich:) I asked the question --

23 A Yes, sir, that's correct.

24 Q How many times was there illegal use in 1983?

25 A One that I was aware of.

1 Q Okay. In your evaluation on the information you
2 received from Mr. Hooker on his inspection report, was it
3 indicated that this was one day only or was it indicated
4 that it was the whole year of 1983, that illegal use was
5 done?

6 A We don't -- when we issued the proposed notice of
7 violation and imposition of civil penalty, which is document
8 appendix --

9 Q Please just answer my question.

10 JUDGE SMITH: He's answering.

11 A When we issued that citation, we said that we
12 covered it over a period of time, from April 14, '81, to
13 June, 1984. I did not go back, because there were so many
14 times that you illegally used it, that I tried to pick
15 out -- to match the exact dates to things.

16 MR. REICH: Your Honor, he just --

17 JUDGE SMITH: Wait a minute. Mr. Reich is entitled
18 to have a specific answer to a specific question. Now, you
19 will be given an opportunity to explain, Mr. Flack. We want
20 you to. But in the meantime, he really was entitled to a
21 yes or no answer to that last question. He's trying to
22 establish that there was one instance and only one instance
23 in 1983, and he's entitled to do it.

24 THE WITNESS: To my knowledge, that is all.

25 Q (By Mr. Reich:) But you still are referring to

1 many times, and I'm not done questioning yet.

2 A Okay.

3 Q But you do agree there was only one authorized --
4 unauthorized use in the year of 1983?

5 A To my knowledge at this point, you know, I would
6 have to go back and look at what I originally looked at.
7 What I'm trying to get at is I looked at it from a bird's
8 eye view up here.

9 Q Do you agree or don't you agree?

10 A I would have to go back and review the inspection
11 report and see whether that that was listed, if you are
12 trying to pin me to that. If you are getting to that point.

13 MR. REICH: Your Honor, there is only one page of
14 utilization logs for 1983. Would he be allowed to inspect
15 it and see if there was any other times of illegal usage?

16 JUDGE SMITH: I think we can all sit down here
17 right now and satisfy ourselves that that's the case or not
18 the case. Let's do it.

19 I see one right off the bat -- that's North Dakota.

20 THE WITNESS: Were there any more, Chuck?

21 MR. HOOKER: No, except the source was still being
22 stored in Montana. It was not in license all during the
23 year 1983, which is storage and use is synonymous.

24 JUDGE SMITH: Mr. Hooker is testifying now, do you
25 understand that?

1 MR. HOOKER: Yes, sir. Storage and use is
2 synonymous whether it is used one day in the field or --

3 MR. REICH: I didn't ask you the question.

4 MR. HOOKER: I thought we were trying to clarify
5 something.

6 JUDGE SMITH: This is one of my questions of Mr.
7 Reich, because one of the things I wanted to know does he
8 have a storage facility in North Dakota.

9 MR. REICH: Are you asking me?

10 JUDGE SMITH: I will when you testify.

11 MR. REICH: Okay.

12 JUDGE SMITH: Mr. Hooker just shook his head, no,
13 when I said that.

14 MR. HOOKER: I thought you were asking me a
15 question.

16 JUDGE SMITH: I want the record to show that you
17 indicated, no, he does not have a storage facility in North
18 Dakota.

19 MR. HOOKER: Correct.

20 JUDGE SMITH: Well, apparently nobody can find --

21 MR. REICH: I have --

22 JUDGE SMITH: This is the one on 11/18/83?

23 MR. REICH: Yes.

24 JUDGE SMITH: In Montana. That's the only one.
25 Does everyone agree that's it? That's the best evidence.

1 MR. REICH: One time in that year there was illegal
2 use.

3 Q (By Mr. Reich:) You testified in your testimony
4 that the reason for the severity being increased and also
5 referred to me as being very negligent and continued to not
6 comply with regulations. And you have also testified here
7 that there are many times, many times, that it was used
8 illegally. I just looked at 1983. I saw only one use.

9 A 1982 we have a number of instances, as I recall.
10 Look at Mr. Hooker's testimony on page 14, which better
11 describes it.

12 Q I will ask the questions, if you don't mind.

13 A I thought you did ask me a question.

14 JUDGE SMITH: That's something you brought on
15 yourself. You made an observation, and he could have
16 inferred it to be a question.

17 MR. REICH: Okay.

18 JUDGE SMITH: That's one of the problems of you
19 testifying at the same time you are asking questions.

20 THE WITNESS: On May 10 through June 6, 1982, this
21 is page 14 I'm reading from Mr. Hooker's testimony, in Rock
22 Springs, Wyoming, on July 2 --

23 Q (By Mr. Reich:) Wait. You are going too fast.
24 Could you give those dates again?

25 A The specific dates, I would prefer not to go to the

1 utilization log, I would prefer to rely on Mr. Hooker, who
2 has put it in his testimony, and I would prefer to go to his
3 testimony on page 14 in answer to question 37, because he
4 was the one who has, and I have not reviewed the utilization
5 logs and verified the dates, but he has done that in his
6 testimony. That's why I would prefer to use his and not go
7 back to the original data. If you have a discrepancy, I
8 think it might be more appropriate to ask Mr. Hooker.

9 Q Okay. You testified that you have used Mr.
10 Hooker's inspection report to come up with the proper
11 penalty that was to be imposed on me.

12 A That's correct.

13 Q Earlier this morning we determined that Mr.
14 Hooker's inspection report, it differed from the actual
15 usage--

16 A There were some slight errors which Mr. Hooker put
17 out --

18 Q I'm not finished. I didn't ask you a question.
19 I'm still making a statement.

20 JUDGE SMITH: I think we need a little bit of
21 correction in our ground rules. You are arguing with him,
22 and then he attempts to explain -- respond to your argument,
23 and then you cut him off. Now, either you will have to ask
24 him a question, explain what your concern is and ask him a
25 question, or wait and then testify. But this is becoming

1 very confusing.

2 MR. REICH: Okay.

3 JUDGE SMITH: Explain what your concern is.

4 Q (By Mr. Reich:) Okay, Mr. Flack, my concern is in
5 your evaluation and in imposing the penalty is that you
6 didn't take the time to check to see if Mr. Hooker's
7 inspection was valid. We have established that there were
8 discrepancies in it. And I feel that the inspection report
9 submitted by him had dates exaggerated, which we established
10 this morning, and that would influence your decision as to
11 continued and many times bad use.

12 MS. CUOCO: Objection, Your Honor.

13 JUDGE SMITH: What's your objection?

14 MS. CUOCO: My objection, Judge Smith, is that Mr.
15 Reich is characterizing certain facts as being established
16 which have not been established. The staff certainly does
17 not agree.

18 JUDGE SMITH: Just a minute. See, really you have
19 no basis to object to what he did because we are using--and
20 I'm having increasing doubts about it--this informal method
21 of allowing him to express his concern and then get the
22 witness' comments. So the witness can very well say I
23 disagree with your characterization of the events. If it
24 were a pure question form, perhaps, yes, you could have
25 objected. But we will go with this method for a little bit.

1 if it doesn't work, then we will have to clean it up.

2 Now, the question to you is do you agree with his
3 statement of his concern?

4 THE WITNESS: No, sir, I disagree, because I did
5 not look at specific individual times that it was not used.
6 There were so many, I did not focus in on that. It only
7 takes one time for you to have unauthorized people use it to
8 be a violation. There were numerous of these times that
9 this happened. And you were warned about this -- excuse me,
10 I'm sorry, you you were warned about this in 1981. It
11 occurred again in 1984, over a period of time of three
12 years, numerous times, and that was the factor why this is
13 escalated up, this particular penalty. It is a severity
14 level III if you do it one time. When you do it numerous
15 times, it aggravates it, and this is one of the violations
16 that pushed it up into it.

17 Likewise, the failure to calibrate your survey
18 instrument, which you did in 1982, we found it again in
19 1984. That escalates it up.

20 Also, you failed --

21 MR. REICH: Can I ask the questions?

22 JUDGE SMITH: No, this is one of the dangers of
23 your approach.

24 THE WITNESS: Also, you were warned about these, as
25 I mentioned, three different times in 1981 about these

1 problems with your calibration of your survey instruments
2 and your unauthorized use. You were warned by Mr. Hooker,
3 you were warned --

4 MR. REICH: Unauthorized use, no. I had NRC 241,
5 Mr. Flack.

6 THE WITNESS: Your NRC 241 only goes for 180 days.
7 It went from June until December, and it was only good in
8 the State of Montana. In -- you used it also in Utah in
9 1981, as I recall. And maybe Wyoming, I'm not quite sure.
10 But from the end of 1981, 1982, 1983, you had no
11 authorization to use those americium sources in NRC's
12 jurisdiction.

13 Q (By Mr. Reich:) As I mentioned to Ms. Cuoco, most
14 of this usage is in North Dakota. There has been use in
15 these other states. I have been under an NRC 241 that
16 authorized me. It gave me the authority to work with
17 sources.

18 A No, sir.

19 JUDGE SMITH: Is this an argument you are making to
20 me or this is a question you are going to put to Mr. Flack?

21 MR. REICH: I'm telling Mr. Flack that I was
22 authorized from --

23 JUDGE SMITH: Are you trying to get him to agree
24 with you?

25 MR. REICH: It has been already established we have

1 the NRC 241 that was inspected.

2 JUDGE SMITH: They disagree with you on that, Mr.
3 Reich, and I have not rendered a decision on it yet.

4 MR. REICH: Okay, I will continue with my
5 questioning.

6 JUDGE SMITH: Yes, but I'm afraid it is
7 degenerating into simple argument with the witness rather
8 than -- one thing, we want you to in an informal way to
9 express your concern to the witnesses and ask them to
10 address your concern. But you are using it to argue with
11 him, and that is not producing much.

12 MR. REICH: Okay, Your Honor, if I ask him a
13 specific question and I want a specific answer back, I don't
14 want a bunch of details, is that asking too much?

15 JUDGE SMITH: No, that's fine. But then you ask a
16 specific question and don't precede it with an argument.

17 MR. REICH: Okay.

18 Q (By Mr. Reich:) I understand your main concern,
19 and the reason for the imposition of this severe civil
20 penalty is the threat to society and the safety, that we
21 aren't conferring with your regulations as far as your
22 safety requirements. Could you give me one specific area
23 that you know where an individual or society itself has been
24 threatened by illegal use of our sources?

25 A Yes, sir. We have had several instances, and the

1 Judge has looked at part 39, he may have seen this in there,
2 where we have instances where we have had leaking --

3 MR. REICH: I'm referring to mine, Your Honor.

4 A And these sources, we have had instances where it
5 has cost millions of dollars to clean up where they have had
6 these leaking sources. And when you have unauthorized
7 possession, unauthorized users, and are operating with an
8 instrument which is not calibrated and is your eyes and
9 ears, that's the only way to detect the radiation, and the
10 americium as I described is transuranic, if you get it
11 inside of your body, it can result in health effects,
12 possible health effects, and we are very concerned. It is
13 one of the isotopes which we refer to in the health physics
14 area as being one of the more hazardous types, because it
15 has a very low maximum permissible body burden.

16 And when you operate without a survey instrument
17 that has been calibrated, unauthorized users, in your use of
18 the material throughout a period of time, you could be in a
19 situation--one example is Shell Oil, where they thought they
20 could remove the source, they drilled into it, and it cost
21 over a million dollars to clean up from this drilled in
22 source.

23 Another example up in Region 1 we had --

24 Q Mr. --

25 JUDGE SMITH: I understand you are not taking Mr.

1 Reich's activities in a vacuum. You are looking at industry
2 experience and you are explaining why his activities are a
3 matter of concern. Not that you did it, that you have
4 industry experience to indicate it. But you cannot impute
5 to him all of the examples you are aware of.

6 His question now, understand it, what is there
7 about his activities that you believe --

8 MR. REICH: My particular--

9 THE WITNESS: It is the potential of him using an
10 uncalibrated survey meter with unauthorized users, and with
11 use and possession of material in our jurisdiction which we
12 did not review, even though in that short period of time in
13 1981 you were authorized to use it in our jurisdiction,
14 those other time periods you were not authorized, and you
15 were only authorized to use it in Montana, and you carried
16 your activities outside.

17 We carry on inspections, spot checks, of people
18 that come into our jurisdiction. That's what those 241
19 forms are used for. You are supposed to list the places
20 where you are going to be, and we may go out and look at you
21 to make sure that your radiation safety controls are
22 adequate for your use.

23 We just don't give you blank jurisdiction.

24 Q (By Mr. Reich:) You are way off of the question I
25 asked. I asked if you have seen where Reich Geo-Physical

1 has committed an unsafe act and can prove it.

2 A Yes, sir. When you operate with uncalibrated
3 instruments, unauthorized users, in unauthorized places,
4 there could be the potential that something happened that we
5 didn't know about it.

6 Q Could be.

7 JUDGE SMITH: Let him go. You asked the question
8 and he is giving you his opinion. It is his professional
9 opinion that those are unsafe practices.

10 THE WITNESS: We take our regulations very
11 seriously --

12 JUDGE SMITH: Wait a minute. You are extending it
13 now.

14 MR. REICH: I haven't committed any--

15 JUDGE SMITH: This is testimony that you can give
16 and you can argue.

17 MR. REICH: Okay. I'm just confused.

18 JUDGE SMITH: You asked him his opinion and he gave
19 it to you. He unloaded on you is what he did.

20 Q (By Mr. Reich:) Mr. Flack, taking into account
21 these particular sources that we use, did you observe on my
22 utilization logs the surveys that we take when we load and
23 unload the tool?

24 A No, sir, I did not look at those sort of things. I
25 only looked at your violations that you had, the six

1 violations, the unauthorized possession and use,
2 unauthorized users, the unauthorized storage of the
3 material, the failure to calibrate your survey instruments,
4 the failure to leak test it, and the failure to comply with
5 the transportation. Those are the ones that I considered in
6 my evaluation.

7 Q Okay. Do you consider americium-241, 15.5
8 millicurie and 25 -- excuse me, 25 millicurie to be high
9 activity sources?

10 A If there is leakage of the radioactive material and
11 if that leakage is not detected by someone who may not have
12 a calibrated survey, unauthorized individual handling, which
13 increases the possibility, and that possibility, that could
14 increase into a big problem in my mind, and create a very
15 hazardous situation, because deposition of that radioactive
16 material internally is considered very hazardous by its
17 maximum permissible body burden, which is one of the lowest
18 of all radionuclei. It is similar to plutonium.

