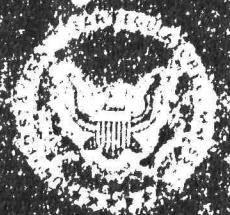


CASE No. 3-95-044

United States
Nuclear Regulatory Commission



Report of Investigation

PERRY NUCLEAR POWER PLANT

Alleged Discrimination Against a Contractor
Radiation Worker for Raising Safety Concerns
in a Law Suit Regarding a Radiation Exposure
During an Outage

Office of Investigations

Reported by CH SHH

9610070252 961001
PDR ADOCK 05000440
G PDR

CASE No. 3-95-044

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Office of Investigations

Reported by OI: RIII

9510070252 951001
PDR ADOCK 05000440
G PDR

Title: PERRY NUCLEAR POWER PLANT

ALLEGED DISCRIMINATION AGAINST A CONTRACTOR RADIATION
WORKER FOR RAISING SAFETY CONCERNS IN A LAW SUIT
REGARDING A RADIATION EXPOSURE DURING AN OUTAGE

Licensee:

Centerior Energy Corporation
P.O. Box 94661
Cleveland, OH 44101-4661

Docket No.: 50-440 & 50-441

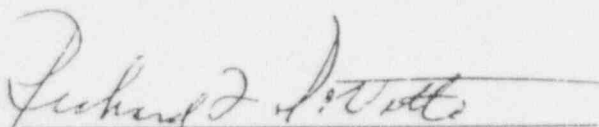
Case No.: 3-95-044

Report Date: July 3, 1996

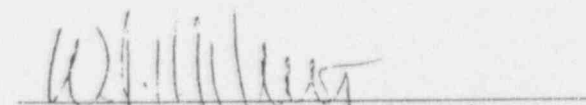
Control Office: OI:RIII

Status: CLOSED

Reported by:


Richard L. DeVitto, Special Agent
Office of Investigations
Field Office, Region III

Reviewed and Approved by:


William J. McNulty, Acting Director
Office of Investigations
Field Office, Region III

WARNING

The attached document/report has not been reviewed pursuant to
Title 10 CFR Subsection 2.790(a) exemptions nor has any exempt
material been deleted. Do not disseminate or discuss its contents
outside NRC. Treat as "OFFICIAL USE ONLY."

SYNOPSIS

On November 2, 1995, an investigation was initiated by the U.S. Nuclear Regulatory Commission (NRC), Office of Investigations (OI), Region III (RIII), to determine if a former contract asbestos worker at Centerior Energy Corporation's (Centerior), Davis Besse Nuclear Power Station (DBNPS), had been the victim of employment discrimination. The contract employee and five other insulators, while removing insulation from the steam generator area of the DBNPS, were subject to an uptake of radioactive contamination. A subsequent NRC inspection disclosed that the worker's were subject to a radiological exposure and issued a Notice of Violation. Subsequent to filing a civil action under the Atomic Energy Act of 1954 in U.S. District Court against Centerior, the insulators were barred from working at any Centerior facility.

Based on evidence developed during this investigation, and upon a recommended decision and order of a U.S. Department of Labor, Administrative Law Judge, it has been determined that the asbestos workers had been discriminated against by the licensee when their unescorted access was revoked and they were terminated from entering any Centerior facilities.

ACCOUNTABILITY

The following portions of this Report of Investigation (Case No. 3-95-044) will not be included in the material placed in the Public Document Room. They consist of pages 3 through 11.

