



UNITED STATES
NUCLEAR REGULATORY COMMISSION

REGION IV

611 RYAN PLAZA DRIVE, SUITE 400
ARLINGTON, TEXAS 76011-8064

November 12, 1996

EA: 96-447

Mr. Ralph Abeyta
President
Testing Laboratories, Inc.
P. O. Box 1144
Alamogordo, New Mexico 88311-1144

SUBJECT: NRC INSPECTION REPORT 150-00030/96-02 AND
INVESTIGATION REPORT 4-96-027

Dear Mr. Abeyta:

On November 5, 1996, the NRC completed an inspection of activities performed by Testing Laboratories, Inc. (TLI) at federal facilities in the state of New Mexico. As discussed with you during the inspection, the federal facilities where TLI conducted activities using portable moisture/density gauges were determined to be areas where the NRC maintains jurisdiction for regulating the use of byproduct material. In addition to the inspection, the NRC Office of Investigation's Field Office, Region IV, conducted a concurrent investigation which was completed on September 26, 1996. The results of the inspection and investigation were discussed with you during a telephonic exit briefing on November 5, 1996, and are described in detail in the enclosed report.

The purpose of the inspection and investigation was to determine whether activities conducted by TLI at Holloman Air Force Base (AFB) and White Sands Missile Range (WSMR) were performed safely and in accordance with NRC requirements. The inspection and investigation identified one apparent violation which is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. The apparent violation involved the failure to comply with 10 CFR 30.3 which requires, in part, that except for persons exempt as provided in 10 CFR Parts 30 and 150, no person shall possess or use byproduct material except as authorized in a specific or general license issued pursuant to Title 10, Chapter 1, of the Code of Federal Regulations. The inspection and investigation determined that TLI performed activities at both Holloman AFB and WSMR using byproduct material on numerous occasions between 1991 and 1996 without being authorized to conduct such activities under either a specific or general NRC license.

Although a specific or general NRC license was required to perform activities using byproduct material in areas under exclusive federal jurisdiction within an Agreement State during the period in question, we note that as a matter of practice the NRC has accepted a Form 241, and the applicable fee, in lieu of an application for an NRC license from Agreement State licensees seeking authorization to perform activities in areas of exclusive federal jurisdiction within an Agreement State. Our review of TLI's activities at federal

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facilities in the state of New Mexico confirmed that TLI filed a Form 241 to report proposed activities at Holloman AFB and WSMR in November 1991, October 1994, and March 1996. However, the notifications provided by TLI did not identify all dates that TLI worked in areas under NRC jurisdiction in calendar years 1991, 1994 and 1996. In addition, TLI failed to obtain authorization prior to performing activities at WSMR and Holloman AFB in calendar years 1992, 1993 and 1995.

Based on the investigation findings, it appears that the vice president, also the radiation safety officer (RSO), was aware of the requirement to obtain authorization from the NRC prior to performing activities at the above noted locations. Specifically, the inspection and investigation disclosed that the RSO was made aware of the requirement to obtain authorization from the NRC by staff at WSMR and that TLI filed a Form 241 when prompted by the radiation safety officer at WSMR. However, the RSO acknowledged during the inspection and investigation that TLI did not report all activities conducted at Holloman AFB and WSMR during calendar years 1991, 1992, 1993, 1994, 1995 and 1996 because of concerns about paying the associated fees.

The NRC considers the failure to obtain appropriate authorization prior to conducting licensable activities in areas under its jurisdiction to be a matter of significant regulatory concern. We are further concerned that as admitted by the RSO, TLI was aware of the requirement to obtain authorization from the NRC, or to provide notification, prior to conducting activities at the above noted facilities but chose not to do so because of financial considerations.

A predecisional enforcement conference to discuss these apparent violations has been scheduled for November 26, 1996 at 10:00 a.m. (CT). The decision to hold a predecisional enforcement conference does not mean that the NRC has determined that a violation has occurred or that enforcement action will be taken. Accordingly, no Notice of Violation is presently being issued for these inspection findings. In addition, please be advised that the number and characterization of apparent violations described in the enclosed inspection report may change as a result of further NRC review. This conference is being held to obtain information to enable the NRC to make an enforcement decision, such as a common understanding of the facts, root causes, missed opportunities to identify the apparent violation sooner, corrective actions, significance of the issues and the need for lasting and effective corrective action. In particular, we expect you to address decisions made by TLI managers to not provide notification to the NRC, or otherwise seek authorization, regarding TLI's activities at Holloman AFB and WSMR.

In addition, the conference is an opportunity for you to point out any errors in our inspection report and for you to provide any information concerning your perspectives on 1) the severity of the violations, 2) the application of the factors that the NRC considers when it determines the amount of a civil penalty that may be assessed in accordance with Section VI.B.2 of the Enforcement Policy, and 3) any other application of the Enforcement Policy to this case, including the exercise of discretion in accordance with Section VII.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practices," a copy of this letter will be placed in the NRC Public Document Room (PDR).

Should you have any questions concerning this inspection, please contact Mr. Mark R. Shaffer at (817) 860-8287 or Ms. Linda Howell at (817) 860-8213.

Sincerely,

A handwritten signature in black ink, appearing to read "Ross A. Scarano". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ross A. Scarano, Director
Division of Nuclear Materials Safety

Docket: 150-00030

License: New Mexico DM223-10

Enclosures:

1. NRC Inspection Report 150-00030/96-02
2. Conference Agenda
3. NRC Enforcement Policy, NUREG-1600
4. 10 CFR Parts 30 and 150

cc w/Enclosures 1 & 2:

New Mexico Radiation Control Program Director

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bcc dist. by RIV:

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SJCollins

JLieberman, OE (OWFN-7H5)

DACool, NMSS (TWFN-8F5)

GFSanborn

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