19 Q Do you consider these to be high activity sources?

20 JUDGE SMITH: I think he's answered that question--

21 MR. REICH: He didn't.

22 JUDGE SMITH: --twice now. Once when I put it to
23 him and once you put it to him, and he's explained it, as
24 you have explained before, time is a consideration, too.

25 Q (By Mr. Reich:) Would these be considered higher

1 active than the cesium-137, 125 millicurie source that I'm
2 licensed under the NRC?

3 A There is more activity in the cesium and it is a
4 different type of isotope. It is an external type of
5 problem. An americium is an internal type of problem.

6 JUDGE SMITH: What do you understand he means by
7 activity?

8 THE WITNESS: I have to look at it, if you look at
9 pure activity, one is 15 and one is 25 and one is 125,
10 certainly the cesium, there is more activity in them. The
11 25, there is five times as much activity. But the different
12 radiological hazards associated with these two different
13 types of sources are different. The cesium is an external
14 type, which you can get an external type of radiation. The
15 other is an internal type, whereas if there is leakage and
16 that sort of thing, it can create a big problem.

17 JUDGE SMITH: I understand -- you understand his
18 question to be activity in the absolute sense. You are
19 trying to explain as far as hazard is concerned, the
20 americium can present a greater hazard.

21 THE WITNESS: Internally.

22 JUDGE SMITH: Internally?

23 THE WITNESS: Yes, sir.

24 JUDGE SMITH: But you equate activity as being a
25 potential for activity over time or just an absolute

1 relative?

2 THE WITNESS: I don't understand what you are
3 saying.

4 JUDGE SMITH: You have explained that the risk
5 involved with americium is that it will go undetected.

6 THE WITNESS: That's right.

7 JUDGE SMITH: Therefore, over months, years
8 perhaps, its activity goes on and on and on and on. You
9 have --

10 THE WITNESS: Very long half life, americium.

11 JUDGE SMITH: Yes. Low activity but --

12 THE WITNESS: And a high radiotoxicity if it is
13 taken inside. The cesium source, if you grab the source,
14 can be like radiographers. We have had a lot of problems
15 with them handling sources and getting burns on their
16 hands --

17 JUDGE SMITH: Wait a minute. Your point is
18 relevant to the case, and it is information I asked you
19 about and I want to know about. In the meantime, Mr. Reich
20 has the right to build his case a step at a time. I'm
21 trying to establish just what you mean by activity. If you
22 mean activity in a relative sense as compared to other
23 isotopes, that's one thing. If you mean activity to be
24 activity over time --

25 THE WITNESS: I'm talking about relative to other

1 isotopes. I'm trying to compare cesium-125 to 15 and 25
2 millicurie americium.

3 JUDGE SMITH: He has a right to establish those
4 differences. Then you, through counsel, or if you wish
5 yourself, can explain, as you already have, your position
6 about the long term hazard. I'm trying to narrow it down to
7 make sure that you refer to activity in the absolute sense
8 and not activity over time.

9 THE WITNESS: Okay. The activity of the sources
10 comparing the three, the millicurie amounts?

11 JUDGE SMITH: By any standard. What standard would
12 you use, if somebody puts to you what is the activity, not
13 to hazards, the activity of americium-241, 15.5 millicuries?
14 How would you answer it as a health physicist, using the
15 word "activity"?

16 THE WITNESS: When we refer to activity, it usually
17 means radio activity which is based upon millicurial
18 amounts. Certainly the cesium source with 125 millicuries,
19 the curie is all based upon how many disintegrations per
20 minute are happening with this radio isotope, meaning it is
21 decaying and giving off radiation. And a 125 millicurie
22 source would give off more disintegrations per time period
23 than a 15.5.

24 MR. REICH: That's fine.

25 THE WITNESS: Sorry I had trouble.

1 Q (By Mr. Reich:) So you agree cesium is of higher
2 activity than the americium?

3 A Of radio activity.

4 Q Yes, that's fine.

5 A Of radiotoxicity, it is a different question.

6 Q Do you agree that I'm licensed to use cesium source
7 under my NRC license?

8 A Yes, sir.

9 Q So if I am licensed, then, you believe that I am
10 qualified to handle it?

11 A Yes, sir. Certainly. That went through a review
12 process with our licensing people. The americium sources
13 did not.

14 Q But they are of smaller quantities, is that right?

15 A Smaller radio activity.

16 Q Activity?

17 A Radio activity.

18 Q Activity means what they emit?

19 A They emit different types of radiation.

20 Q Different amounts.

21 JUDGE SMITH: There is another nuance here. He's
22 defined activity to be two types of activity, radio activity
23 and radio toxicity. I don't know if you intended to do
24 that, but that's what you said.

25 THE WITNESS: Yes, I did. Because the americium is

1 an alpha emitter and alpha problem. It is an internal
2 problem. The cesium is an external gamma type of problem.
3 We didn't review his americium, which we just did when we
4 renewed his license.

5 Q My americium is a gamma emitter.

6 A It has a small gamma, but the radio toxicity of the
7 alpha problems when they get inside of the body, that is the
8 problem we are worried about.

9 Q Do you understand that these are sealed sources?

10 A Yes, double encapsulated sealed sources.

11 Q Yes, and they are also placed in a logging tool?

12 A Yes, sir. My problem is when they get damaged --

13 Q I'm asking the questions.

14 JUDGE SMITH: Let him do his case his way.

15 Q You understand how they are used in a well logging
16 tool?

17 A I have some understanding. I'm sure I don't have
18 your understanding, since you work with them all the time.

19 Q Please tell me how you think one of these could
20 become ruptured in the well logging process?

21 A Well, when you drop it down in there, there is all
22 sorts of types of problems that may happen where you get --
23 where you get the device stuck down there, and then a lot of
24 times you try to recover the sources, and when you recover
25 them, we have had experience where they have become damaged

1 and have leaked.

2 Q You have no evidence -- you are talking about
3 recovering, Mr. Flack. Do you have any evidence that I have
4 ever had a tool stuck?

5 A That you have?

6 Q Yes.

7 JUDGE SMITH: Just answer it.

8 A No, sir.

9 Q You still haven't answered my question as to how
10 this could become ruptured. You have agreed --

11 JUDGE SMITH: You are not being fair in your
12 question. Your question was how could it become ruptured,
13 and in the process of explaining that to you, you interrupt
14 him and say, well, does he have any evidence that you have
15 ever done that.

16 MR. REICH: I'm sorry. I don't mean to be
17 doing--I'm not familiar with all the procedures.

18 JUDGE SMITH: Well, we will bear with you.

19 MR. REICH: I'm just trying to get some things
20 established.

21 JUDGE SMITH: We will bear with you. Let's take
22 one thought at a time.

23 Q (By Mr. Reich:) Briefly, I think in my response
24 letter I describe the use of this source, and that it was
25 not exposed to any resistive forces which would all but

1 eliminate any chance of puncturing a sealed source. Without
2 a resistive source, Mr. Flack, do you agree it would be
3 highly unlikely that that source could become ruptured?

4 A I don't know. You had unauthorized users out there
5 handling the sources --

6 JUDGE SMITH: Wait a minute. You can give an
7 answer, if you can, to his question. You can accept his
8 hypothesis. His hypothesis is in his operations there is
9 not a resistive force. If you don't know, you can say it.

10 THE WITNESS: I don't accept that because we have
11 had incidents where these things have been stuck and we have
12 had problems with them and they have become damaged. That's
13 my problem.

14 JUDGE SMITH: Wait a minute. He is giving you a
15 hypothetical question. He's going to testify, or it is in
16 evidence apparently, that in his operations there is just no
17 resistive force. What is it, just mud?

18 MR. REICH: There is no resistance.

19 JUDGE SMITH: You don't agree with that. You say
20 there is industry experience where that is not the case.

21 THE WITNESS: That's right.

22 JUDGE SMITH: Nevertheless, for his question, you
23 accept his hypothesis and give an answer based upon that
24 even though you don't agree with it. Then you have your
25 opportunity to explain what you don't agree now with that

1 hypothetical situation, which is his testimony which you
2 have to accept, that there is no resistive forces in his
3 logging operation. Can you answer the question?

4 THE WITNESS: No, sir, I can't, because I don't
5 know whether there are or aren't in his particular... I mean
6 all I can go from is experience from past where these
7 things --

8 JUDGE SMITH: You don't understand. You may accept
9 the hypothesis that there is no resisting forces in his well
10 logging operation. Whether you agree with it or not, assume
11 that that is the case.

12 Now, if that is the case, as you must assume for
13 the question, can you answer the question?

14 THE WITNESS: Then I guess it wouldn't rupture.

15 JUDGE SMITH: You could say you don't know or it
16 won't rupture or what.

17 THE WITNESS: I really don't know.

18 JUDGE SMITH: You don't believe it would rupture?

19 THE WITNESS: I don't think it would. But let me
20 also state that periodically these sources we have found
21 over a period of time have all of a sudden started to leak,
22 and we don't know all of the reasons why --

23 JUDGE SMITH: You are trying to get your whole case
24 in in every question. That's why you have Ms. Cuoco here is
25 to make sure that your case is put on in an organized way,

1 and she will consult with you and see if there is something
2 you wanted to explain, and you will have that opportunity.
3 In the meantime, Mr. Reich also has a right to build his
4 case as he sees fit, as long as it makes some sense and is
5 relevant.

6 Q (By Mr. Reich:) So you haven't ever observed an
7 actual well logging where a source was transferred and put
8 into the well and fastened to the tool. Is that your
9 statement?

10 A I have seen it on film. I have never actually been
11 at a well logging site and seen it. And I have read about
12 it in books of what is done.

13 Q But yet you -- I'm not going to put it that way. I
14 will keep asking questions to try to stay... My next
15 question is, in taking your surveys of the sources before
16 they are put into use, they have been recorded on
17 utilization logs, and I'm wondering if you have seen the
18 amounts that we have recorded on those utilization logs in
19 inspecting our utilization logs? Have you seen what we
20 recorded?

21 A Yes. As I recall from what it said from the
22 inspection report, it was very minimal.

23 Q Very minute?

24 A Yes, as far as the external radiation. But --

25 JUDGE SMITH: On the logs?

1 MR. REICH: Yes.

2 THE WITNESS: I didn't really look at the logs.
3 What I looked at was the inspection report which said there
4 wasn't any problem in this area regarding your survey of
5 your sources, as I recall.

6 Q (By Mr. Reich:) Would you agree then that when we
7 take our surveys and when we are handling our tools, that we
8 are doing it in a safe manner?

9 A I can't answer that. How would I -- I have to rely
10 upon the data--Mr. Hooker was the one that looked at that
11 sort of thing, our inspector, and he looks at a very short
12 snapshot of those sort of things from your logs and other
13 things, and, you know, I don't have any knowledge
14 specifically regarding what you do.

15 Q Well, it is obvious the way you have leveled the
16 penalty you insinuate we are not operating safely.

17 A The penalty was based upon your unauthorized use
18 and possession, basically your unauthorized users, your
19 failure to calibrate your survey meters, your failure to
20 leak test the sources, and the two minor violations are the
21 transportation and the unauthorized storage. It does not
22 have anything to do of relevance to me, really, whether you
23 did these surveys or not and they showed up minimal. We
24 expect licensees to pay very strict close attention to their
25 requirements in their license and to comply with them to the

1 utmost. You have failed to do that. And it extended over a
2 period of time, and that is why we have very few licensees
3 that do that, repeat such things as you have done, and then
4 repeat the two violations, the unauthorized possession and
5 the use, failure to calibrate, and then we come back and we
6 find out there is unauthorized users. We considered, as I
7 stated in my testimony, to revoking your license. That was
8 one of our options. We could have --

9 MR. REICH: Listen, I'm asking questions here.
10 Please, when I ask a question, answer it. If you don't, let
11 me go to my next question.

12 JUDGE SMITH: I think where you began considering
13 revocation ended your answer. Up to that point, it was a
14 fair answer to his question. However, I have a clarifying
15 question. Would you please be careful as to how you
16 allocate these various violations. This past time you said
17 two of them you believed were unimportant, and that was
18 transportation and the storage.

19 Then there is a category of those you believe is
20 important. There is one that seems to fall in the cracks,
21 and that is the failure to have leak tests. How do you
22 allocate that?

23 THE WITNESS: The two most important ones in my
24 mind were the two repeat violations; the unauthorized use
25 and possession, the failure to calibrate the survey

1 instrument. The third most important, if I had to put them,
2 was the unauthorized users. And the leak test is right up
3 there very close to them, because if you are operating with
4 instruments that are not calibrated and you are failing to
5 leak test the sources, this can result in a potential that
6 could result in severe consequences, in my mind.

7 JUDGE SMITH: That's fine. I want to make sure, so
8 when you have made these various references to the
9 categories of importance and nonimportance, that is what you
10 just intended, what you just testified to?

11 THE WITNESS: Yes.

12 Q (By Mr. Reich:) Mr. Flack, my next few questions,
13 would you just answer yes or no unless I ask you further?

14 A I will try to do my best. Sometimes I have to
15 expand on my answers to make sure it is understood.

16 JUDGE SMITH: In this instance, if you cannot
17 answer yes or no, you say so.

18 Q (By Mr. Reich:) If the source, Mr. Flack, would be
19 leaking, and you have average surveys for, say, a week prior
20 to that of .20 MR per hour, somehow the source started to
21 leak, would you observe a higher count rate, a lower, or the
22 same count rate, with your survey instrument?

23 A I don't think that's fair.

24 Q You can't answer yes or no on that.

25 A I can answer his question. But I have to explain

1 it.

2 JUDGE SMITH: No, you don't.

3 THE WITNESS: Basically with americium it is very
4 hard to detect. It is not so easy with the sophisticated
5 type of survey instrument that you have to detect it. And
6 that's why we have you do wipe tests and send them in,
7 because you have to use a more sophisticated type instrument
8 to detect it. So it is a good possibility that you could
9 not detect that radiation and your surveys could show that
10 you are getting about the same reading.

11 So, you know--

12 MR. REICH: But that's the only instrument I'm
13 required to have.

14 Q (By Mr. Reich:) Let me rephrase the question. If
15 a source was leaking, would you detect a higher amount of
16 radiation that it was emitting?

17 A Not necessarily with americium. There is a
18 possibility you could miss it.

19 Q So then if it was leaking and it wasn't detectable
20 with the survey instrument, then it would be very minute and
21 it would not be causing any damage, would you agree with
22 that?