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DETAILS OF INVESTIGATION

Applicable Regulations

Allegation: Alleged Discrimination Against a Contractor Radiation Worker for Raising Safety Concerns in a Law Suit Regarding a Radiation Exposure During an Outage

10 CFR 50.7: Employee Protection.

10 CFR 50.5: Deliberate misconduct.

42 USC 5851: Protected Activities as established by Section 211 of the Energy Reorganization Act of 1974, as amended.

Purpose of Investigation

On November 2, 1995, an investigation was initiated by the U.S. Nuclear Regulatory Commission (NRC), Office of Investigations (OI), Region III (RIII), to determine if a former contract asbestos worker, Dennis MALONEY, at Centerior Energy Corporation (Centerior), Davis Besse Nuclear Power Station (DBNPS), had been the victim of employment discrimination. MALONEY, and five other insulators (Owen McCAFFERTY, Sean KILBANE, Terry McLAUGHLIN, Sean McCAFFERTY and Robert PROHASKA), while removing insulation from the steam generator area of the DBNPS were subject to an uptake of radioactive contamination. A subsequent NRC inspection disclosed that the worker's were subject to a radiological exposure and issued a Notice of Violation. Subsequent to filing a civil action under the Atomic Energy Act of 1954 in U.S. District Court against Centerior, the insulators were barred from working at any Centerior facility.

Background

The complainants are insulators and members of Local 3 of the Heat and Frost Insulators Union in Cleveland, Ohio. During the fall of 1994, the complainants were performing outage work at DBNPS in Oak Harbor, Ohio, as employees of Gem Industrial Services, a contractor of DBNPS. Their work included removing mirror insulation from steam generators and other components of the plant. On October 7, 1994, complainants were exposed to radioactive materials after removing a piece of insulation. The exposure was unplanned as the area where they were working was supposed to be clean, in that a survey of the area supposedly determined that they would not encounter radioactive materials. The exposure prompted a NRC inspection by RIII, which resulted in a Notice of Violation to Centerior for not making proper surveys to assure compliance to control the concentration of radioactive contamination in the air. The complainants continued to work at the DBNPS until the refueling outage was completed. Subsequently, on August 7, 1995, the complainants filed a civil suit against Centerior in the U.S. District Court for the Northern District of Ohio under the Price-Anderson Act of the Atomic Energy Act (42 USC 2210). The complainants alleged that Centerior breached a duty owed to complainants by failing to take the necessary precautions to prevent unwarranted exposure to radioactive materials and included counts of negligence, intentional infliction of emotional distress, etc. In September 1995, MALONEY was hired by Fishbach Power Services, Inc. (Fishbach) to perform maintenance at Centerior's Perry Nuclear Power Plant, Perry, Ohio. MALONEY

SUPPLEMENTAL INFORMATION

On July 3, 1996, William P. SELLERS, Esq., Senior Legal Advisor for the Regulatory Enforcement, General Litigation and Legal Advise Section, Criminal Division, U.S. Department of Justice, Suite 200 West, 1001 G. Street, N.W., Washington, DC 20001, was apprised of the results of the investigation. Mr. SELLERS advised that, in his view, the case did not warrant prosecution and rendered an oral declination.

LIST OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>
1	Investigation Status Record (ISR), dated November 2, 1995.
2	Interview Report of MALONEY, dated November 16, 1995.
3	Documents furnished by Steven D. BELL, Ulmer & Berne, Attorneys at Law, Legal Counsel for the complainants.
4	U.S. District Court Complaint filed in the Northern District of Ohio against Centerior by McCafferty, et al.
5	Recommended Decision and Order of June 11, 1996, U.S. Department of Labor, Administrative Law Judge, in matter of McCafferty, et al, v. Centerior Energy.

EXHIBIT 1

INVESTIGATION STATUS RECORD

Case No.: 3-95-044 Facility: PERRY NUCLEAR POWER PLANT
Allegation No.: RIII-95-A-0128 Case Agent: DEVITTO
Docket No.: 50-440; 50-441 Date Opened: NOVEMBER 2, 1995
Source of Allegation: ALLEGER (A)
Notified by: OAC:RIII (FUNK) Priority: NORMAL (Coordinated with the RIII technical staff)
Category: IH Case Code: RP
Subject/Allegation: ALLEGED DISCRIMINATION AGAINST A CONTRACTOR RADIATION WORKER FOR RAISING SAFETY CONCERNS IN A LAW SUIT REGARDING A RADIATION EXPOSURE DURING AN OUTAGE

