mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the violations occurred as stated in the Notice, and that the violation set forth in Section I of the Notice was appropriately classified at a Severity Level III. The staff also has determined that an adequate basis was provided for partial mitigation of the penalty, and that a penalty of \$2,000 should be imposed.

## IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, it is hereby ordered that: MTA pay a civil penalty in the amount of \$2,000 within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738.

MTA may request a hearing within 30 days of the date of the date of this Order. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, with a copy to the Commission's Document Control Desk, Washington, D.C. 20555. Copies also shall be sent to the Assistant General Counsel for Hearings and Enforcement at the same address and to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, PA 19406

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If MTA fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event MTA requests a hearing as provided above, the issue to be considered at such hearing shall be whether, on the basis of Violation I, which is admitted by MTA, this Order should be sustained.

Dated at Rockville, Maryland, this 26th day of April 1995.

For the Nuclear Regulatory Commission. **James Lieberman**,

Director, Office of Enforcement.

## Appendix—Evaluations and Conclusion

On February 13, 1995, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for a violation identified during a review of communications (and associated documents) conducted between NRC and McCormick, Taylor and Associates, Inc. (MTA) between August 13, 1992 and November 9, 1994, as well as an NRC inspection conducted at the MTA facility on December 2, 1994. MTA responded to the Notice in two letters, both dated March 10, 1995. In its responses, MTA admits the violations as stated in the Notice, but requests mitigation of the penalty. The NRC's evaluation and conclusion regarding MTA's requests are as follows:

Summary of MTA's Request for Mitigation

In its response, MTA maintains that there are a number of extenuating circumstances and other mitigating factors which should be considered and result in mitigation of the penalty.

With respect to the NRC application of 50% escalation because the violation was identified by the NRC, MTA contends that it, in fact, notified the NRC on December 2, 1994, that it could not locate the gauge. MTA states that it did not become convinced until December 1 or 2, 1994 that the gauge had been stolen or misplaced. MTA further contends that a statement made by the Radiation Safety Officer during a telephone conversation with the NRC on December 2, 1994, was, in fact, a notification that MTA was in violation.

With respect to the NRC application of 50% escalation because of the lack of prompt action, MTA states that it was not until December 2, 1994, that it became fully aware that the gauge was lost or stolen. MTA further maintains that it has acted promptly and aggressively since December in an attempt to locate the gauge.

With respect to the NRC application of 100% escalation because of prior opportunity to prevent the violation, MTA states that it did not believe it ever received the Order issued in 1992 for nonpayment of fees. At the enforcement conference, MTA indicated that it requested proof of a delivery receipt from the NRC but the NRC has not yet provided MTA with a receipt. MTA also states that its Chief Financial Officer had a conversation with an NRC representative (unnamed) in 1993, and was told that with its payment of fees and penalties at that time it was fully paid up through September 1994.

With respect to the NRC application of 100% escalation based on duration (because the gauge was unattended for an extended period), MTA states that there is no evidence to document how long the gauge was outside the locked storage closet before it was lost or stolen. MTA also states that its office is not easily accessible and is typically a secure location, noting that the fact that the gauge was out of its locked storage cabinet was not as risky a location as it might seem. Therefore, while admitting the violation, MTA maintains that these factors should reduce the escalation.

MTA also describes other bases which it considers mitigating factors and extenuating circumstances to the proposed civil penalty. Specifically, MTA contends that there was significant confusion over payment of fees from 1991 to 1993, noting that on at least one occasion, it was cited for nonpayment of a particular charge that had in fact been paid. MTA stated that due to the confusion over payment of fees, when it was contacted in August and September of 1994, there was still confusion over payment. MTA further states that this confusion, and the fact that it never received the Order in 1992 may help explain why it did not initially respond with urgency.

MTA also states that a significant amount has already been paid in penalties for late payment of fees and that the imposition of an additional \$3,000 seems excessive. MTA maintains that it acted aggressively to locate the gauge over the ten weeks prior to its response. MTA states that the penalty is excessive to emphasize the importance of maintaining a valid license, and is unnecessary since MTA does not intend to possess a gauge of this type, or any NRC licensed material, in the future. MTA requests that the civil penalty be reduced to \$500.

NRC Evaluation of Licensee's Request for Mitigation

The NRC letter, dated February 13, 1995, transmitting the civil penalty, notes that the base civil penalty amount of \$500 in this case was increased by 50% because the violations were identified by the NRC; increased by 50% based on the licensee's lack of prompt corrective action; increased by 100% based on the prior opportunity since the Order provided ample notice of the need to control entry to restricted areas; and increased 100% based on the duration because the gauge was unattended in the vicinity of a closet for an extended period, based on the RSO's recollection. The letter also notes that to emphasize the importance of maintaining a valid license or properly disposing of NRClicensed materials, particularly after the NRC directed and reminded MTA to do so, and the importance of maintaining proper control of licensed material, the NRC exercised discretion in accordance with Section VII.A of the Enforcement Policy and increased the base civil penalty by an additional 200%. As a result, a penalty of \$3,000 was proposed.

With respect to the identification factor, the NRC is not citing the licensee for failure to notify the NRC as required. It was during the NRC inspection that the specific violation was identified, namely, failure to maintain adequate security of licensed material (which resulted in the gauge being lost or stolen). Further, the loss of the gauge was only identified after the NRC repeatedly reminded MTA of the need to transfer the gauge to an authorized recipient, as well as to notify the NRC that such a transfer had taken place. Therefore, mitigation is not warranted for this factor.

With respect to the corrective actions and prior opportunity to identify factors, the NRC also notes that MTA had ample opportunity to identify and correct any problems with security of the gauge, via the repeated