

February 24, 2005

EA-01-083
EA-01-091

Mr. Lew Myers
Chief Operating Officer
FirstEnergy Nuclear Operating Company
Perry Nuclear Power Plant
P. O. Box 97, A290
10 Center Road
Perry, OH 44081

SUBJECT: NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY -
\$55,000 [OFFICE OF INVESTIGATIONS REPORT NO. 3-2000-025 AND
REPORT NO. 3-2000-025S]

Dear Mr. Myers:

This refers to the investigation conducted by the U.S. Nuclear Regulatory Commission (NRC) Office of Investigations (OI) into alleged employment discrimination, during March 2000, by the Williams Power Corporation (Williams Power), a contractor at the FirstEnergy Nuclear Operating Company's (FENOC) Perry and Davis-Besse Nuclear Power Plants. A summary of OI Report No. 3-2000-025, concerning apparent violations of 10 CFR 50.7, "Employee Protection," was provided to FENOC on May 4, 2001. A predecisional enforcement conference (PEC) was held on September 26, 2001, with FENOC and Williams Power at the NRC Region III office in Lisle, Illinois. Enforcement action by the NRC staff was postponed until the U.S. Department of Justice (DOJ) completed further review of the matter.

Based on OI Report No. 3-2000-025, information presented by representatives of FENOC and Williams Power at the PEC, and upon information provided to the NRC following the PEC, the NRC staff has concluded that a violation of 10 CFR 50.7 occurred at Perry (EA-01-083). Additional information was provided by the complainant in an undated letter (postmarked November 24, 2001); in letters dated January 16 and February 28, 2002, from FENOC; in letters from Williams Power dated October 17, October 19, and November 13, 2001; and in an October 12, 2001, letter from the former Site Superintendent for Williams Power at the Perry Nuclear Power Plant (Perry). Three painters employed by Williams Power engaged in activities protected by 10 CFR 50.7 as described in the attached Notice of Violation and Proposed Imposition of Civil Penalty. Immediately afterwards, the Site Superintendent for Williams Power threatened the painters with termination if they did not volunteer for a layoff. As a result, two painters were laid off and the third was forced to resign. The protected activities were a contributing factor to the threats to the three painters, the layoffs, and the constructive discharge (forced resignation), employment actions adverse to the compensation, terms, conditions and privileges of the painters' employment. Therefore, the

actions of the Site Superintendent caused FENOC and Williams Power to be in violation of 10 CFR 50.7. In assessing this violation, the NRC considered the Site Superintendent's position in the overall organization of Williams Power. Accordingly, this violation is categorized in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600 (Enforcement Policy) at Severity Level III (EA-01-083).

In accordance with the Enforcement Policy, the base civil penalty amount for a Severity Level III violation on March 9, 2000, was \$55,000. Because Perry was the subject of an escalated enforcement action in EA-99-012 (a Severity Level III violation of 10 CFR 50.7 which resulted in a civil penalty), within the two years preceding the current violation, the NRC considered the civil penalty adjustment factors for *Identification* and *Corrective Action*. The violation was identified by the NRC staff. Although the Perry Ombudsman was aware that the painters were laid off following their meeting with the Ombudsman, and the Ombudsman notified the then FENOC Vice President for Perry, FENOC did not follow-up with Williams Power to determine the circumstances of the lay-off. Therefore, credit is not warranted for the civil penalty adjustment factor for *Identification*. Credit is warranted for the *Corrective Action* civil penalty adjustment factor. Corrective actions included, but were not limited to: (1) conducting a site survey of the safety conscious work environment (SCWE); (2) conducting stand-downs to discuss SCWE and chain-of-command; (3) revising bid specifications and contracts to include added references to 10 CFR 50.7 and SCWE; (4) conducting continual training for supervisors to include SCWE; and (5) establishing an Oversight and Process Improvement Department to provide oversight of employee concerns program. Additionally, Williams Power established a written policy statement that it would not tolerate employment discrimination. In addition, FENOC canceled its contract with Williams Power for work at the Davis-Besse Nuclear Plant (Davis-Besse) during the Spring and Summer 2001, pending resolution of this issue.