Remarks:

Monthly Status Report:

11/02/95: On October 20, 1995, an allegor reported having received an uptake of radiation in approximately October, 1994, while working at Davis-Besse Nuclear Power Station, and that the allegor had maintained a body burden since that incident. The allegor subsequently went to work at Perry Nuclear Power Station for a few weeks. According to the allegor, this employment was terminated allegedly because of an outstanding lawsuit the allegor has filed against the licensee, Centerior Energy, related to the radiation uptake received at Davis-Besse in 1994. The allegor also believes that he was "singled out" for a more extensive whole body count procedure upon leaving his employ at Perry Nuclear Power Station. STATUS: FWP ECD (90 DAYS): (2/96)

EXHIBIT 2

REPORT OF INTERVIEW
WITH
DENNIS MALONEY

Mr. Dennis MALONEY, former contract asbestos worker for Fischbach Power Services, Inc. (Fischbach), assigned to the Centerior Energy's Davis-Besse Nuclear Power Station (DBNPS), Oak Harbor, OH, was interviewed on November 16, 1995, at the law offices of Ulmer & Berne, 1300 E. 9th Street, (Suite 900), Cleveland, OH by OI:RIII Investigator Richard L. DeVitto. Mr. MALONEY was interviewed regarding an issue of alleged discrimination for being discharged from his position after raising safety concerns in a civil action filed in the United States District Court for the Northern District of Ohio, Eastern Division. The suit, filed under the Price Anderson Act (42 USC 2014(q)), named Centerior Energy, et al, as defendants. Present during the interview was Steven D. BELL, legal counsel for Mr. MALONEY.

MALONEY explained that on October 7, 1994, while working at DBNPS as a contractor he was assigned, with 5 others, to remove insulation from the steam generator area of the plant. MALONEY said he was subject to an uptake of radioactive contamination, which became airborne during the removal of insulation panels. MALONEY indicated that he was not wearing a respirator, dust mask or protective clothing. MALONEY advised that the event was investigated by the plant and he took a whole body count.

INVESTIGATOR'S NOTE: A subsequent NRC inspection disclosed that the workers were subject to Cobalt-58, Cesium 134 & 143 and low levels of Cobalt-60 radioisotopes. On November 23, 1994, the NRC issued a Notice of Violation to Centerior Energy for not making proper surveys to assure compliance to control the concentration of radioactive contamination in the air. On December 21, 1994, in response to the NRC inspection Centerior Energy admitted that they did not adequately evaluate and plan for changed or unexpected radiological conditions.

MALONEY recalled that he was assigned to the DBNPS in September 1994, and was laid-off, with the others, upon the normal completion of the job in December 1994. MALONEY inferred no disparate treatment in connection with this lay-off.

MALONEY said that on or about October 5, 1995, he was re-employed with Fischbach Power Services, Inc. at the Perry Nuclear Plant (Perry), Perry OH, which is also owned by Centerior Energy. MALONEY recalled that upon assignment to Perry he was given a whole body count and that the graph registered high. MALONEY said that he was given a copy of the count (Exhibit 3) and then went to work and assumed that everything was as normal.

MALONEY explained that on October 16, 1995, he was paged over Perry's plant intercom and told to see George BROUGH, a supervisor for Fischbach. MALONEY said he was accompanied by Chuck SCARL, the business manager for Fischbach. MALONEY stated that BROUGH advised him that his (MALONEY's) access had been revoked and didn't explain anything further. MALONEY related that he was then taken for another whole body count and was told by the technician to put on a

paper suit. MALONEY said he advised the technician that upon starting at Perry he was given the count wearing only his street clothes, however MALONEY was told that by wearing the suit the results would be more accurate. MALONEY declined the count.

