



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION I
475 ALLENDALE ROAD
KING OF PRUSSIA, PENNSYLVANIA 19406-1415

October 12, 2005

IA No. 05-045

Philip K. Whittingham
**[HOME ADDRESS DELETED
UNDER 10 CFR 2.390(a)]**

SUBJECT: NRC OFFICE OF INVESTIGATIONS REPORT NO. 1-2004-047;
NRC INSPECTION REPORT NO. 03019398/2004001

Dear Mr. Whittingham:

This letter is in reference to an investigation initiated on October 20, 2004, by the NRC's Office of Investigations (OI) regarding licensed activities at Mayer Brothers Construction Company (MBCC), Erie, Pennsylvania. The purpose of the OI investigation was to determine if you made a false statement to an NRC inspector regarding the number of gauges that MBCC possessed. The investigation determined that you deliberately made a false statement regarding the number of gauges that were possessed by MBCC on September 29, 2004. In reaching this conclusion, we considered that you admitted to the investigator that you stated that MBCC possessed only one gauge containing licensed material, when, in fact, MBCC possessed two such gauges.

10 CFR 30.10(a)(1) states, in part, that any employee of a licensee may not engage in deliberate misconduct that causes a licensee to be in violation of any rule or regulation, and 10 CFR 30.10(a)(2) states, in part, that any employee of a licensee may not deliberately submit to the NRC information that the person submitting the information knows to be inaccurate in some material respect to the NRC.

During an inspection on September 29, 2004, in apparent violation of 10 CFR 30.10(a)(2), you told the inspector that MBCC possessed one nuclear gauge when in fact on that day, MBCC possessed two such gauges. This false statement caused MBCC to not be in compliance with 10 CFR 30.9 which requires that the information provided to the Commission by a licensee be complete and accurate in all material respects. As such, the NRC has determined that your false statement to the inspector constituted a violation of 10 CFR 30.10 (Deliberate Misconduct). A Notice of Violation is enclosed.

The violation is classified at Severity Level IV after careful consideration of the factors involved in this specific instance and in accordance with the NRC Enforcement Policy. Specifically, the violation posed a minimal health and safety problem because 1) before the conclusion of the inspection, you corrected the inaccurate information that you initially provided to the inspector, 2) the second (unauthorized) gauge was similar to the gauge that MBCC was authorized to possess, and, 3) the violation represents an isolated case.

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You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence. Your response may reference or include previous docketed correspondence, if the correspondence adequately addresses the required response. After reviewing your response to this Notice, including your proposed corrective actions and the results of future inspections, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements.

You may request Alternative Dispute Resolution (ADR) with the NRC in an attempt to resolve any disagreement on whether these violations occurred and the appropriate enforcement action. The enclosed Notice of Violation is the enforcement action proposed for this violation. ADR 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 via a neutral party. You must contact ICR at (877) 733-9415 within 10 days of the date of this letter if you are interested in pursuing resolution of these issues through ADR. You must contact Mr. John D. Kinneman at (610) 337-5252 within 10 days of the date of this letter to notify the NRC of your decision to respond to the Notice or pursue ADR. An ADR session will generally be held within 30 days of the date of this letter.

Current NRC regulations are included on the NRC's website at www.nrc.gov; select **Nuclear Materials; Medical, industrial, and academic uses of nuclear material**; then **toolkit index page**. The Current General Policy and Procedure for NRC Enforcement Actions are included on the NRC's website at www.nrc.gov; select **What We Do, Enforcement**, then **Enforcement Policy**. Or you may obtain these documents by contacting the Government Printing Office (GPO) toll-free at 1-888-293-6498. The GPO is open from 7:00 a.m. to 9:00 p.m. EST, Monday through Friday (except Federal holidays).

In accordance with 10 CFR 2.390 of NRC's "Rules of Practice," a copy of this letter will be made available electronically for public inspection from the NRC's document system (ADAMS), accessible from the NRC Website at <http://www.nrc.gov/reading-rm/adams.html>.

This letter will be maintained by the Office of Enforcement (OE) in an NRC Privacy Act system of records, NRC-3, "Enforcement Actions Against Individuals." The NRC-3 system notice, which provides information about this system of records, can be accessed from our Web Site at <http://www.nrc.gov/reading-rm/foia/privacy-systems.html>.

P. Whittingham
Mayer Brothers Construction Company

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Your cooperation with us is appreciated.

Sincerely,

Original signed by Francis Costello

George Pangburn, Director
Division of Nuclear Materials Safety

Enclosures:

1. Notice of Violation
2. NRC letter to MBCC, with Inspection Report
3. Brochure/NUREG 0317

P. Whittingham
Mayer Brothers Construction Company

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NOTICE OF VIOLATION

Philip K. Whittingham
[HOME ADDRESS DELETED
UNDER 10 CFR 2.390(a)]

IA-05-045

During an NRC inspection conducted on September 29, 2004, and the subsequent investigation by NRC's Office of Investigation, a violation of NRC requirements was identified. In accordance with the NRC Enforcement Actions, the violation(s) is (are) listed below:

10 CFR 30.10(a) states, in part, that any employee of a licensee may not:

- (1) Engage in deliberate misconduct that causes a licensee to be in violation of any regulation; or
- (2) Deliberately submit to the NRC, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

10 CFR 30.9(a) states, in part, that the information provided to the Commission by a licensee shall be accurate in all material respects, and

contrary to the above, on September 29, 2004, you deliberately provided inaccurate information to the NRC inspector regarding the number of nuclear gauges that your employer, Mayer Brothers Construction Company (the licensee) possessed. Specifically, you told the inspector that the licensee possessed one nuclear gauge when in fact on September 29, 2004, the licensee was in possession of two nuclear gauges. This inaccurate information caused the licensee to be in violation of 10 CFR 30.9 as stated above.

This is a Severity Level IV violation (Supplement VII).

Pursuant to the provisions of 10 CFR 2.201, Philip K. Whittingham is hereby required to submit a written statement or explanation to the U.S. Nuclear Regulatory Commission, ATTN: Regional Administrator, Region I, 475 Allendale Road, King of Prussia, PA 19406, and marked "Open by Addressee Only" within 30 days of the date of the letter transmitting this Notice of Violation (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation; IA-05-045" and should include: (1) the reason for the violation, or, if contested, the basis for disputing the violation, (2) the corrective steps that have been taken and the results achieved, (3) the corrective steps that will be taken to avoid further violations, and (4) the date when full compliance will be achieved. 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 to why such other action as may be proper should not be taken. Where good cause is shown, consideration will be given to extending the response time.

If you contest this enforcement action, you should also provide a copy of your response, with the basis for your denial, to the Director, Office of Enforcement, United States Nuclear Regulatory Commission, Washington, DC 20555-0001. Under the authority of Section 182 of the Act, 42 U.S.C. 2232, any response which contests an enforcement action shall be submitted under oath or affirmation.

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>; therefore, 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. 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).

Dated this 12th day of October 2005