Therefore, to emphasize the need for prompt identification of violations, the importance of a workforce that is free of employment discrimination, and in recognition of your previous escalated enforcement action, I have been authorized, after consultation with the Director, Office of Enforcement, to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice) in the base amount of \$55,000 for the Severity Level III violation at Perry.

Two related matters require disposition. First, one painter who was laid off on March 9, 2000, by Williams Power at Perry was subsequently denied employment as a painter with Williams Power on March 17, 2000, at FENOC's Davis-Besse. Investigation by OI developed information indicating that the Production Manager for Williams Power at Davis-Besse may have discriminated against the painter because of the painter's earlier protected activities at Perry. At the PEC on September 26, 2001, however, representatives of FENOC and Williams Power presented information indicating that the local union had not referred the painter to Williams Power for employment at Davis-Besse. Information presented by Williams Power also indicated that the individual whom Williams Power had designated to be the Production Manager at Davis-Besse did not report to that facility as of March 17, 2000, and, therefore, would not have been able to discriminate

against the painter. Therefore, this issue of potential employment discrimination at Davis-Besse on March 17, 2000, is closed without further action (EA-01-091).

Second, the issues concerning the Williams Power General Foreman's instruction to the painters to violate a painting procedure were identified to FENOC by the painters and the information was entered into the Perry corrective action system as Condition Report No. 00-752. No enforcement action is being taken for this matter since it was identified to the licensee, the information was entered into the corrective action system, and the matter was investigated by FENOC which led to employment action against the General Foreman. Other issues the painters brought to the attention of FENOC concerned industrial safety. A FENOC investigation of the issues led to disciplinary action against the General Foreman by Williams Power.

You are required to respond to this letter and should follow the instructions in the enclosed Notice when preparing your response. The NRC will use your response, in part, to determine whether further enforcement action is necessary to ensure compliance with regulatory requirements.

If you disagree with this enforcement sanction, you may request alternative dispute resolution (ADR) with the NRC. Alternative dispute resolution is a general term encompassing various techniques for resolving conflict outside of court using a neutral third party. The technique that the NRC has decided to employ during a pilot program which is now in effect is mediation. Additional information concerning the NRC's pilot program is described in the enclosed brochure (NUREG/BR-0317) and can be obtained at <http://www.nrc.gov/what-we-do/regulatory/enforcement/adr.html>. The Institute on Conflict Resolution (ICR) at Cornell University has agreed to facilitate the NRC's program as an intake neutral. Please contact the ICR at (607) 255-1124 within 10 days of the date of this letter if you are interested in pursuing resolution of this issue through ADR.

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without redaction. If personal privacy or proprietary information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such material, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

L. Myers

-4-

Questions concerning this matter should be addressed to Kenneth Riemer, Chief, Plant Support Branch, who can be reached at (630) 829-9757.

Sincerely,

/RA/

James L. Caldwell
Regional Administrator

Dockets No. 50-346; 50-440
Licenses No. NPF-3; NPF-58

Enclosures:

1. Notice of Violation and Proposed
Imposition of Civil Penalty
2. NUREG/BR-0317

cc w/encl:

The Honorable Dennis Kucinich
G. Leidich, President - FENOC
L. Myers, Chief Nuclear Operating Officer - FENOC
R. Anderson, Vice President - Nuclear, Perry
M. Bezilla, Vice President-Nuclear, Davis-Besse
J. Hagan, Senior Vice President Engineering and Services, FENOC
F. von Ahn, Plant Manager, Nuclear Power Plant Department
W. O'Malley, Manager, Maintenance Department
J. Lausberg, Manager, Regulatory Compliance
J. Messina, Director, Performance Improvement
T. Lentz, Director, Nuclear Engineering Department
M. O'Reilly, Attorney, First Energy
Public Utilities Commission of Ohio
Ohio State Liaison Officer
R. Owen, Ohio Department of Health
Plant Manager, Davis-Besse
Manager - Regulatory Compliance, Davis-Besse
President, Board of County Commissioners
of Lucas County
C. Koebel, President, Ottawa County Board of Commissioners
D. Lochbaum, Union Of Concerned Scientists
J. Riccio, Greenpeace
P. Gunter, N.I.R.S.