23 A No, because like I said, it only takes a small
24 amount of material inside you to create a big problem, and
25 it could be leaking a very small amount. If it was leaking

1 a large amount, certainly I might expect your survey
2 instrument to pick it up. That's why we have you to do leak
3 tests, and that's why it is one of your requirements is to
4 make sure that it is not leaking a small amount.

5 Q So we are required to do leak tests in six months;
6 is that right?

7 A Every six months.

8 Q Okay. If this source had become damaged and was
9 not detectable on the meter, are you saying that it could
10 cause physical problems to a person, even though it wasn't
11 detectable on a meter?

12 A I didn't say it could cause physical problems. I
13 said that you could get some inside of you and it could over
14 a long period of time result in increased incidence of such
15 things as cancers.

16 Q But there isn't any safety factor involved if it is
17 not measurable, an increased measurable amount isn't
18 detected on the meter and it is leaking, there is not any --
19 are you saying there is not any safety?

20 A I'm saying -- I say there is safety significance
21 because you are working at a well logging site and there are
22 members of the public at that site and even small amounts of
23 americium can result in problems to public health and safety
24 in our viewpoint.

25 Q How is it to be detected then, Mr. Flack, if it is

1 not measurable on a survey meter?

2 A In small amounts it would be detected by your leak
3 test if it was leaking.

4 Q Once every six months?

5 A Yes, if it was a very small amount.

6 Q Well, then,, I would think if it was to that
7 significant a safety factor, and someone used something like
8 that for six months, that the regulations should be changed.

9 A If it is a very small amount, is what I'm talking
10 about.

11 Q Okay.

12 A You are getting into a very small amount.

13 JUDGE SMITH: Now you are arguing.

14 MR. REICH: I'm sorry.

15 Q (By Mr. Reich:) Okay. Let's go on. Do you agree
16 that if the source is leaking, it will be detected with a
17 survey meter?

18 JUDGE SMITH: That's the same question, isn't it?

19 A I have already answered that.

20 JUDGE SMITH: That is exactly the same question.
21 If it is different, I wish you would explain it.

22 Q (By Mr. Reich:) All right. If the source is
23 leaking, will you detect it on a survey meter, and I want an
24 answer yes or no.

25 A Depends on how much is leaking, Mr. Reich.

1 JUDGE SMITH: Mr. Reich, I'm confused now. What is
2 there about your present question that you do not think has
3 been answered? He just went to a very lengthy explanation
4 of wipe test.

5 MR. REICH: I'm trying to establish the fact that
6 all of our instrument readings with our survey meters didn't
7 vary, we did not detect any leakage.

8 JUDGE SMITH: I understand that. You have pointed
9 out the logs, he's explained -- are we talking about the
10 uncalibrated instruments, by the way?

11 MR. REICH: Yes.

12 JUDGE SMITH: He's explained it. Yes, indeed they
13 may not be detectable, but the wipe test is important. I
14 think he's explained that several times now.

15 THE WITNESS: And with an uncalibrated instrument,
16 as he infers, that could lead to a problem where you might
17 not detect it.

18 Q (By Mr. Reich:) Mr. Flack, do you believe that I
19 requested amendment in NRC 241 forms?

20 A The only information I have is that you claimed in
21 your response in 1981 that you had sent in to our licensing
22 office requesting forms. Is that what you are referring to?

23 Q Yes.

24 A Requesting forms to amend your license. Our
25 indications indicate, from what we have put in our

1 testimony, we have no record of you requesting that, except
2 in your letter that you went to the regional office where
3 you said you did request the forms from Washington.
4 Washington has no record, or we also went to our regional
5 office, they have no record of anything in their files that
6 you requested these forms that you are referring to to amend
7 your license, and you never did take the time again to
8 request them. You know, we consider that as careless
9 disregard that you would let this go on for a period of
10 time.

11 JUDGE SMITH: You are answering too much. Your
12 answers -- the question was, do you believe he requested it?

13 THE WITNESS: I don't know. My indication says no,
14 from all our searches, it indicates no. It should be, no, I
15 do not believe you requested the forms to our Washington
16 office to get those forms. I have no indication --

17 Q (By Mr. Reich:) Either form?

18 A The forms to amend your license to allow you to use
19 the americium sources.

20 Q Okay.

21 A And, you know, you put in for your 241, and that
22 was the only thing you did that I'm aware of. You didn't do
23 anything further.

24 MR. REICH: Okay. I would like to refer, Your
25 Honor, to a letter that was sent to me from Mr. Carl

1 Seyfrit.

2 THE WITNESS: That is a -- excuse me.

3 MR. REICH: May I read it?

4 JUDGE SMITH: What is the letter?

5 MR. REICH: What it says, it says here that they
6 have sent NRC forms enclosed, also understands that I did
7 request --

8 JUDGE SMITH: Let's take this a step at a time.

9 MS. CUOCO: Judge Smith, I still don't know what
10 letter he is referring to. If he could read me the date or
11 show it to me so I'm familiar with it.

12 (Pause.)

13 I am familiar with this letter. It is a letter
14 dated May 21, 1981, from Carl V. Seyfrit, who was at that
15 time the director of NRC Region 4. The staff has admitted
16 that document into evidence. It is an attachment to Staff
17 Exhibit 3, and it is Attachment 5 to Staff Exhibit 3.

18 Q (By Mr. Reich:) Do you have a copy there, Mr.
19 Flack?

20 A Yes, I do.

21 Q In this letter is it in your opinion that it was a
22 request made for forms, sir?

23 A It is a request, but it says that you plan to do
24 this. The words "Regarding the matter discussed, we
25 understand that you have taken or will have taken the

1 following actions," I don't know whether you took those
2 actions or not. It says you will apply to amend your
3 license and you will get the forms from the Material
4 Licensing Branch. I don't know whether you did or you
5 didn't because it says, or will have undertaken.

6 Q Is it apparent that I did file NRC 241 form?

7 A The NRC 241 form, yes, sir, you filed a 241 form,
8 and the 241 form, it is Exhibit -- it is appendix 7 of
9 Exhibit 3, and we have gone over that.

10 MS. CUOCO: It is Attachment 7, Your Honor, to
11 Staff Exhibit 3.

12 Q (By Mr. Reich:) From this letter, and it was a
13 telephone conversation, which I assume you don't have a
14 recording of, would you say that amendment forms were
15 requested along with the 241? I mean the conversation
16 between me and Mr. Spitzberg?

17 A I don't know, because you had to go to Washington
18 to get those forms. It says, "You should contact the
19 Material Licensing Branch," and that is a Washington number.
20 Whether you carried through with that or not, I have no
21 recollection, and we have gone to our Washington office and
22 asked them if they have ever received it, and they have told
23 us, no. We then went to our regional office and searched
24 those files, and we never found a request there.

25 Q Is a telephone conversation--a request by

1 telephone, is that a request for amendment forms? Is it
2 authorized?

3 MS. CUOCO: Objection, Your Honor. Mr. Reich keeps
4 going over the same ground. It is clear this witness has no
5 knowledge of the alleged conversation that took place in May
6 of 1981, and Mr. Flack just does not appear to be able to
7 answer this question.

8 MR. REICH: I am just trying to establish the fact,
9 Your Honor, that I did make a request for amendment forms.

10 JUDGE SMITH: You have testified to that effect.

11 MR. REICH: Yes.

12 JUDGE SMITH: You are offering this letter as some
13 evidence of it?

14 MR. REICH: Yes.

15 JUDGE SMITH: I can read the letter as well as Mr.
16 Flack can.

17 Let me ask you about it. This is a telephone
18 conference of May 18, confirmed by Mr. Seyfrit's letter of
19 May 21, and --

20 THE WITNESS: This happened after the --

21 JUDGE SMITH: Just a moment. A few days later, on
22 about three or four weeks later, you filed form 241?

23 MR. REICH: Yes.

24 JUDGE SMITH: What is the relationship between you
25 filing 241, form 241, which is Attachment 7, and this

1 letter, in your memory and your testimony?

2 MR. REICH: Okay.

3 JUDGE SMITH: The letter being Attachment 5.

4 MR. REICH: Your Honor, I requested both forms and
5 I requested the NRC 241 because it would expedite the time
6 that was involved before we could be legally working with
7 these sources. That was the reason for filing an NRC 241.
8 I also requested amendment forms to make it a permanent
9 amendment to my NRC license.

10 JUDGE SMITH: So then you recognize that Attachment
11 7, the form 241, was, whatever you intended it to be, it was
12 only a temporary authorization?

13 MR. REICH: Yes, 180 days.

14 JUDGE SMITH: You understood that?

15 MR. REICH: Yes.

16 Q (By Mr. Reich:) You haven't reviewed any of this.
17 I won't ask you anymore questions on that, Mr. Flack. In
18 your testimony on page 7, you say possession and/or use of
19 unauthorized equipment or material to conduct -- in the
20 conduct of licensee activities which degrades safety. I'm
21 very unclear as to what safety threats were made.

22 A In our viewpoint, we require, when you use any sort
23 of radioactive material, you must come in for a license --
24 get authorization from our licensing branch to use that
25 material. When that comes in, we review the safety

1 significance of the use and control of that radioactive
2 material. And as I explain further, different isotopes, you
3 you have to set up different kinds of radiological controls
4 for different types of isotopes.

5 And in this case you were not authorized to use the
6 americium sources in 1982, I think you have agreed, in 1983,
7 and in 1981 in certain states, and it would have been--you
8 know, we would expect, if you wanted to use that, you should
9 have come in and requested to use it and followed up on
10 getting those forms so we could review your use of those
11 materials. It does not mean, even though we approved the
12 North Dakota, if you are going to use it longer than that
13 period of time, we would want -- we would want to review it
14 ourselves.

15 Q Okay. I refer to page 8 of your testimony. The
16 notification, Mr. Flack, you asked to be given that
17 notification, so you had the opportunity to inspect our
18 procedures; is that right?

19 A That's correct. We do spot check inspections of
20 people that come into our jurisdictions from other agreement
21 states under the 241 reciprocity that you did, and that's
22 why we want to know where you are using the material in case
23 we decide we want to do an inspection of you.

24 Q Isn't it a fact that I have a license in Montana
25 and Wyoming, and even if I did not notify you about the

1 americium, you still had the right to come and inspect me at
2 any time you wanted? I don't see where there is any
3 significance as to the americium.

4 A There is a difference, as I tried to explain, in
5 the americium sources from the other sources, and we would
6 want to go through a licensing review to look at your use of
7 that to see whether you needed different requirements or
8 not. And we also like to do periodic inspections of people
9 that are coming in from other agreement states, because
10 sometimes they may act differently from when they are in
11 their agreement state. Your North Dakota license only
12 allowed you to do it in North Dakota. And then you use it
13 to jump over into your jurisdiction into Montana and Utah
14 and other states.

15 Q But you said, Mr. Flack, in your testimony that I
16 prevented the NRC from monitoring my activities, and I
17 didn't --

18 A That's right, you were unauthorized to use the
19 americium in our jurisdiction. You came in in our
20 jurisdiction and used that unauthorized material, and you
21 furthermore prevented us from looking at where you were
22 doing that because on the form you only put down Billings --
23 your 1019 Arlington Road, Billings address. We would expect
24 you to list all the places that you are using that material
25 normally.

1 Q That's impossible, Mr. Flack. Energy exploration,
2 I have no way of determining where the next well is going to
3 be drilled.

4 A Would you look at that form 241 and it says,
5 locations at which these activities will be conducted and
6 dates scheduled?

7 MR. REICH: Your Honor, we talked about this this
8 morning. I have no idea --

9 JUDGE SMITH: You simply have not convinced him,
10 that's all.

11 Q (By Mr. Reich:) Are you familiar with well
12 logging?

13 A Yes, you have to go to various places. When you
14 come under reciprocity in our jurisdiction we expect you to
15 list all the places that you plan to use those sources. You
16 can't just say that you are going to use it in 1019
17 Arlington Drive, Montana, and expect to use it all over our
18 jurisdiction.

19 Q Mr. Flack, I just expressed that I can't determine
20 where a well is drilled. Do you understand that?

21 A I'm telling you --

22 JUDGE SMITH: That's enough of this. When I try to
23 stop the exchange, use your brakes a little bit faster. You
24 are trying to get him to agree with you that from your point
25 of view it is not possible to comply with the literal terms

1 of form 241. He repeatedly has testified that he does not
2 agree with you. He knows what the form says, and that's
3 what he expects. You will not get him to change his mind.
4 You are just arguing is what you are doing. Your problem is
5 convincing me now.

6 MR. REICH: Okay. I think I have convinced you,
7 Your Honor --

8 JUDGE SMITH: Well, I don't know if you have or
9 not. You may very well convince me that it may not be
10 possible when you look at your schedule for a six-month
11 period to anticipate all of the locations and all the dates
12 that you are going to be using it. That's quite possible
13 that you can convince me of that.

14 I think I can almost infer that from looking at
15 your logs. On the other hand, I'm not saying that you have
16 convinced me one way or the other, that you are then excused
17 from complying with the requirements of your license,
18 requirements of the regulation, and excused from filling out
19 a form in a manner which the form contradicts. That's what
20 you have to convince me, that you were justified in filling
21 out a form in a way in which the face of the form itself
22 contradicts. I think you have testified that you believed
23 that that was the means by which you could temporarily
24 expand, at least for practical purposes, for functional
25 purposes, you could temporarily expand your license. Now it

1 is for me to decide whether I think that that was reasonable
2 or not.

3 Q (By Mr. Reich:) It is apparent, Mr. Flack, you
4 haven't been on any well logging -- any sites and seen the
5 actual use of the tool. You testified to that; that you saw
6 it on a film?

7 A Saw it on film, read about it, that sort of thing.

8 Q Not actually on a site?

9 A No, not physically present.

10 Q So then you are not familiar with loading and
11 unloading procedures or anything?

12 A I have seen those on films and that sort of thing.

13 MS. CUOCO: Your Honor, we have covered this
14 material before on Mr. Frack's cross-examination. I ask Mr.
15 Reich where he's going with this, if he's going to be
16 raising a new issue or just covering the same ground again.

