

January 27, 1997

EA 96-308

Nelson Excavating, Inc.
ATTN: Mr. James C. Nelson, Owner
Euclid Avenue Addition
Thomas, West Virginia 26292

SUBJECT: NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY -
\$5,000 (NRC Inspection Report No. 47-24923-02/96-01 and 96-02)

Dear Mr. Nelson:

This letter transmits a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) and terminates your Nuclear Regulatory Commission (NRC) License No. 47-24923-02 for a Troxler Electronic Model 3400 series portable moisture density gauge (gauge), containing nominally 11 millicuries (mCi) of Cesium-137 and 44 mCi Americium-241. These actions are based upon NRC inspections conducted during the period March 19 through April 1, 1996, and August 14 through 15, 1996, at your Thomas, West Virginia facility. The inspections included a review of your compliance with an October 24, 1995, Order Suspending License (Effective Immediately), with respect to your use of by-product material that you possessed under NRC License No. 47-24923-02. The results of these inspections were sent to you by letters dated June 11, 1996, and September 25, 1996. Our June 11, 1996 correspondence to you also transmitted a Demand for Information (DFI), that required you to respond to several specific questions regarding various aspects of your licensed activities. After NRC prompting and a visit to your facility, you provided a written response to the DFI on August 15, 1996.

In our September 25, 1996 letter, you were requested to attend a predecisional enforcement conference to discuss the apparent violations, their root causes, and the corrective actions to preclude recurrence. As of the date of this letter, NRC has not received any response from you, despite numerous attempts to contact you. Contact with your Office Manager revealed that due to non-business related problems you do not intend to respond. Consequently, we have decided to proceed and subsequently determined the appropriate enforcement action in this matter based on the information currently available to us.

Based on the information developed during the inspections and the information you provided in your August 15, 1996, response to the DFI, the NRC has determined that violations of NRC requirements occurred. The violations described in Part I of the Notice directly resulted from your deliberate misconduct, as owner and operator of Nelson Excavating, Inc. Specifically, Violation I.A involved your deliberate failure to provide complete and accurate information to the NRC. In a September 17, 1992, written statement to the NRC, you misrepresented the identity of the Radiation Protection Officer (RPO). The individual named as RPO had not been employed at Nelson Excavating, Inc. since September 1987, and another individual not named in the license had been performing this function, in violation of Condition 11 of

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your NRC License. Although not cited in the enclosed Notice, you also made oral statements to NRC Region II management on May 15, 1996, that the gauge had not been used under your license since the October 24, 1995 Order Suspending License, when in fact, it had. Violation I.B. involved your conducting licensed activities since September 1987, with an RPO other than the individual authorized by your NRC license. Violation I.C. involved your actual use of licensed material, i.e., your gauge, on thirteen occasions after your license was suspended. Ten utilizations of the gauge were subsequent to the May 15, 1996, aforementioned discussions with the NRC.

In the response to the DFI, you admitted to use of the gauge during the prohibited period. As an explanation, you stated that you had reading and comprehension difficulties, and following your March 19, 1996 payment of backfees and receipt of a March 1, 1996 notice from NRC extending your license until September 30, 2002, you believed you could use the gauge. In addition, as the owner and operator of Nelson Excavating, Inc., you stated that you paid for it [the gauge], you owned it, and would use it accordingly. This is in contrast to what you had told the NRC in the May 15, 1996, conversation, i.e., that you understood that the material could not be used.

Nelson Excavating, Inc.'s failure to comply with an NRC Order and deliberately providing inaccurate information to the NRC is of very significant regulatory concern to the NRC. In addition, the NRC has had to twice visit your facility in West Virginia in order to obtain a response to the October 24, 1995 Order and the June 11, 1996 DFI. It is essential that the NRC be able to maintain the highest trust and confidence that individuals working with licensed material will comply with regulatory requirements, act with integrity, and communicate with candor on regulatory issues. Your lack of responsiveness, your use of licensed material even after being told that use was in violation of an NRC Order, and your failure to use the RPO designated in your license, all clearly indicate disregard for NRC requirements and bring into question your commitment to conduct licensed activities safely and in accordance with regulatory requirements. Therefore, in accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600, the violations have been categorized collectively as a Severity Level I problem.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$5,000 is considered for a Severity Level I problem. In accordance with the civil penalty assessment process described in Section VI.B.2 of the Enforcement Policy, the NRC considered whether credit was warranted for *Identification* and *Corrective Action*. In this case, the NRC concluded that credit was not warranted for *Identification* because the NRC identified the violations. Regarding *Corrective Action*, on August 15, 1996, you transferred your licensed material to an authorized recipient and discontinued licensed activities. In addition, on August 15, 1996, you submitted a formal request to terminate your license. Notwithstanding these actions, NRC intervention was required to focus your attention on this matter and your deliberate actions continued even after NRC discussions with you on May 15, 1996. We have therefore determined that credit is not warranted for *Corrective Action*. This assessment results in a civil penalty twice the base amount. However,

under the circumstances of this case including the enclosed termination of license, a base civil penalty is warranted.

Therefore, to emphasize the importance of compliance with all regulatory requirements associated with your license and to make clear to you that deliberate failures to comply with NRC regulations cannot be tolerated, I have been authorized, after consultation with the Commission, to exercise enforcement discretion and to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice) in the amount of \$5,000 for the Severity Level I problem.

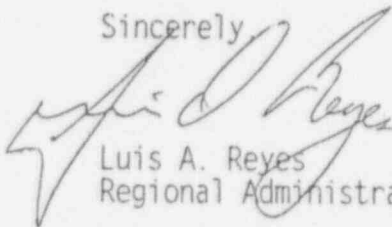
The violation described in Part II of the enclosed Notice has been categorized at Severity Level IV and involves the failure to test your licensed materials for leakage and/or contamination at the required frequency. In your response to the DFI, you provided no explanation for this failure; however, detailed corrective actions regarding the particular violation are not necessary due to your recent disposition of the licensed material.

Your deliberate actions as the owner of Nelson Excavating, Inc., directly contributed to the violations. Therefore, the NRC, by separate correspondence is issuing an Order to you prohibiting you from engaging in, or overseeing, NRC-licensed activities for a period of five years.

You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. The NRC will consider your response, in part, to determine whether further enforcement action is necessary to ensure compliance with regulatory requirements. It is not necessary for you to respond with the actions to correct the violations since you have transferred any material under this license to another licensee, and have requested to have your license terminated. In accordance with that request, NRC has enclosed a notice terminating your license.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and any response you may provide will be placed in the NRC Public Document Room (PDR).

Sincerely



Luis A. Reyes
Regional Administrator

Docket Nos. 030-32882
License No. 47-24923-02

Enclosures: 1. Notice of Violation and Proposed
Imposition of Civil Penalty
2. License Termination

cc w/encls:
State of West Virginia

Nelson Excavating, Inc.

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