DISTRIBUTION:

ADAMS (PARS)

SECY

OCA

L. Reyes, EDO

E. Merschoff, DEDR

F. Congel, OE

J. Caldwell, RIII

G. Grant, RIII

L. Chandler, OGC

J. Moore, OGC

J. Dyer, NRR

S. Gagner, OPA

H. Bell, OIG

G. Caputo, OI

J. Piccone, OSTP

C. Pederson, RIII

R. Caniano, RIII

M. Satorius, RIII

S. Reynolds, RIII

D. Holody, Enforcement Coordinator, RI

C. Evans, Enforcement Coordinator, RII

K. O'Brien, Enforcement Coordinator, RIII

G. Sanborn, Enforcement Coordinator, RIV

R. Franovich, Enforcement Coordinator, NRR

G. Longo, OGC

D. Starkey, OE

N. Hilton, OE

C. Weil, RIII

K. Riemer, RIII

Resident Inspector - Perry

Resident Inspector - Davis-Besse

R. Paul, RIII:OI

S. Kryk, RIII:OI

J. Strasma, RIII:PA

R. Lickus, RIII

J. Lynch, RIII

OEWB

OEMAIL

OAC3

AJM

DFT

SPS1

RidsNrrDipmlipb

CST1

CAA1

DRPIII

DRSIII

PLB1

JRK1

DOCUMENT NAME: E:\Filenet\ML050560009.wpd

To receive a copy of this document, indicate in the box: "C" = Copy w/o att/encl "E" = Copy w/att/encl "N" = No copy

OFFICE	RIII	E	D:OE ¹	E	RIII	E	RIII	E	RIII	N	RIII	N
NAME	O'Brien for Weil		Starkey for Congel		Caniano for Pederson		Satorius		O'Brien		Caldwell	
DATE	02/22/05		02/22/05		02/23/05		02/23/05		02/24/05		02/24/05	

OFFICIAL RECORD COPY

¹ D. Starkey, OE, provided HQ concurrence by e-mail on February 22, 2005.

NOTICE OF VIOLATION
AND
PROPOSED IMPOSITION OF CIVIL PENALTY

FirstEnergy Nuclear Operating Company
Perry Nuclear Power Plant, Unit 1

Docket No. 50-440
License No. NPF-58
EA-01-083

During an NRC investigation completed on February 26, 2001, a violation of NRC requirements was identified. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600, the NRC proposes to impose a civil penalty pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205. The particular violation and associated civil penalty are set forth below:

10 CFR 50.7 prohibits, in part, discrimination by a Commission licensee or a licensee contractor against an employee for engaging in certain protected activities. Discrimination includes discharge and other actions that relate to compensation, terms, conditions or privileges of employment. The protected activities are established in Section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act. Protected activities include providing information to a licensee or an employer about alleged violations of the Atomic Energy Act or Energy Reorganization Act.

Contrary to the above, and in violation of 10 CFR 50.7, in March 2000, the Site Superintendent for Williams Power Corporation (Williams Power), a contractor at the Perry Nuclear Power Plant (Perry), discriminated against painters employed by Williams Power for having engaged in protected activities. Specifically, three painters employed by Williams Power contacted a licensee maintenance supervisor on March 8, 2000, to discuss concerns about violation of licensee painting procedures by Williams Power. Condition Report No. 00-752 was prepared on March 9, 2000, based on the information the painters provided to the maintenance supervisor on March 8, 2000. On March 9, 2000, the three painters met with the Perry Ombudsman to discuss their concerns, including instructions of a Williams Power General Foreman that the painters were not to follow licensee procedures in preparing surfaces before applying paint in the Fuel Handling Building. Immediately following their meeting with the Perry Ombudsman, the painters were told by the Site Superintendent for Williams Power at Perry that they could volunteer for lay off or be terminated. As a result, two painters were subsequently laid off on March 9, 2000, and the third painter resigned his employment with Williams Power on March 10, 2000. The painters' discussion with the FENOC Maintenance Supervisor and their meeting with the Ombudsman were protected activities which contributed to the threat by the Williams Power Site Superintendent, to the subsequent layoff of two painters, and to the resignation of the third painter.