17 MR. REICH: I'm continuing with my line of
18 questioning.

19 JUDGE SMITH: I think he's done with this point
20 now.

21 MR. REICH: Yes.

22 Q (By Mr. Reich:) Are you familiar with the presence
23 of time, distance, and shielding?

24 A Yes, sir.

25 Q Are they important on handling radiation?

1 A Certain types of sources. Your cesium source, that
2 would be more applicable than your americium sources. As we
3 have cited in our discussion, the external radiation hazard
4 is paramount in your cesium source, but your an americium
5 source is not a big external problem from it. The problem
6 is an internal problem if the source becomes ruptured and it
7 gets outside and people ingest it, that sort of thing.

8 Q In your opinion, Mr. Flack, do you believe that I'm
9 applying the factors of time, distance, and shielding?

10 A Yes, sir.

11 Q That is a safety factor involved, isn't it?

12 A That's one.

13 Q Okay.

14 Q Are you aware that on your utilization logs, when
15 our meters were out of calibration, that on quite a few
16 occasions we took readings with both meters and observed
17 about the same amounts of activity coming from the storage
18 containers?

19 A I would have to -- I don't know that for a fact,
20 but that could be very possible from a theoretical point of
21 view. But as I recall, you had problems with calibrating
22 both survey meters. You calibrated one just one time and
23 the other one maybe two times during that whole period from
24 1981 to '83, as I recall. So you really fell down in that
25 area as far as calibration.

1 As I explained before, your survey instrument is
2 basically your eyes and your ears while you are out there.
3 That's the only way you have of detecting the radiation.

4 Q Okay. And if we did have some type of a leakage,
5 we would, on that survey instrument that we are talking
6 about, even if it was out of calibration, a very minute
7 portion, would it increase that reading, would you say?

8 A We have already gone over that question.

9 Q In imposing your civil penalty I feel it to be a
10 very heavy penalty considering. The publicity I received
11 off --

12 JUDGE SMITH: Is this argument to me or a question
13 to him?

14 MR. REICH: No, I'm asking him about part of his
15 testimony.

16 Q (By Mr. Reich:) This is on page 11, it is your
17 answer to question 27. It is the second paragraph. It
18 leads me to believe there that you are imposing this penalty
19 to set an example, use me as an example as to what
20 enforcement action can be taken.

21 A We do civil penalties, or public knowledge. We put
22 them in accordance with the enforcement policy, which you
23 have a copy of, I think everybody has a copy. In section,
24 public disclosure of enforcement actions under section 6, we
25 do make these available to the public. It is public

1 information. We expect other licensees to look at these, be
2 aware of these civil penalties, and also to improve their
3 activities as a result of these.

4 We put out a publication, a new reg, which comes
5 out quarterly, which lists all of our civil penalties, and
6 states the reasons so that licensees, other licensees, can
7 look at these and see where we are focusing our attention,
8 and see where we are finding violations, in the hope that
9 they will improve their performance.

10 In the policy one of the statements in the
11 enforcement policy, it states, encourage improvement of
12 licensees performance and by example of industry including
13 the prompt identification -- well, just the first part is
14 more applicable. Basically, we, as a public agency, a part
15 of the federal government, put this out. We are required to
16 put it out promptly, and we do give you the courtesy of
17 notifying you so that you have it in hand before you are
18 barraged with reporters and things. But it is public
19 knowledge. And Congress has mandated that this be so.

20 Q Okay.

21 A We feel sorry when people get hurt and get bad
22 publicity and things, but we can't control the press.

23 MR. REICH: No more questions right now, Your
24 Honor.

25 MS. CUOCO: Judge Smith, at this time may I ask if

1 Mr. Reich plans to have any more questions of Mr. Flack?

2 JUDGE SMITH: Now is the time for it.

3 MR. REICH: Are we going to take any type of a
4 recess?

5 JUDGE SMITH: We will. I wanted to clarify at
6 least one thing.

7 MS. CUOCO: I also would like an opportunity to
8 direct examination Mr. Flack, redirect examination.

9 JUDGE SMITH: Yes.

10 Mr. Hooker alluded to it, and I will ask you to
11 clarify, do you equate possession with use of the byproduct
12 material?

13 THE WITNESS: Yes, sir. Possession and use, we
14 usually use those terms synonymously. In our proposed civil
15 penalty, we cited as a license condition, that was the first
16 violation, in that license condition 3, authorized only the
17 possession of one and for use. So possession and use we
18 usually put together. It is synonymous. Some people may --
19 possession -- it could be on his 241 that they considered,
20 when they looked at that, that he was only going to possess
21 that material at 1019. That could be a possibility. I
22 mean -- generally I would say, yes, I shouldn't go further.

23 JUDGE SMITH: So it would be your view that after
24 the 241 period expired, which was December of '81, that Mr.
25 Reich was in violation of his license any time that he did

1 not have the americium back in North Dakota?

2 THE WITNESS: Yes, sir.

3 JUDGE SMITH: What do you say to that?

4 MR. REICH: As far as possessing, I'll agree, as
5 far as the possession part of it. Other than the times I
6 wasn't in North Dakota, which was a great deal of time.

7 MS. CUOCO: Judge Smith, for your information, the
8 notice of violation Mr. Flack was referencing is Attachment
9 to Staff Exhibit 3.

10 JUDGE SMITH: Yes.

11 Does the license specify the means -- I was going
12 to ask if the license specifies a means of periodic testing
13 of the americium, but since the license doesn't cover an
14 americium, it doesn't cover that.

15 THE WITNESS: It would, sir, because if you look at
16 the license he was under, which is Attachment 1, if you go
17 back on the second page there under 13A on the second page,
18 top of the page, it says each sealed source containing
19 license shall be tested. Then it goes through under the
20 number 2 part, it says, that they won't -- if they are in
21 storage, they don't have to. Under the B part down there,
22 it says the amount that you have to make sure that it is
23 within, and somewhere in here it states you have to do it
24 within six months.

25 JUDGE SMITH: Yes, but there is nothing about the

1 license -- you testified some place the americium testing
2 should be by some type of wiping and chemical testing?

3 THE WITNESS: Yes.

4 JUDGE SMITH: Which is a very high resolution type
5 of testing?

6 THE WITNESS: Yes.

7 JUDGE SMITH: However, his license quite logically
8 would not specify that because it is not intended to cover
9 americium; is that correct?

10 THE WITNESS: That's correct.

11 JUDGE SMITH: Do you know, did his North Dakota
12 license --

13 THE WITNESS: Yes, that would require him to do
14 leak testing.

15 JUDGE SMITH: Leak testing. In that particular
16 way?

17 THE WITNESS: The same exact words almost would be
18 on his license in North Dakota.

19 JUDGE SMITH: Which does not specify a high
20 resolution wipe test for americium?

21 THE WITNESS: It says each source. Any source he
22 has in his possession, he must do it.

23 JUDGE SMITH: Do what?

24 THE WITNESS: Pardon?

25 JUDGE SMITH: Do what?

1 THE WITNESS: To what level?

2 JUDGE SMITH: The license says he has to leak test
3 the sources. Doesn't say how much.

4 THE WITNESS: Yes. Yes, it does. If you read
5 paragraph A1, each sealed source containing license -- other
6 than tridium, shall be tested for leakage at regular
7 intervals not to exceed six months. Now, let's get down to,
8 it says under B part, the test shall be capable of detecting
9 the presence of .05 millicuries of radioactive materials on
10 test. It shall be taken from the sealed source. It tells
11 how. Records shall be kept.

12 JUDGE SMITH: It doesn't tell you how, it tells you
13 your acceptance criteria for the test, what the test must
14 deduce, but how it has to be done?

15 THE WITNESS: Basically it is set up in the
16 regulations. Is that where it is at? Can they answer that?

17 MR. HOOKER: It tells you the acceptance criteria
18 for leak tests. The normal procedures submitted to the
19 licensee gives the procedures and how the leak test will be
20 conducted.

21 THE WITNESS: In his license application he
22 probably told who was going to do his leak test. That would
23 be the next supplement.

24 JUDGE SMITH: We keep slipping off. Here we
25 have --

1 THE WITNESS: This would be Attachment 2 on the
2 second page, number 14. Leak tests shall be performed every
3 six months. This is what the licensing office--

4 MR. REICH: When in use?

5 THE WITNESS: Yes. If it is in storage, you don't
6 have to do it. But when you take it out of storage, then
7 you --

8 JUDGE SMITH: Gentlemen, you are cluttering up the
9 record. I'm trying to understand one point. He agreed in
10 his application, 1978, that he would use a swab test, and
11 that, however, was for cesium.

12 THE WITNESS: That's correct.

13 JUDGE SMITH: He did not apply for americium.

14 THE WITNESS: That would also be applicable to any
15 type of leak test, sir. That's a standard type of leak test
16 and that would apply to any source that he had in his
17 possession.

18 JUDGE SMITH: Part of your violation is
19 unauthorized use, and then you continue in a hypothetical
20 sense, and that is unauthorized use, and assuming, however,
21 authorized use, he failed to perform other things that would
22 have been a part of authorized use? Do you understand that?

23 THE WITNESS: Yes, sir. Basically --

24 JUDGE SMITH: Do you understand my point?

25 MR. REICH: No.

1 JUDGE SMITH: You weren't allowed to use it to
2 begin with.

3 MR. REICH: Okay.

4 JUDGE SMITH: According to them. So if if you are
5 not allowed to use it to begin with, what difference does it
6 make if you had a swab test or not?

7 MR. REICH: Yes, I understand your point now.

8 JUDGE SMITH: Or if you had -- if you checked -- if
9 your meters were calibrated, what difference does it make,
10 you are not allowed to use it. You don't have a license to
11 use it in the first instance. I'm trying to learn your
12 enforcement theory along that line. Are you saying those
13 things exacerberated the unauthorized use?

14 THE WITNESS: Basically most licensees, such as Mr.
15 Reich, have sources, and they know that they are supposed to
16 be when they are in use, any type of sealed source like
17 that, is supposed to be leak tested at the six-month
18 interval. We felt since he had them, he should have leak
19 tested them.

20 JUDGE SMITH: That makes the violation of
21 unauthorized use more severe?

22 THE WITNESS: Yes, sir.

23 JUDGE SMITH: In your view?

24 THE WITNESS: Yes, sir.

25 REDIRECT EXAMINATION

1 Q (By Ms. Cuoco:) Can sources leak without applying
2 chemical or unresistive force to them?

3 A Yes, there can be, a period of time, they can
4 develop and deteriorate and result in leakage over a period
5 of time. Also, periodically manufacturers will send out new
6 sources and they will have defects and could be leaking.

7 Q Then there could be a manufacturer's defect and
8 that might cause a source to leak?

9 A Yes, ma'am.

10 Q In your view, Mr. Flack, is a civil penalty, or any
11 kind of enforcement action, for that matter, appropriate to
12 encourage compliance by other licensees?

13 A Yes. We consider it appropriate. As I stated in
14 the enforcement policy, we put out the press releases
15 regarding all civil penalties. We put out a new reg in
16 which we state we have all the information regarding the
17 civil penalty in the new reg. The documents that we put out
18 that propose the imposed civil penalties, the letters we
19 receive from the licensee, yes, we do consider it important.

20 Q And why is that so, why do you consider it
21 important?

22 A It is to encourage other licensees to improve their
23 compliance with NRC regs.

24 Q Isn't it to give other licensees an idea as to what
25 the NRC considers a violation?

1 A Yes, ma'am.

2 Q Mr. Flack, did hear Mr. Reich testify earlier he
3 has had no incident with respect to radioactive leakage from
4 his sources?

5 A Yes.

6 Q Does that convince you, because he has not had an
7 incident in the past, that he might not have some kind of
8 incident in the future?

9 A No, it doesn't. Periodically these things can
10 happen, and for no explained reason you could have leakage,
11 you could have other incidents, problems with the sources.

12 Q Then even though Mr. Reich has had no history of
13 safety problems in terms of leaking sources or other
14 radioactive incidents, you would not, because of that
15 history, see it permissible for him to depart from NRC
16 requirements?

17 A That's correct.

18 MS. CUOCO: That's all I have for Mr. Flack.

19 JUDGE SMITH: Anything further?

20 MR. REICH: No, Your Honor. There was one question
21 I did forget to ask.

22 JUDGE SMITH: All right,

23 MR. REICH: When he looked at Mr. Hooker's
24 inspection report, if he also looked at my response letter
25 in conjunction with it.

1 THE WITNESS: Which response letter?

2 MR. REICH: The response letter I'm referring to is
3 the one I sent.

4 MS. CUOCO: That is Attachment 10 to Staff Exhibit
5 3, response of Reich Geo-Physical to notice of violation of
6 imposition of proposed civil penalty, September 10, '84.

7 THE WITNESS: Yes, what happens is we propose a
8 civil penalty, you have 30 days in which to respond to the
9 civil penalty. We extended that period time period at your
10 request. That response came in. The Region looked at your
11 response. They formulated what should be done, and we
12 then -- they then sent it up to me. I reviewed your
13 response, and then we imposed the civil penalty. So it is
14 the second step in the process. We are now at the third
15 step, the hearing stage. So that was really -- I looked at
16 that before we imposed the civil penalty.

17 Q (By Mr. Reich:) And then in reviewing my response,
18 did you consider any of my response to be legitimate?

19 A Basically --

20 Q Or justified excuse, I might say?

21 A Basically you admitted to essentially most of the
22 violations generally, except for the transportation
23 violation, which you thought the manufacturer should have
24 supplied the label.

25 Q Would it be better stated to say that I admitted

1 partially to some of them and asked for mitigation?

2 MS. CUOCO: Objection, Your Honor. Mr. Reich is
3 seeking to clarify his position in this case through Mr. --
4 through his cross-examination of Mr. Flack.

5 JUDGE SMITH: Where are you going on it? I can
6 read the letter.

7 MR. REICH: Okay. I have my question answered. I
8 wanted to know if he reviewed this. That's all I have.

9 JUDGE SMITH: Is that all you have?

10 MR. REICH: Yes.

11 JUDGE SMITH: Do you have any additional testimony
12 you wish to submit to have me consider?

13 MR. REICH: Yes. I would like to have you consider
14 the fact, Your Honor, I don't believe I did in any way
15 threaten any person.

16 JUDGE SMITH: All right. I want to distinguish
17 between arguments and testimony. I'm going to give you a
18 chance to argue about the case and tell you how you can wrap
19 it all up. But now I have in mind for you to give me
20 factual testimony you that you want me to consider.

