

October 7, 1996

EA 96-312

Baily Engineering and Testing, Inc.

ATTN: Mr. Joseph Baily

President

P.O. Box 427

Pensacola, Florida 32592-0427

SUBJECT: EXERCISE OF ENFORCEMENT DISCRETION  
(NRC INSPECTION REPORT NO. 150-00009/96-09)

Dear Mr. Baily:

This refers to the special, unannounced inspection conducted by this office on August 7-8, 1996. The results of this inspection were provided to you in our letter dated September 5, 1996. At that time you were informed that the inspection had identified one apparent violation, the failure to obtain a general or specific NRC license, as required by 10 CFR 30.3, prior to using portable nuclear gauges containing by-product material. Specifically, since 1990, you used portable nuclear gauges on numerous occasions at Eglin Air Force Base (AFB) and Hurlburt Field, Florida, in areas where the NRC maintains jurisdiction for regulating the use of by-product material without an NRC license. You were informed at that time that the apparent violation was under consideration for enforcement. Subsequent to issuance of the inspection report, the NRC determined that Hurlburt Field, Florida is not an area of exclusive Federal jurisdiction; therefore, the work you performed at that location did not require an NRC license.

Although the requirements of 10 CFR 30.3 apply to work performed in areas of exclusive Federal jurisdiction in Agreement States, we also note that as an alternative to obtaining an NRC license, as permitted by NRC practice, Baily Engineering and Testing, Inc. (BETI) could have filed an NRC Form-241, paid the associated fees, and conducted these activities as described in 10 CFR 150.20.

The inspection established that your representatives did not appear to be aware of the need to either have a specific license under 10 CFR 30.3 or in lieu thereof, to file a Form-241 with the NRC. The inspection also determined that you relied on base personnel to inform you of the applicable regulatory requirements regarding licensed activities performed by you at their respective facilities. As a result, you believed that the work could be performed under authorization provided through your State of Florida Radioactive Materials License.

Normally, the failure to obtain an NRC license or failure to file an NRC Form-241 to notify the NRC of activities being conducted within its jurisdiction would be considered for escalated enforcement action which could include the issuance of a civil penalty in accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions" (Enforcement

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Policy), NUREG-1600. However, after consultation with the Director, Office of Enforcement, and the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support, the NRC is exercising enforcement discretion and is not taking any enforcement action in this matter, in accordance with Section VII.B.6 of the Enforcement Policy. The NRC is exercising enforcement discretion based on the circumstances described above and in the subject inspection report, including our conclusions that you did not intentionally fail to obtain the proper license and that BETI did not understand the regulatory requirements pertaining to use of licensed materials in areas of exclusive Federal jurisdiction within an Agreement State. In reaching this decision, the NRC also considered the efforts taken by BETI to become familiar with applicable NRC requirements, the fact that BETI was not made aware by Eglin AFB contracting personnel that the bases contained areas of exclusive Federal jurisdiction, and our conclusions that activities conducted by BETI at this facility appeared to have been done safely and generally in accordance with the conditions of your Florida license.

Although the NRC is exercising enforcement discretion based on the circumstances identified during the inspection, you are advised that future failures to seek appropriate authorization to perform activities in areas where the NRC maintains jurisdiction will result in significant enforcement action. We would expect that, in the future, BETI would obtain written assessments from, or document assessments by, Federal authorities as to whether a proposed work site is in an area of exclusive Federal jurisdiction. Absent such documentation showing that Federal authorities assessed the work site as not being in an area of exclusive Federal jurisdiction, significant enforcement action may be taken for failure to seek the required authorization to perform licensed activities in areas of exclusive Federal jurisdiction.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and any reply will be placed in the NRC Public Document Room.

Should you have any questions regarding this inspection, please contact Mr. Charles Hosey at (404) 331-5614.

Sincerely,

  
Stewart D. Ebnetter  
Regional Administrator

Docket No.: 150-00009/96-09  
Florida License No.: 1926-1

cc: State of Florida

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*OE  
Concurrence  
09/30/96*

*See  
previous  
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This case is not exempt from OE's enforcement action timeliness requirements.

Attachments: 1. Draft Letter to Chadbourne  
2. Draft Letter to Okaloosa  
3. Draft Letter to Bailey  
4. Draft Letter to Jacobs

cc w/attachments: D. Cool, NMSS  
J. Goldberg, OGC

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