This is a Severity Level III violation (Supplement VII).
Civil Penalty - \$55,000 (EA-01-083)

Pursuant to the provisions of 10 CFR 2.201, FirstEnergy Nuclear Operating Company (Licensee) is hereby required to submit a written statement or explanation to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, within 30 days of the date of this Notice

of Violation and Proposed Imposition of Civil Penalty (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation; EA-01-083" and should include for each alleged violation: (1) admission or denial of the alleged violation, (2) the reasons for the violation if admitted, and if denied, the reasons why, (3) the corrective steps that have been taken and the results achieved, (4) the corrective steps that will be taken to avoid further violations, and (5) the date when full compliance will be achieved. Your response may reference or include previous docketed correspondence, if the correspondence adequately addresses the required response. If an adequate reply is not received within the time specified in this Notice, an order or a Demand for Information may be issued as why the license should not be modified, suspended, or revoked or why such other action as may be proper should not be taken. Consideration may be given to extending the response time for good cause shown.

Within the same time as provided for the response required above under 10 CFR 2.201, the Licensee may pay the civil penalty proposed above, in accordance with NUREG/BR-0254 and by submitting to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, a statement indicating when and by what method payment was made, or may protest imposition of the civil penalty in whole or in part, by a written answer addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission. Should the Licensee fail to answer within 30 days of the date of this Notice of Violation and Proposed Imposition of Civil Penalty, an order imposing the civil penalty will be issued. Should the Licensee elect to file an answer in accordance with 10 CFR 2.205 protesting the civil penalty, in whole or in part, such answer should be clearly marked as an "Answer to a Notice of Violation" and may: (1) deny the violation listed in this Notice, in whole or in part, (2) demonstrate extenuating circumstances, (3) show error in this Notice, or (4) show other reasons why the penalty should not be imposed. In addition to protesting the civil penalty in whole or in part, such answer may request remission or mitigation of the penalty. In requesting mitigation of the proposed penalty the factors addressed in Section VI.C.2 of the Enforcement Policy should be addressed. Any written answer in accordance with 10 CFR 2.205 should be set forth separately from the statement or explanation in reply pursuant to 10 CFR 2.201, but may incorporate parts of the 10 CFR 2.201 reply by specific reference (e.g., citing page and paragraph numbers) to avoid repetition. The attention of the Licensee is directed to the other provisions of 10 CFR 2.205, regarding the procedure for imposing a civil penalty.

Upon failure to pay any civil penalty due which subsequently has been determined in accordance with the applicable provisions of 10 CFR 2.205, this matter may be referred to the Attorney General, and the penalty, unless compromised, remitted, or mitigated, may be collected by civil action pursuant to Section 234c of the Act, 42 U.S.C. 2282c.

The response noted above (Reply to Notice of Violation, statement as to payment of civil penalty, and Answer to a Notice of Violation) should be addressed to: Frank Congel, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738, with a copy to the Regional Administrator and

Enforcement Officer, U.S. Nuclear Regulatory Commission, Region III, 2443 Warrenville Road, Suite 210, Lisle, IL 60532-4352, and a copy to the NRC Resident Inspector at the Perry Nuclear Power Plant.

Because your response will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), to the extent possible, it should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without redaction. ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. If personal privacy or proprietary information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such material, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

In accordance with 10 CFR 19.11, you may be required to post this Notice within two working days.

Dated this 24th day of February 2005