21 MR. REICH: Okay.

22 JUDGE SMITH: Also factual testimony can be what
23 your thinking was, too.

24 MR. REICH: All right. I think that you are clear.
25 I might ask you if you are clear as to where energy

1 exploration leads us. That we can't foresee where we are
2 going to work, where we are going to be asked to work.

3 JUDGE SMITH: If you tell me that, that -- you are
4 the best expert I have on your business. I can see by the
5 relatively short terms, it seems to be the case -- the one I
6 picked up is a bad example because you stayed in one city
7 there for a long time, for almost five months. That was in
8 North Dakota where you were licensed.

9 I guess I did get the impression from the various
10 places you were during our telephone conference calls, you
11 do not have the type of business where you can plan ahead
12 for six months. And that's your testimony.

13 MR. REICH: Yes.

14 JUDGE SMITH: What is a typical length of stay at a
15 site?

16 MR. REICH: It depends, Your Honor, if we are
17 working in coal exploration or oil and gas. Oil and gas is
18 usually not as long term. Coal exploration involves more
19 drilling and we are in a place for longer periods of time.

20 The point I would like to bring up to you is we get
21 very short notice on these. A matter of a day or two at
22 times. And in my NRC license stating that I am authorized
23 to work in Montana and Wyoming, which I have since renewed
24 and amended to state that I can work in any nonagreement
25 state, this may have been --

1 JUDGE SMITH: For americium.

2 MR. REICH: For either one, cesium and americium.

3 This may have been an oversight on my first application,
4 which was the first license I ever applied for, is that I
5 didn't foresee energy exploration going to these different
6 areas. Therefore, I stated specifically Montana and Wyoming
7 on that license. After being under the jurisdiction and
8 reading regulations and understanding more as time went on,
9 this all could have been corrected in the initial
10 application by asking for the NRC to authorize me to work in
11 their nonagreement states. Maybe it was on my part an
12 oversight to state Montana and Wyoming. I didn't foresee
13 energy exploration going to the other areas at that time.

14 It wasn't done out of neglect or willful intent to
15 disregard anything. It is just that I didn't see that I
16 would be working in the different areas that I now am.

17 I'm sure I have explained to you well enough we
18 don't do any work at all at that residence or that address
19 that's listed on the license. It should have been changed
20 or clarified to everyone involved. There isn't any actual
21 work done there. All our work is outside those limits
22 within the different states.

23 I can't foresee, I can't apply and say I'm going to
24 work in a certain county in Montana a month from now. I
25 don't know. I can't foresee that. I don't have the notice.

1 That's the reason that I didn't get my original license to
2 state all nonagreement states.

3 JUDGE SMITH: Okay. Anything further?

4 MR. REICH: Not as far as testimony unless you have
5 something you want to ask me.

6 JUDGE SMITH: Do you have some cross-examination?

7 MS. CUOCO: Yes, I do, Judge Smith. Can I take
8 just a moment?

9 JUDGE SMITH: Certainly.

10 CROSS-EXAMINATION

11 Q (By Ms. Cuoco:) Mr. Reich, you just testified that
12 the nature of your business is such that you have fairly
13 short notice when you are going to go out to a particular
14 job site, didn't you?

15 A Yes.

16 Q Well, in that case, wouldn't it have been better,
17 rather than to go to the NRC form 241 route, to have applied
18 for an amendment to your NRC license for possession and use
19 of americium-241 sources?

20 A That was the intent. The reason for filing the NRC
21 241 was that it can be filed three days prior to going to
22 work and I would be legal for work. As in the past, and a
23 good example is my license renewal, is that for an amendment
24 to be applied for and approved takes a long period of time,
25 and I wanted to legalize my use.

1 Q Well, then, Mr. Reich, why did you you wait until
2 1984, when you came in to amend your NRC license, to seek
3 authorization for the americium sources, since the
4 unauthorized use was first identified you to you in April of
5 1981?

6 A Okay. Because after my NRC license -- excuse me,
7 NRC 241 form had expired, I didn't see any -- foresee any
8 more work in nonagreement states. And I also requested
9 amendment forms to amend this license. The amendment forms
10 were never sent out to me.

11 Q Mr. Reich, do you have a copy of a letter or some
12 other kind of documentation to show you did request
13 amendment forms from the NRC?

14 A I requested -- I requested it in a telephone
15 conversation, to which was with Mr. Carl Seyfrit, I believe.
16 Asked him to send me both NRC 241 forms and amendment forms.
17 In his return letter he has the NRC forms, and in
18 parentheses, it states that they are enclosed, and says
19 nothing about amendment forms.

20 Q So you are saying, then, that the NRC sent you NRC
21 form 241 but did not send you license amendment forms; is
22 that correct?

23 A Yes.

24 Q Did you follow up on your request that you say was
25 made in that letter to Mr. Seyfrit for license amendment

1 forms?

2 A No.

3 Q Did you ever contact the headquarters office of
4 Nuclear Materials Safety and Safeguards as indicated both in
5 Mr. Seyfrit's letter and in your August 11, 1981, letter to
6 follow up on the request?

7 A Yes, I believe I did.

8 Q Do you have some kind of documentation as to that?

9 A I believe it was a telephone conversation.

10 Q Who did you call?

11 A I don't recall the exact person I talked to. It
12 would be Mr. Brown's office is who I used as a reference, I
13 believe.

14 Q So you are saying you did follow up on your
15 request. You called Mr. Brown and requested --

16 A Not personally Mr. Brown. I'm referring to that
17 department.

18 Q And when would you have made that call?

19 A I couldn't give you an exact date.

20 Q Was it sometime in 1981?

21 A I believe it was in the first part of 1982.

22 Q Did you try later in 1982 after you didn't receive
23 the forms to contact again?

24 A No.

25 Q Did you try in 1983 to contact headquarters office

1 for license amendment forms?

2 A I didn't see any reason to amend the license at
3 that point because I didn't foresee any work in nonagreement
4 states.

5 Q But you just testified, Mr. Reich, you know, your
6 business has very little predictability and you really don't
7 know from one month to the next where you are going to be.
8 Wouldn't it have been better that you would have have
9 foreseen you might be going into NRC regulated states?

10 A There was two reasons for not doing it. One was I
11 didn't foresee any work. I lost contracts. I didn't expect
12 any work. Energy exploration was very depressed. I
13 contemplated selling the business. I didn't see why to go
14 through with the effort to amend the license when I know
15 longer had the business. That's the reasons.

16 Q Were you -- are you aware, were you aware, Mr.
17 Reich, there was no need for you to obtain a specific NRC
18 license amendment form to --

19 A No, I wasn't aware of that.

20 Q Mr. Reich, we have established today, through both
21 the utilization logs, your testimony, and the testimony of
22 the NRC staff witnesses, that you possessed two
23 americium-241 sealed 15.5 and 25 millicuries during the
24 period of 1981 to 1984; is that correct?

25 A Yes.

1 Q Where did you store those sources when you were not
2 using them in the State of North Dakota?

3 A They are stored in the vehicles.

4 Q In the vehicles. And what address?

5 A 1019 Arlington Drive.

6 Q Here in Billings?

7 A That's right.

8 Q Billings, Montana.

9 In 1981 you stored your americium sources here in
10 Billings, Montana?

11 A Whatever my utilization logs indicate.

12 Q Other than the times when you were using them in
13 other states?

14 A That's right.

15 Q And then in 1982, other than the times that you
16 were using the sources as indicated in the utilization logs
17 you were storing the sources here in Billings, Montana?

18 A In the vehicles, respective vehicles.

19 Q And also in 1983, other than the use identified in
20 the logs, you were storing the americium sources in the
21 vehicles at 1019 Arlington Drive in Billings; is that
22 correct?

23 A H-m h-m-m.

24 Q What does your NRC license, which was in effect for
25 the period 1981 through 1984, during the period of the

1 inspection, what kind of material does that authorize you to
2 possess?

3 A Could you give me the dates?

4 Q Sure. 1981 to 1984 prior to your recent license
5 renewal?

6 A For the period -- the last part, excuse me, of
7 1981, I was authorized to have americium-241, and
8 cesium-137, and upon the expiration of that was cesium-137.

9 Q Isn't it true that NRC license itself in 1981 only
10 authorized you to possess one cesium-137 source of, I
11 believe it was, no more than 150 millicuries, however it was
12 on the NRC form 241 which allowed you to use two
13 americium-241 sources in NRC states during 1981? Isn't that
14 correct?

15 A Yes.

16 Q Mr. Reich, I refer you to Staff Exhibit 3,
17 Attachment 7. That's the form that has been the source of a
18 lot of discussion today, NRC 241 that was filed in 1981.

19 A All right.

20 Q Now, you have testified, and the your utilization
21 logs are in evidence, isn't it true that you used americium
22 sources in Wyoming and Utah in 1981 even though the NRC form
23 241 did not specify that location?

24 A As I stated earlier, well logging operations are
25 not conducted at this particular address.

1 Q That's correct. I'm asking you about Wyoming and
2 Utah, not Montana.

3 A What dates?

4 Q Are the states of Wyoming and Utah specified on
5 your NRC form 241?

6 A Not on this form. I'm working under an agreement,
7 under an agreement state, which authorizes me to work
8 Montana and Wyoming under my NRC license. Not Utah.

9 JUDGE SMITH: All right. I was just going to
10 interrupt to make sure that the question and answer met.
11 But I think there is a meeting of the minds now, or you are
12 approaching it.

13 Q (By Ms. Cuoco:) Mr. Reich, are you familiar with
14 the provisions of 10 CFR 150.20?

15 A No.

16 Q You are not. I refer you to item 8B of Attachment
17 7 of NRC form 241. Could you read that for me, just read it
18 outloud?

19 A All information in this report is true and
20 complete.

21 Q I'm sorry. Item 8B.

22 A I have read and understand the provisions of the
23 general license--

24 Q Yes. Continue.

25 A --10 CFR 150.20, reprinted on the cover sheet of

1 this form, and I understand that I am required to comply
2 with these provisions as to all byproducts, source, or
3 special nuclear material which I possess and use in
4 nonagreement states under the general license for which this
5 report was filed with the U. S. Nuclear Regulatory
6 Commission.

7 Q Now, you just testified that you were not
8 familiar -- you are not familiar with 10 CFR 150.20. I
9 guess you signed this form?

10 A I guess I didn't recognize the numbers. I'm not
11 that familiar with numbers referring to regulations.

12 Q Do you understand what 10 CFR 150.20 requires of
13 you?

14 A Yes.

15 Q What does that general license require of you?

16 A What does it require?

17 Q Yes, what does it require?

18 A That I am now authorized, after filing an NRC 241
19 form, to work under the conditions of my general license.

20 Q I'm not asking you, Mr. Reich, what the form --
21 what this particular form allowed you to do. I'm asking you
22 if you understand what the general license granted to
23 agreement state licensees, what the requirements of that are
24 in order for you to have the general license?

25 A I know the requirements of my general license.

1 Q And what are they?

2 A They are stated on the license.

3 Q Can you tell me?

4 A No, I don't know them by memory.

5 Q Isn't it true that you have to file an NRC form 241
6 three days prior to any use in an NRC jurisdiction? You are
7 not familiar with that?

8 A This is filed three days before use.

9 Q I'm asking you about the general provisions of the
10 requirement, the general license that is granted under this
11 particular provision. I'm asking you if you understand what
12 you your obligations are with respect to that provision?

13 A Yes.

14 Q You do understand --

15 A To file three days prior, yes.

16 Q Is that the only obligation you have?

17 A And to comply with the provisions of my general
18 license.

19 Q And did you comply with the provisions of your
20 general license here?

21 A Yes.

22 Q Well, you just testified that you used material in
23 Wyoming and Utah in 1981 and you didn't on your NRC form 241
24 indicate Wyoming and Utah as places where you would be using
25 that material?

1 A I'm authorized to work in Wyoming under my general
2 NRC license.

3 Q You are referring to your license for cesium?

4 A Yes.

5 Q But not -- isn't it true that during the 1981 to
6 1984 time period the NRC license you held --

7 A You got me confused. Are you referring to the
8 period that the NRC 241 is in effect?

9 Q No.

10 A What are you referring to?

11 Q I'm referring -- yes, I'm referring to that period
12 of time, and when the NRC form 241 allowed you to conduct
13 activities in Wyoming and Utah.

14 A Not Utah. Wyoming I am licensed to conduct
15 activities.

16 Q But isn't that only for the cesium-137 source?

17 A When this NRC form was not in effect, that's
18 correct.

19 Q So you view this NRC form 241 as not only
20 authorizing you to use americium in the State of Wyoming
21 during 1981, but authorizing you to use americium in the
22 State of Wyoming in 1981?

23 A That's correct.

24 Q Mr. Reich, isn't it true that you currently hold an
25 agreement state license in North Dakota?

1 A That's right.

2 Q You have held that license since approximately
3 March of 1978?

4 A That's right.

5 Q At the time you were licensed in North Dakota, did
6 you have a local address there, your original license?

7 A I don't think North Dakota license has any bearing
8 on this case.

9 Q Mr. Reich, I think it does. Do you still have an
10 address in North Dakota?

11 A As I stated, I would like to have Judge Smith
12 express his view as to whether this is relevant to the case.
13 I don't see where any actions in North Dakota, since I am
14 licensed under a separate license there, are relevant in
15 this case.

16 Q Mr. Reich, the predicate for filing a form 241 is
17 that you hold an agreement state license, and so in that
18 case, the fact that you hold an agreement -- the fact that
19 you have a license in North Dakota is relevant since you are
20 conducting activities under a form 241.

21 A Okay. That's been established that I have a
22 license in North Dakota.

23 Q Well, let me ask you again, you said at the time
24 you were originally licensed in North Dakota you had a local
25 address there; is that correct?

1 A I don't see the relevance of the address. I
2 admitted to having a license in North Dakota.

3 JUDGE SMITH: I think it's relevant. It certainly
4 is relevant. The question is how relevant is it, how far do
5 you want to go with it? Without your North Dakota license,
6 there is absolutely no color of authority for you to have
7 used americium up until your most recent license amendment.
8 It would have been simply a straight out bootleg operation
9 if you had not been licensed in North Dakota.

10 MR. REICH: Right. I can't --

11 JUDGE SMITH: So the only argument you have for
12 being allowed to use americium in Wyoming, Montana, and Utah
13 is your North Dakota license.

14 MR. REICH: Yes, I do have a current North Dakota
15 license.

16 JUDGE SMITH: So if you want to say it is
17 irrelevant, then that doesn't help your case, because then
18 you are just an out and out unlawful user.