MALONEY advised that before leaving the plant on October 16, 1995, he also met with Don TIMS, Perry's ombudsman. MALONEY said that during the exit interview with TIMS he was advised that the reason he was being denied access was because of the litigation he was involved in with Centerior. MALONEY explained that R.A. CLINE, Project manager for Fischbach drafted a letter to Local #3 of the Heat & Frost Insulators & Asbestos Workers Union regarding MALONEY's access denial, as well as the other 5 original workers involved in the October 7, 1994, contamination event, at DBNPS (Exhibit 3).

INVESTIGATOR'S NOTE: Attached to the exhibit 3 are memoranda/letters from Perry explaining that due to the fact that Centerior is involved in litigation with MALONEY and the other 5 named individuals they cannot be allowed to work at any Centerior facility. Mr. Robert SCHRAUDER, Director of Perry Nuclear Services Department is the signatory.

MALONEY said that CLINE, project manager for Fischbach, had advised him in the presence of Dan DEHANEY, local union representative, that Fischbach had nothing to do with the MALONEY'S access revocation. CLINE identified Centerior as the one responsible for MALONEY'S access denial.

MALONEY recalled that he returned to Perry the following Friday (October 20, 1995), after he was laid-off and acquiesced to a whole body count, in a suit, as a condition to being paid for the short time he was at Perry. MALONEY said that present with him during the whole body count was Jim FEATHERSON, a Fischbach pipe fitter and an all-trade representative. MALONEY stated that the technician administering the count said that MALONEY's levels looked like they were coming down.

MALONEY in closing indicated that he has filed a grievance with his union regarding his lay-off for filing a law suit against Centerior. MALONEY has also filed a discrimination complaint with the U.S. Department of Labor under Section 211 of the Energy Reorganization Act which is actively being investigated by local Wage and Hour Division.

This Report of Interview was drafted on November 17 and 20, 1995.

Richard L. DeVitto, Investigator
Office of Investigations Field Office
Region III

EXHIBIT 3



Contract # 137643
Correspondence
Code: C95-529

October 16, 1995

Local #3
Heat & Frost Insulators & Asbestos Workers
1617 East 30th Street
Cleveland, OH 44114

Attention: Mr. Chris Scarl
Business Manager

Subject: Access Denial

Dear Mr. Scarl:

The following individuals have been denied access at the Perry Nuclear Power Plant by Centerior Energy. The supporting memorandums and field forms are attached.

Current work for Fischbach Power Services, Inc. at Perry requires site access.

Please ensure these individuals have resolved their site access restriction with Centerior Energy prior to being referred for work at Perry.

McCafferty, Owen
McCafferty, Sean
Kilbane, Sean

McLaughlin, Terrence
Maloney, Dennis
Prohaska, Robert

Sincerely,

R.A. Cline
Project Manager

RAC/sr
Attachments

cc: T. Pagan - Labor Relations
G. Brown - Denver

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
PERRY NUCLEAR POWER PLANT

M E M O R A N D U M

TO R. CLINE

ROOM TF-1

FROM G.K. DUNN
PHONE 5126
SUBJECT ACCESS

DATE 10/16/95
ROOM PACP

In response to a letter sent to you on October 13th, 1995. The following individuals are not employable at this time, due to CEI liability concerns.

Name:

McCafferty, Owen
McCafferty, Sean
Kilbane, Sean
McLaughlin, Terrence
Maloney, Dennis
Prohaska, Robert

Social Security Number:



cc: File
Greg Dunn
Al Bolesic



**CENTERIOR
ENERGY**

PERRY NUCLEAR POWER PLANT

10 CENTER ROAD
PERRY, OHIO 44081
(216) 239-5737

Mail Address:
PO BOX 87
PERRY, OHIO 44081

October 18, 1995

Mr. Richard A. Cline
Fishbach Power Services, Inc.
c/o Perry Nuclear Power Plant
10 Center Road, TP-1
Perry, Ohio 44081

Subject Contract: S 137645

Dear Mr. Cline:

Due to the fact that Centerior is currently involved in litigation with the following six individuals we cannot, at this time, allow any one of them to work at any Centerior facility.