19 MR. REICH: I stated I do have a North Dakota
20 license. I don't see the line of questioning as to the
21 address of it and everything. I don't see where that is
22 relevant.

23 JUDGE SMITH: That is relevant in that at least as
24 far as I'm concerned already in the case it is relevant that
25 all of the time that that source was not in North Dakota, it

1 had to be some place else, and that some place else had to
2 be in an NRC state. Then she may establish other
3 relevances, I don't know, but we will let her try.

4 Q (By Ms. Cuoco:) Mr. Reich, to go back to my last
5 question, at the time you were licensed in North Dakota did
6 you have a local address there?

7 A For a period of time.

8 Q Do you --

9 A Short period of time.

10 Q Do you recall when that was changed?

11 A I don't recall. I did submit an amendment and the
12 license was changed. It was discussed with the staff of
13 North Dakota that it would be in the best interest to change
14 the address.

15 Q Wasn't it in June of 1982 that you -- that your
16 North Dakota license was changed to reflect -- well, your
17 North Dakota license was changed to reflect you no longer
18 had an address in the state of North Dakota?

19 A That's possible.

20 Q Perhaps this document will refresh your
21 recollection. This is license amendment 3 to your North
22 Dakota license. I believe if you turn the page you will see
23 that it has -- you can certainly read it. There is no
24 dispute, then, on June 29, 1982, North Dakota issued a
25 license amendment changing a local address you had in North

1 Dakota to 1019 Arlington Drive in Billings, Montana, isn't
2 that true?

3 A That's right.

4 Q So for any period of time -- so isn't it true that
5 any time period of time after 1982, you had no place to
6 store sources in North Dakota?

7 A No, that's not true. If I was working in North
8 Dakota, I had storage. My trucks are qualified as storage.

9 Q But you wouldn't be keeping, for long periods of
10 time, you had no place to keep sources in North Dakota other
11 than your trucks?

12 A The trucks are designated storage areas. They can
13 be stored in there long periods of time. They are
14 designated storage areas.

15 Q So, in other words, you were storing the americium
16 in Billings, Montana, as you earlier testified?

17 A In designated storage areas.

18 Q In the instruction in Billings, Montana, when you
19 were not using it.

20 A That's right.

21 Q And isn't it true, Mr. Reich, until your NRC
22 license was amended in November of 1984, that you were not
23 authorized to possess americium-241 in the NRC regulated
24 State of Montana?

25 A Other than the time I had the NRC form, that's

1 true.

2 Q That's correct. Mr. Reich, do you recall the
3 frequency with which you calibrated your survey meters?

4 A Not right offhand.

5 Q Did you calibrate them every six months?

6 A Some of them weren't in use. They didn't require
7 calibration.

8 Q Is that how -- well, let me do this. Do you recall
9 the license application that you submitted on August 8,
10 1978?

11 A Referring to what?

12 Q Referring to your NRC license.

13 A What about it?

14 MS. CUOCO: For reference, Judge Smith, it is 2.

15 JUDGE SMITH: 2.

16 MS. CUOCO: Staff Exhibit 3, Attachment 2.

17 Q (By Ms. Cuoco:) First, let me direct your
18 attention to your NRC license that was issued, I believe, on
19 March 1, 1979, and it was in effect on the date of Mr.
20 Hooker's inspection. Could you turn to license condition
21 17?

22 A Which attachment?

23 Q This is Attachment 1.

24 Q Would you read license condition 17 for me?

25 A I would rather have you read it.

1 Q I would like to have it read into the record by
2 you.

3 A Mine is not legible.

4 JUDGE SMITH: No. 17. Except as specifically
5 provided otherwise by this license, the licensee shall
6 possess and use the licensed material described in items 6,
7 7, and 8 of this license in accordance with statements,
8 representations, and procedures contained in application
9 dated August 8, 1978, and letter dated January 30, 1979.

10 Q (By Ms. Cuoco:) So isn't it true, then, Mr. Reich,
11 that your NRC license incorporates your August 8, 1978,
12 application by reference?

13 A You referred to the time. Are you referring to
14 this license being in effect at the time that Mr. Hooker
15 inspected me?

16 Q That's correct.

17 A I had already amended and renewed my license at the
18 time of his inspection.

19 Q No, you hadn't.

20 A I had applied.

21 Q Well, Mr. Reich, let me ask you this: Isn't it
22 true that you applied for renewal of your NRC license on
23 February 28, 1984, approximately that date?

24 A Right.

25 Q And isn't it also true that I believe it was by

1 letter dated April 13, 1984, you received a letter from I
2 believe Robert J. Everitt of the NRC Region 4 office,
3 indicating that they -- the Region 4 office had received
4 your license application; however, until the office acted on
5 that application, are license that you held at that time
6 would remain in effect?

7 A No, it was deemed filed timely is what it was.

8 Q I appreciate it was filed timely. But isn't it
9 true that Mr. Everitt told you, in April of '84, that this
10 particular -- your license that was issued on March 1, 1979,
11 would remain in effect until licensing action was taken on
12 your application?

13 A I don't know. I don't remember.

14 Q Let me go back to the issue I was pursuing. We can
15 pick that issue up later.

16 Let me show you this letter, and allow you to take
17 a look at it. It is a letter, Judge Smith, dated April 13,
18 1984. It is addressed to Keith A. Reich and signed by Robert
19 J. Everitt, Chief of the Materials Section in NRC Region 4.

20 A What this says is that the license will not expire
21 until final action has been taken in this office.

22 Q That's correct.

23 A I don't see where it says anything about any -- not
24 renewing or not taking into consideration the renewal.

25 Q That's correct. So you would agree that's a

1 reasonable copy of what you received from Mr. Everitt, which
2 indicates to you that the license issued to you on March 1,
3 1979, was in effect until action was taken on or February,
4 1984, license renewal?

5 A I don't see where this has any bearing.

6 JUDGE SMITH: I think there is a language problem
7 here, a communication problem.

8 Is it your belief that simply by filing for an
9 amended license, -- is it license renewal?

10 MS. CUOCO: Yes.

11 MR. REICH: And amendment.

12 JUDGE SMITH: You filed for a new license renewal
13 and you wanted to expand it to include americium, and
14 perhaps other states, too?

15 MR. REICH: Yes.

16 JUDGE SMITH: Is it your testimony that you believe
17 that the filing alone of that application granted you that
18 right?

19 MR. REICH: Not the right to operate, Your Honor,
20 but the fact that I had filed it and -- expected it to be
21 acknowledged.

22 JUDGE SMITH: Right. But you didn't expect the
23 filing by itself would constitute granting of the renewal,
24 did you?

25 MR. REICH: I knew it had to be reviewed.

1 JUDGE SMITH: Had to be reviewed and approved and
2 signed and fully issued?

3 MR. REICH: Yes.

4 JUDGE SMITH: What did you think this letter did?

5 MR. REICH: That it still made me legal to operate.

6 JUDGE SMITH: Operate what?

7 MR. REICH: My cesium source.

8 JUDGE SMITH: Okay.

9 Q (By Ms. Cuoco:) So then based on that, Mr. Reich,
10 you would agree on June 20, 1984, when Mr. Hooker conducted
11 his inspection at Reich Geo-Physical, this first license
12 that was issued by the NRC which we identified today as
13 Attachment 1, is the license that you were operating under?

14 A H-m h-m-m.

15 Q And it wasn't until November of 1984 that the NRC
16 authorized you to possess and use americium sources?

17 A That was beyond my control. I had no control over
18 how long it took for them to review --

19 Q Mr. Reich, I'm just asking --

20 A To review that license, which was not a timely
21 review, believe me.

22 Q Mr. Reich, let me ask the questions here.

23 MS. CUOCO: I would ask that answer be stricken.

24 JUDGE SMITH: We will let it be an argument.

25 Q (By Ms. Cuoco:) So Mr. Reich, I think you have

1 testified, and we are agreed, condition 17 of the NRC
2 license -- we have established that the license dated March
3 1, 1979, was in effect on the date of the NRC inspection,
4 and we have further established that license condition 17 to
5 that license incorporates by reference the application you
6 submitted to the NRC on August 8, 1978; isn't that correct?

7 A Yes.

8 Q Let me direct your attention, Mr. Reich, to item 11
9 of that NRC application you filed. And that is Attachment 2
10 to Staff Exhibit 3.

11 Could you read for me, Mr. Reich, what item 11
12 provides?

13 A Ludlum models will be calibrated--ludlum model 2
14 will be calibrated by ICN pharmaceuticals every six months.

15 Q Isn't that true that that license condition simply
16 says that you are to calibrate your survey meters a flat
17 every six months and does not tie calibration of survey
18 meters to use of your sources?

19 A When they are in use. If they are not in use, they
20 don't need to be calibrated.

21 Q You just read to me the condition. The license
22 condition says survey meters will be calibrated every six
23 months.

24 A It is a regulation. The staff made the
25 regulations. When they are in use, they are to be

1 calibrated every six months. If they are not in use, there
2 is no need to calibrate those meters when not in use.

3 Q Mr. Reich, regardless, the license condition says
4 the survey meters shall be calibrated every six months.
5 Isn't that true?

6 A That's what it states here. That's not the
7 legal --

8 Q That's what it states, in your opinion.

9 A There is one --

10 JUDGE SMITH: Is there a regulation that does
11 provide that you may be relieved of calibrating it?

12 MR. REICH: Your Honor--

13 MR. HOOKER: He's--

14 MS. CUOCO: He's confusing the leak test with the
15 meter--

16 MR. REICH: No.

17 MR. HOOKER: An inspection, if a licensee is not
18 using this material and is not required to do any storage
19 surveys or such, his meter is not calibrated, we don't
20 require him to have that calibrated. However, if he goes to
21 use the material, transport it, requires any other types of
22 survey, that meter has to be calibrated prior to him using
23 the material again.

24 JUDGE SMITH: Unless it had been calibrated had six
25 months before?

1 MR. HOOKER: Correct.

2 JUDGE SMITH: That is my memory, when there is a
3 nonuse of a -- any tool, it has to be calibrated, it is
4 either --

5 MR. HOOKER: Unless there are certain other surveys
6 that are required along with that.

7 JUDGE SMITH: Right.

8 MR. REICH: So in answer to your question, when not
9 in use it does not need to be calibrated.

10 JUDGE SMITH: But then you understand that it would
11 have to be calibrated again before use--

12 MR. REICH: Yes.

13 JUDGE SMITH: If it had not been calibrated within
14 six months of the use, the new use?

15 MR. REICH: Yes. I do understand that. I just
16 wanted to clarify that it is not a requirement to have six
17 month calibrations when not in use.

18 JUDGE SMITH: It would not do a lot of damage to
19 your case if you had a meter locked up, not being used, year
20 after year and you didn't have it calibrated. I don't think
21 you have to worry about that. What you have to worry about
22 is, in my view, is did you comply with the most recent
23 discussion we had, and that is an unused meter was
24 calibrated before you used it again. Did you comply with
25 that?

1 MR. REICH: Okay.

2 JUDGE SMITH: Do you know what I mean?

3 MR. REICH: I know.

4 JUDGE SMITH: Are you saying one or more of these
5 meters were not in use; therefore, you did not calibrate
6 them.

7 MR. REICH: Your Honor, there is only one meter
8 listed on here. That's a ludlum model two.

9 JUDGE SMITH: Two ludlum model twos?

10 MR. REICH: My -- the two is the model number.

11 JUDGE SMITH: Then the next column, number
12 available, two.

13 MR. REICH: Okay, up on top. On No. 10. Okay.

14 JUDGE SMITH: Then, of course, I see meter numbers,
15 more than one meter number anyway.

16 MR. REICH: That's right.

17 JUDGE SMITH: Is it your testimony that there was
18 no use of these meters more than six months following the
19 last calibration?

20 MR. REICH: There was occasions that they were
21 used.

22 Q (By Ms. Cuoco:) I will move on to another issue
23 now. Are you familiar with license condition 10 of your NRC
24 license which was in effect at the date of Mr. Hooker's
25 inspection? That would be Attachment 1.

1 JUDGE SMITH: That's the one we just had.

2 MS. CUOCO: No, we were dealing with license
3 condition No. 17. Now we are moving to 10.

4 JUDGE SMITH: That's the one about -- okay.

5 MR. REICH: What is it?

6 Q (By Ms. Cuoco:) I direct you to the first page of
7 your license, No. 10. License material may be used at the
8 licensee's address stated in item 2 above and the temporary
9 job cites of the licensee throughout the States of Montana
10 and Wyoming.

11 JUDGE SMITH: I'm sorry. I look at condition 10 --
12 I see application 10. Excuse me. I'm sorry.

13 MR. REICH: Yes, I see the condition.

14 Q (By Ms. Cuoco:) Isn't it true that at the date --
15 on the date of Mr. Hooker's inspection that your cesium-137
16 source was not located at the address stated in item 2, but
17 was located at the airport industrial park here in Billings?

18 A There was a reason stated for it.

19 Q Yes or no answer.

20 A There was a reason stated for it.

21 JUDGE SMITH: Is that true?

22 Q Is it true?

23 A Yes.

24 Q Mr. Reich, are you familiar with 10 CFR 71.5A of
25 the Commission's regulations?

1 A Not right offhand. If you express to me what it
2 is.

3 Q They are the Commission's regulations that pertain
4 to Department of Transportation regulations.

5 JUDGE SMITH: May we go off the record?

6 (Discussion off the record.)

7 Q (By Ms. Cuoco:) Mr. Reich, let me show you this.
8 I have circled in this volume 10 CFR 71.5A. Could you
9 please read that regulation out loud?

10 A Each licensee who transports licensed material
11 outside of the confines of its plant or other place of use,
12 or who delivers licensed material to a carrier for
13 support -- excuse me -- for transport, shall comply with
14 applicable requirements of the regulation appropriate to the
15 mode of transportation of DOT in 49 CFR parts 170 to 179.

16 Q So isn't it true, Mr. Reich, that that regulation
17 requires you to comply with those Department of
18 Transportation regulations which are applicable to the kinds
19 of sources you possess?

20 A No, it is not true.

21 Q What is not true about the statement?

22 A It is not true that--first of / 1, I'm not carrying
23 material outside the confines of my plant. I'm authorized
24 to carry in my truck. That's a storage. That's an approved
25 storage facility.

1 Q But every time you drive to a job site, aren't you
2 transporting radioactive material?

3 A I'm not transferring it any place.

4 Q Transporting.

5 A Transporting. I'm transporting, that's right.

6 Q Mr. Reich, do you recall, I'm sure you do, the
7 discovery response that you provided to me by letter dated
8 June 28, 1985?

9 A What are you referring to?

10 Q I'm referring to one of the documents that you
11 attached in response to one of the staff's questions. The
12 shipper -- specifically the shipper's certificate that you
13 supplied during discovery with respect to the americium-241
14 source of 15.5 millicuries. Does this appear to you to
15 be a true and accurate copy of what you provided to me in
16 discovery?

17 A It appears to be.

18 Q Let me point out to you the column, package, and
19 the category. Could you please read for me what the
20 shipper's certificate says with respect to category of
21 material on that certificate, shipper's certificate?

22 A What are you trying to establish here?

23 Q I'm just asking you --

24 A Is it appropriate?

25 Q This particular column -- the --

1 A It says package, White 1.

2 Q White 1. Shouldn't that put you on notice that you
3 would have been required, whenever you shipped your
4 americium-241 sealed source of 15.5 millicuries, to use a
5 radioactive White 1 label?

6 A My sources are marked, as Mr. Hooker observed in
7 his inspection. They are labeled, radioactive material.

8 Q Do they --

9 A They don't have to be placarded on the outside.

10 Q Do the sources have a radioactive White 1 label?

11 A They have a radioactive yellow marking on them.
12 They are a tag.

13 JUDGE SMITH: The answer is, no.

14 MR. REICH: No, I don't understand what a White 1
15 label looks like. Do you have one for display?

16 MS. CUOCO: Yes, I do. Judge Smith, if you will
17 give me a moment.

18 JUDGE SMITH: What was it that Mr. Reich took with
19 him to Denver?

20 MR. REICH: That was a DOT tag.

21 MR. HOOKER: That was a required marker to be put
22 on that is required to describe the type of shipping
23 container. I think there is some confusion here between the
24 labels that the people are talking about.

25 JUDGE SMITH: Do you think Ms. Cuoco is confused?

1 MR. HOOKER: Mr. Reich is confused. She is asking
2 about a shipping label. There was a label on the container.
3 However, there is a White label 1 transport type label that
4 is a DOT required type shipping label. The other label that
5 Mr. Reich is talking about is an identification type label
6 that is usually on a logging container identifying it as a
7 source with him.

8 MS. CUOCO: Just to clarify, Judge Smith. I have
9 here, which -- this is a radioactive White 1 label.

10 Q (By Ms. Cuoco:) Mr. Reich, let me show you the
11 same label. This label, it is in the third line of a chart
12 which is labeled, Hazardous Material Warning Labels, it is
13 the second label identified there. This particular label,
14 Mr. Reich. Was that label on your americium-241 sealed
15 sources?

16 A Do you understand that this label is twice the size
17 of the storage container?

18 Q Was that label on?

19 A It is not feasible to put a label of that size on
20 there, Your Honor.

21 JUDGE SMITH: That may be and then you can explain
22 that.

23 MR. REICH: Okay.

24 JUDGE SMITH: Answer her question.

25 MR. REICH: That particular label was not on the

1 source container because the shipping container, being
2 approximately three inches in diameter and approximately
3 three inches high, you would have entirely wrapped that. It
4 wouldn't have been legible. It was marked with the
5 appropriate tag, which Mr. Hooker approved in his inspection
6 as being an appropriate marking.

7 Q (By Ms. Cuoco:) I'm not sure what Mr. Hooker
8 approved in his inspection. Nevertheless, would you agree
9 that that White 1 label was not on that source?

10 A It won't fit. It is not feasible to put it on
11 there.

12 Q Mr. Reich, I'm going to move on.

13 JUDGE SMITH: What do we do about that?

14 MR. REICH: I'd like to make a statement, Your
15 Honor.

16 JUDGE SMITH: Let's see if Mr. Hooker can explain.

17 MR. HOOKER: Some --

18 MR. REICH: Will that fit on my container?

19 MR. HOOKER: As you said, it will pretty much cover
20 it. There is a requirement, however, that label be on a
21 transport container. There is a requirement of the size of
22 the container. We normally will accept if that label would
23 have been -- that particular type of label had been in the
24 general vicinity of the shipping container itself. However,
25 that particular label was not applied as required by the

1 transportation requirements. That label being present on
2 the shipping container as best could be applied is what we
3 would normally accept.

4 JUDGE SMITH: The label was not any place?

5 MR. HOOKER: Correct.

6 MR. REICH: Excuse me, Your Honor. There was a
7 label.

8 MR. HOOKER: That particular label was not there.
9 The one you talked about before was the identification label
10 which is a separate issue.

11 MR. REICH: Excuse me. I disagree. He inspected
12 it. This other particular label is right in plain view. It
13 is the one right next to it, Your Honor.

14 JUDGE SMITH: Which label are you referring to?

15 MR. REICH: The label right next to it. Plain
16 eyesight.

17 JUDGE SMITH: Radioactive 2?

18 MR. REICH: That's right.

19 MR. HOOKER: That I don't recall. I remember there
20 was a radioactive sign there for radioactive storage but not
21 the same label.

22 MS. CUOCO: Judge Smith, there is clearly a dispute
23 as to fact here. I think Mr. Hooker's testimony speaks for
24 itself as to what Mr. Hooker observed on the date of the
25 inspection as to what was on those sources.

1 JUDGE SMITH: His testimony is that he does not
2 recall. In any event, which of the two labels should have
3 been there?

4 MR. HOOKER: The white label.

5 JUDGE SMITH: Why that one instead of the yellow?

6 MR. HOOKER: Appropriate for the radiation level of
7 the shipping container.

8 MR. REICH: I'm also authorized to carry cesium in
9 there, Mr. Hooker. Is that white label authorized for
10 cesium?

11 MR. HOOKER: It would be authorized depending on
12 the radio level of the shipping container. It doesn't go by
13 isotope. The label that was inside marked, there was a
14 radioactive materials label, but it was a storage type
15 label, nothing to do with the transportation label.

16 JUDGE SMITH: Is it your testimony that you don't
17 recall whether there was a transportation label?

18 MR. HOOKER: There was not a transporation label.
19 There was a radioactive materials label that was on the
20 storage tank. But it designates a storage area, it is not a
21 transport label. A transport label requires additional
22 information.

23 JUDGE SMITH: So your testimony that you cannot the
24 recall whether there was a radioactive Yellow 2?

25 MR. HOOKER: There was none.

1 JUDGE SMITH: Your testimony is that there was
2 none?

3 MR. HOOKER: Correct.

4 JUDGE SMITH: Your testimony, there is one.

5 MR. REICH: Yes.

6 JUDGE SMITH: Your testimony is that it was exactly
7 that.

8 MR. REICH: This sign right here.

9 MR. HOOKER: The sign. But that particular type of
10 label?

11 MR. REICH: This sign is posted.

12 MR. HOOKER: I know. There is a sign that is an
13 identical sign that designates a radioactive material
14 storage area.

15 JUDGE SMITH: Where is that?

16 MR. HOOKER: Inside in the vehicle, which is
17 correct. That has nothing to do with transportation label
18 labels, which also has the same sign, but different type of
19 label. Requires -- means something different.

20 JUDGE SMITH: What is the functional difference?

21 MR. HOOKER: Your storage area where you store
22 certain quantities of material has to be properly marked to
23 designate the storage of radioactive material. Mr. Reich
24 had the appropriate sign for the storage of radioactive
25 material. There was no question about that.

1 JUDGE SMITH: Which is also his transporting.

2 MR. HOOKER: Yes. But the transport label requires
3 other information. It is a designate, it is a DOT
4 requirement.

5 JUDGE SMITH: In case of an accident, they know
6 what the problem is?

7 MR. HOOKER: Correct. They know what it is.

8 Q (By Ms. Cuoco:) Mr. Reich, I will move on again to
9 another subject. Isn't it true that the State of North
10 Dakota conducted an inspection of you in 1982?

11 A Yes.

12 Q Do you recall what North Dakota's findings were at
13 that time?

14 A Not necessarily.

15 Q Didn't they find about 13 or 14 violations of your
16 North Dakota license?

17 A Let me check, Ms. Cuoco.

18 No, I don't believe that's correct.

19 Q Let me refresh your recollection by showing you a
20 document dated June 28, 1984, directed to you from the State
21 of North Dakota. Excuse me, June 28, 1982. Does at that
22 look like a document that you received from the State of
23 North Dakota?

24 A I don't see what relevance this has.

25 Q Does it look like a document that you received from

1 the State of North Dakota?

2 A It looks -- it appears to be from North Dakota.

3 Q Does it look like the document you recall?

4 A It may be.

5 Q Isn't it true that that document states there are
6 numerous violations of your North Dakota license, including
7 the failure to calibrate survey meters and to conduct leak
8 tests?

9 A You didn't have any jurisdiction over my North
10 Dakota activities.

11 JUDGE SMITH: Don't argue, Mr. Reich. You can ask
12 me for relief from answering the question, if you want to.

13 MR. REICH: Okay.

14 JUDGE SMITH: However, that won't do you any good
15 because the question is quite appropriate. It is relevant.

16 MR. REICH: That's right. I did have some meters
17 out of calibration.

18 Q (By Ms. Cuoco:) And you didn't conduct some leak
19 tests?

20 A That's right.

21 JUDGE SMITH: The meters were out of calibration,
22 that means they were out of the calibration period?

23 MR. REICH: Yes. What they are referring to there,
24 Your Honor, is the same dates of noncalibration as the NRC
25 is. We have two different -- we have the State of North

1 Dakota. They are not two separate things. They are
2 referring to the same noncalibration dates.

3 JUDGE SMITH: Is that true, Ms. Cuoco?

4 MS. CUOCO: I know, Judge Smith, it appears these
5 documents -- yes, they are the same days for different
6 jurisdictions, yes. That's my understanding.

7 MR. REICH: Yes.

8 JUDGE SMITH: The significance then in your view is
9 as of 1982 he was informed.

10 MS. CUOCO: That's correct, Judge Smith. He was
11 put on notice by the State of North Dakota in 1982 as to
12 this.

13 Q (By Ms. Cuoco:) Mr. Reich, do you recall North
14 Dakota conducting an inspection of you in September of 1984?

15 A Yes.

16 Q Do you recall the results of that inspection?

17 A Yes.

18 Q What were the the results of that inspection?

19 A Excellent.

20 Q October 5, 1984?

21 A Talking about North Dakota?

22 Q North Dakota, yes.

23 A I got a very good review.

24 Q Let me show you this document, Mr. Reich. This is
25 a letter dated October 5, 1984, addressed to you from the

1 State of North Dakota. Does this look like a letter that
2 you would have received?

3 A Yes.

4 Q Isn't it true that that document states that you
5 failed to -- according to North Dakota officials, you failed
6 to calibrate your survey meters at the required intervals?

7 A You just asked me that. We just talked about the
8 survey meters.

9 Q We talked about different dates.

10 A They are the same dates. They are the same dates
11 you have charged me with filing.

12 JUDGE SMITH: Concentrate on the letter of October
13 5, 1984, not '82, '84.

14 MR. REICH: They are referring to starting in '82,
15 Your Honor.

16 JUDGE SMITH: Same dates. Okay.

17 MR. REICH: I agree with what is stated here, and
18 it is the same dates you are referring to.

19 Q (By Ms. Cuoco:) Could you read what they say
20 there?

21 A Survey meter was not calibrated between the dates
22 7/27/82 and 4/10/84.

23 Q What does the the letter say with respect to leak
24 tests?

25 A With respect to leak tests?

1 Q I believe that's the next item in the letter.

2 A Americium-241 sealed source was not leak tested
3 between 1/12/84 and 4/30/84, three months.

4 Q Thank you.

5 MR. REICH: I might add, there wasn't any use
6 between those two dates, either, which didn't require a leak
7 test.

8 MS. CUOCO: Judge Smith, I don't have anything
9 else.

10 JUDGE SMITH: Mr. Reich, where is your CCM now?

11 MR. REICH: Storage, bunker No. 4 in the airport
12 industrial park.

13 JUDGE SMITH: Is that where under the new license
14 that you are authorized to keep it?

15 MR. REICH: Yes.

16 JUDGE SMITH: Do you have new employees -- do you
17 have your employees listed in your new license?

18 MR. REICH: I have it stated in there, and there is
19 a reason for not stating individual employees, because each
20 time we had an employee turn over we would have to amend the
21 license. So the way I asked that it be stated is that we
22 could employ personnel that had a qualified training course
23 certificate.

24 JUDGE SMITH: And they could function
25 independently?

1 MR. REICH: Yes.

2 JUDGE SMITH: That's been accepted by the NRC?

3 MR. REICH: Yes.

4 JUDGE SMITH: There is one note I have here I
5 forgot to ask Mr. Flack. You had testified that Mr. Reich
6 continued some practice after Mr. Hooker had warned him. As
7 I recall the case, I don't think that that is positive. Do
8 you agree with me?

9 MR. HOOKER: I agree. It was the previous
10 inspector.

11 MS. CUOCO: Yes, it was.

12 MR. HOOKER: That was the inspection.

13 MR. FLACK: Mr. Spitzberg I think was the inspector
14 in 1981, not Mr. Hooker.

15 MS. CUOCO: That's correct.

16 JUDGE SMITH: Anything further by way of testimony?

17 MR. REICH: Your Honor, if this would be testimony
18 or whatever, I would like to have you review my most current
19 inspection from North Dakota, which will show you that I
20 have upgraded my program, and I am in compliance with it.

21 JUDGE SMITH: You can offer that as an exhibit.

22 MR. REICH: I don't have copies for everyone. I
23 just have this one.

24 JUDGE SMITH: That's all right. We will arrange to
25 make copies. However, before we do it, we should give Ms.

1 Cuoco an opportunity to read it and to object.

2 MS. CUOCO: Judge Smith, since Mr. Reich is going
3 to offer his most recent North Dakota inspection materials
4 into evidence, the staff would like to offer the the two
5 letters that I have just referenced into evidence as well.
6 We will make the appropriate copies.

7 JUDGE SMITH: All right. I will mark the letter
8 dated May 13, 1985, to Reich Geo-Physical from Dana K. Mount
9 as Reich Exhibit 1. That also has an attachment to it, which
10 appears to be a form used for inspections. It is a well
11 logging inspection report. That is received without
12 objection.

13 (Received.)

14 MS. CUOCO: I believe, Judge Smith, we are up to
15 NRC Staff Exhibits 4 and 5. Staff 4 would be a letter dated
16 June 28, 1982, and its attachment is an inspection report
17 from the State of North Dakota.

18 And Staff 5, October 5, 1984.

19 JUDGE SMITH: I wonder if I could enlist your aid
20 in taking Mr. Reich's as well as yours back, returning to me
21 the three copies, and providing Mr. Reich a copy with his.

22 MS. CUOCO: Yes.

23 Judge Smith, at this time, if Mr. Reich has no
24 further testimony, I with like to request a recess for the
25 staff to consider whether it needs to offer rebuttal

1 testimony.

2 JUDGE SMITH: Okay. We will do that. Before we
3 do, I want to explain what your options might be at the end
4 of the hearing. You could make an oral argument. You could
5 explain -- you can review the evidence and explain why you
6 believe you shouldn't be penalized. You have pretty well
7 done that as the case has unfolded.

8 We also have a provision under the Administrative
9 Procedure Act, and our rules, which provide you an
10 opportunity, after you have received the transcript, to read
11 it and submit proposed findings of fact, and a decision.
12 You can really do both of those, if you want to. I would
13 recommend, however, as between the two, that you, in a more
14 deliberate way, read the testimony, read the exhibits, and
15 present in writing an argument as to how you think the
16 decision should be, what my decision should be. Of course,
17 that will take more work, and you may just prefer to make an
18 argument or nothing. You are not obliged to do anything.
19 But I want to tell you what your options are.

20 Now, under our regulation, sometimes it is regarded
21 as a default if a party does not file proposed findings and
22 proposed decision. In your case I would not regard it as a
23 default because you have made your arguments all the way
24 through, and I would make the decision based upon the record
25 presented today.

1 I would, however, might regard as a default if you
2 don't do it.

3 MS. CUOCO: I appreciate that. The staff plans to
4 file findings and either a proposed decision or brief,
5 whatever form you would find more acceptable.

6 JUDGE SMITH: So with that in mind, during the
7 brief recess, you think what you might want to do.

8 MR. REICH: I have a question. If I choose the one
9 where I take the testimony and review everything, does that
10 mean that there wouldn't be a judgment made today?

11 JUDGE SMITH: That's right. You don't want a
12 judgment today.

13 MR. REICH: When would the judgment be made?

14 JUDGE SMITH: The judgment, I might tell you, has a
15 relatively low priority in my responsibilities as of now.
16 Basically I am writing a decision on another case, and I
17 wish to read the transcript and be very careful about it
18 before I make a decision. I do not expect to have a
19 decision in this case until -- actually, I have had a long
20 standing --

21 (Discussion off the record.)

22 (Recess.)

23 MS. CUOCO: Judge Smith, the staff has no rebuttal
24 testimony. I would like to make a closing statement.

25 JUDGE SMITH: All right.

1 MS. CUOCO: Judge Smith, we have heard a lot of
2 evidence today. What it comes down to is that there is no
3 real dispute that certain violations occurred as alleged in
4 the notice of violation and proposed imposition of civil
5 penalty. Mr. Reich has admitted as much in his testimony
6 today, and in his response of September 3, 1984. He admits
7 that certain violations did occur.

8 The issue that is before you is whether or not
9 imposition of a \$1600 civil penalty is appropriate in view
10 of the circumstances of his case. The staff has shown
11 through testimony and through its written testimony and the
12 testimony and questions asked today, not only is the civil
13 penalty -- the civil penalty is appropriate here. The staff
14 has shown that Mr. Reich has exhibited over a three-year
15 period of time careless disregard for NRC requirements.
16 What has happened in this case is that in 1981 Mr. Reich was
17 put on notice that certain of his practices constituted, in
18 the NRC's views, violations of his license. He continued
19 those practices through 1982, 1983, and 1984. In that time
20 frame the State of North Dakota found many of the same
21 violations when it inspected him under an agreement state
22 license.

23 Mr. Reich, until he applied for a license
24 amendment, renewal and amendment, in February of 1984, did
25 not even attempt to have his license amended for possession

1 and use of americium sources.

2 Thus, the staff feels he has presented testimony
3 that the \$1600 civil penalty should be imposed as Mr. Taylor
4 imposed in his order of October 31, 1984.

5 JUDGE SMITH: Mr. Reich, what is your pleasure?

6 MR. REICH: I would like to make a closing
7 statement, also, Your Honor.

8 I feel in view of the fact that it is my opinion
9 that I have upgraded my program, I have taken more safety
10 precautions, in interviews and conferring with the NRC I
11 told them certain things I was going to do, as is evident in
12 my North Dakota report, that they also told me I had to
13 upgrade my program, which I did. And you will see, when you
14 review those records I just offered for you to review.

15 I feel that I haven't, in my particular case here,
16 the safety of any individual has not been threatened. There
17 hasn't been any harm done to any individual or the public at
18 all. My safety, as far as being applicable in here, I feel
19 it to be of top quality.

20 I feel the penalty is too severe, and I asked the
21 the NRC to consider the facts that I would comply with all
22 their regulations. I am in full compliance right now with
23 all regulations, which will show you that I do have intent
24 of complying. I am in full compliance right now. I feel
25 the penalty is too severe, and I ask that it be suspended on

1 the condition that I stay in compliance, which I stated I
2 would do in my response letter.

3 JUDGE SMITH: Your response letter of --

4 MR. REICH: Yes, it is one of the exhibits.

5 JUDGE SMITH: Okay. I will take the whole thing
6 under advisement. I recognize \$1600 is a matter of
7 substantial concern to you. It is not an easy case for me
8 at all. It is a difficult case. I do not want to see
9 needlessly an operator of a very small business have to pay
10 money that would be perhaps even a detriment to safety if
11 you are operating on a budget. On the other hand, the
12 Nuclear Regulatory Commission has been charged by Congress
13 with important responsibilities. Just as I hope you would
14 not allow any of your employees to turn over the source to
15 somebody else, the NRC is concerned that you have done just
16 exactly that. That's one of the allegations which concerns
17 me.

18 It is very complicated. I want to study the record.
19 I want to give you every break that is possible, but I will
20 concede, as I heard the evidence today and I read it, I am
21 concerned about repeated violations. So I don't know what
22 to do with it. I will just have to wait, hear what you have
23 to say, hear what Ms. Cuoco says, and make a decision that I
24 believe is most consistent with safety.

25 I had thought of the possibility of asking the

1 staff and you to work together to see if there could not be
2 an alternative solution to this case, that you do something
3 that would give them strong assurances that this will never
4 come up again in lieu of the penalty, because, as I say, I
5 do not like to see a penalty by such a small business be
6 paid. But I have no idea what such an alternative might be.
7 None has occurred to me as I have thought about it.
8 Something that would be equally effective but be less costly
9 to you, but nothing has occurred to me.

10 If after this hearing something should occur to you
11 and to Ms. Cuoco, informally you could always explore it and
12 bring it to my attention. In the meantime, though, the
13 record will be closed. We will set a schedule of filing
14 proposed findings of fact, and I will make my decision when
15 I receive it.

16 So with that, we will close the record, and then --
17 we will leave it open until we set a filing date. I have
18 been thinking, I don't want to be quite as generous with the
19 time as I indicated before. I think I would have between
20 Labor Day and the first two weeks in September, between
21 Labor Day and September 13 to begin working on this
22 decision, perhaps even getting it out.

23 So would having the proposed findings in, giving
24 you all of August to work on them, would that be
25 satisfactory?

1 MS. CUOCO: Yes, it would, Judge Smith.

2 JUDGE SMITH: I would not even be able to use them
3 before August. I could give you all of August. I could use
4 them immediately following Labor Day.

5 Do you intend to say anything in writing?

6 MR. REICH: I would like to review everything and
7 all the documents.

8 JUDGE SMITH: All right, that will be your
9 opportunity then.

10 MS. CUOCO: Labor Day falls on Monday, September 2.
11 Perhaps sometime that week.

12 JUDGE SMITH: That will be fine. Let's say -- I
13 don't --

14 MS. CUOCO: I see a long weekend if I say September
15 the 3rd.

16 JUDGE SMITH: Let's have the findings -- we don't
17 want those hanging over your head over Labor Day, do you?
18 Well, how about September 6?

19 MS. CUOCO: September 6 would be fine with the
20 staff.

21 JUDGE SMITH: September 6.

22 If you are going to make arguments to me from the
23 record here, to do the the best job for yourself, don't make
24 general arguments. Don't say so and so testified and the
25 record says this. Be specific. You say right where I can

1 find it. Give me the page number of the document or the
2 transcript page number so I can find it without any
3 additional effort, because if you want me to consider it
4 carefully, your arguments, make it easy for me to find the
5 source.

6 MR. REICH: May I make a suggestion?

7 JUDGE SMITH: Certainly.

8 MR. REICH: I think maybe to -- he may be referring
9 quite often to those utilization logs. Maybe we ought to
10 number those pages on the exhibits. All I can reference to
11 otherwise is dates.

12 JUDGE SMITH: Well, that's all right. I can find
13 them. They are easy to follow.

14 MR. REICH: Okay.

15 MS. CUOCO: Judge Smith, one final matter. Would
16 you prefer a proposed decision or would you prefer a brief
17 on the matter?

18 JUDGE SMITH: I would very much appreciate a
19 decision in which I can virtually adopt unchanged the
20 undisputed procedural background. That will save me a lot
21 of time and a lot of work. If you can give me something
22 like when the notice of violation was issued and that type
23 of thing. As to the disputed facts, suit yourself.
24 Whichever way you wish to present it, that's your
25 prerogative.

1 MR. REICH: Your Honor, as you well know, I have
2 never prepared one of these. I guess I will just review
3 everything and write down what I have to say to you. I
4 don't know the form.

5 JUDGE SMITH: If you introduce new information, new
6 arguments, new so-called testimony, I will not consider it.

7 MR. REICH: Okay. I don't see any of that.

8 JUDGE SMITH: I will not consider it.

9 MR. REICH: Okay.

10 JUDGE SMITH: And, also, since it is the staff's
11 burden in this case, I should have given you an opportunity
12 to file after. That's the regulation of the NRC rules of
13 practice gives the staff an opportunity to file after the
14 other party. Do you want that opportunity?

15 MS. CUOCO: Yes, I think we would. We can
16 abbreviate it, perhaps. I know it is difficult to ask Mr.
17 Reich right now if he anticipates a very long response.

18 MR. REICH: I will be on drilling locations all
19 through this and doing it while I'm not working. I will get
20 it done as soon as I can and by September 6, if you
21 designate that the date.

22 JUDGE SMITH: We have to give time for Ms. Cuoco to
23 see if she wishes to add anything to hers.

24 MS. CUOCO: Judge Smith, when will you becoming
25 available again?

1 JUDGE SMITH: After September 16, I will be out of
2 the country from September 16 to October 10. There is no
3 point in having it in to me on September 14, for example,
4 because I would do nothing with it. Yet, it is a matter
5 that should not linger too long. I would like to get
6 working on it while my memory is still fresh and don't have
7 to get reoriented. I would like to be able to work on it
8 the week of -- prior to September -- the week of September
9 8, I mean October 8. I mean September 8, right.

10 I would think I would like to have you get your
11 findings in by August --

12 MS. CUOCO: Perhaps we could just move the filing
13 schedule up about a week or ten days and submit findings on
14 August 26. That would be both Mr. Reich and myself, and
15 then the staff could respond I would say by September 6.

16 JUDGE SMITH: You both file main findings as of
17 when?

18 MS. CUOCO: The 26th of August.

19 JUDGE SMITH: The 26th.

20 MS. CUOCO: Any response the staff would have would
21 be on September 6.

22 JUDGE SMITH: How does that strike you?

23 MR. REICH: That's fine. I will have to do it. I
24 would like to have more time, but that's all right with me.

25 JUDGE SMITH: Well, just remember that I'm going to

1 be reading the transcript. Nobody can change what has
2 happened.

3 We will set that as the schedule. Anything
4 further?

5 MR. REICH: What do I do with mine? Do I send them
6 to you?

7 JUDGE SMITH: Send them to me.

8 MR. REICH: All right.

9 JUDGE SMITH: With a copy to Ms. Cuoco.

10 MR. REICH: Okay.

11 JUDGE SMITH: Just Washington, D C.

12 MR. REICH: I think I have the address.

13 MS. CUOCO: One final matter, should Mr. Reich, or
14 would you be giving Mr. Reich an opportunity to respond to
15 our findings?

16 JUDGE SMITH: No.

17 MS. CUOCO: Our response to his?

18 JUDGE SMITH: No. Since you have the burden, you
19 get the last the last shot at it.

20 Okay. If there is nothing further --

21 MR. REICH: One more question.

22 I'm wondering if I can have my -- the document I
23 gave you that I received from North Dakota, can I get --

24 MS. CUOCO: Yes, the staff, Mr. Reich, we will
25 xerox right now copies of these documents to provide to

1 Judge Smith and I will return the copy to you so you have
2 it.

3 MR. REICH: Also, I just -- I know we have had a
4 lot of problems between the three of us getting together,
5 and if it arises again over this period of time, as you
6 know, I'm hard to get a hold of during the day. But I do
7 try to return your calls. I hope you understand that I
8 don't work eight hours a day. I'm very hard to get a hold
9 of during business hours.

10 JUDGE SMITH: Yes. Do not ignore your filing date.
11 When your filing date comes and nothing has been filed, we
12 will make the assumption that you are not filing.

13 MR. REICH: I understand.

14 JUDGE SMITH: That is the date by which it has to
15 be in the mail first class. Satisfactory?

16 MS. CUOCO: Yes.

17 JUDGE SMITH: Mail, first class, being mailed on
18 August 26. Don't ignore that date.

19 MR. REICH: All right.

20 JUDGE SMITH: If there is nothing further, the
21 hearing is adjourned.

22 (Whereupon, proceedings in the above matter were
23 adjourned.)
24
25

CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the UNITED STATES NUCLEAR REGULATORY COMMISSION in the matter of:

NAME OF PROCEEDING: REICH GEO-PHYSICAL, INC.
Billings, Montana
License No. 25-18304-01

Civil Penalty

DOCKET NO.: 30-14821 (EA84-78)

PLACE: WASHINGTON, D. C.

DATE: WEDNESDAY, JULY 24, 1985

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(sigt)

(TYPED)

Official Reporter

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