Name
McCaferry, Owen
McCaferry, Sean
Kilbane, Sean
McLaughlin, Terrence
Maloney, Dennis
Prohaska, Robert

Social Security Number



Please ensure none of these individuals are currently assigned to the Perry Nuclear Power Plant. In addition, please do not assign any one of them to the Perry Plant at least until this litigation is resolved.

Sincerely yours,

Robert W. Schauder
Director, Perry Nuclear Services Department

RWS/ljb

OCT 16 1995 12:10

FROM: FISCHECHACH POWER SERVICES TO:

ACCESS: DS WIRE 3 P.04

The Cleveland Electric Illuminating Company
Perry Nuclear Power Plant

REVOCATION OF UNESCORTED ACCESS

PIUFP NO 8903 Rev 11/93

Company <i>Fischbach & Moore</i>	Date <i>10/16/95</i>
Notified By <i>Robert Brugh</i>	Received By

Return to: Perry Nuclear Power Plant
Site Protection Section
10 N. Center Road
P.O. Box 97
Perry, OH 44081
Phone: (216) 289-3737

CHECK ONE

<input type="checkbox"/> PROTECTED AREA	<input checked="" type="checkbox"/> SITE & PROTECTED AREA
---	---

Employee(s) Name	Social Security No.	Reason Code	Badge/K. Card
<i>Dennis M. [redacted]</i>	[redacted]	<i>002</i>	<i>1635</i>

* Reason Codes

- | | |
|--|--|
| 001 Laid Off-Eligible for Rehire | 005 Temporary suspension (explain below) |
| 002 Terminated from Company | 006 Unescorted Access No Longer Required |
| 003 Terminated for cause (explain below) | 007 Leave of Absence |
| 004 Transfer to another job site | |

Comments:

For CEI, Site Protection Use Only

Revoked on Date _____ By: _____

FLSCHBACH POWER SERVICES

ATTACHMENT A

IPC CONTACT PHONE NO.

2. HP.

1. TWO

4. MSU:

E. AALT

SITE/CONTRACTOR RESPONSIBILITIES SPONSOR CHECKLIST

RESPONSIBILITY FACTOR SPONSOR CHECKLIST
 Submit and verify the following information for all workers at a minimum of 72 working hours prior to date of arrival at LAC.
 Responsibilities: See Reverse Side

NAME EMP. FOR NO	SOCIAL SECURITY NUMBER	LAST NUCLEAR PLANT WORKED	DATE	LPG DATE OF ARRIVAL	SEA ACCESS REQUIRED (Y/N)	PC USE ONLY	
						TEG REQUIRED	SCREENING REQUIRED
FACCIANI, TIM	[REDACTED]	7/14/90	N/A				
MCCAFFERTY, OWEN	[REDACTED]	003		10/16/95	Y		Full
MCCAFFERTY, SEAN	[REDACTED]						
KILBANE, SEAN	[REDACTED]						
MCLAUGHLIN, TERENCE	[REDACTED]						
PROHASKA, ROBERT	[REDACTED]	003					

The above "003" code was placed on this form by
 GARY DUNN of C&T security. This code was placed
 for "SENSE" due to 10/15 memo from his personnel
 as to do with: removal of Davis - Transit
 [Signature]
 10/16/95

Object name: [REDACTED]
 player:
 Job Code:
 Reason: Investigate
 Count type: Individual
 Height: 0.00
 Sex: Male
 CMT: 0.00
 Comment:

Identification #: [REDACTED]
 Count Started: 5-OCT-1995 12:56:30.
 Intake Date: 5-OCT-1995 12:56:30.
 Frequency:
 Operator: NJP
 Weight: 0.00
 Date of Birth:

Counter: INVESTIGATE
 Arrangement/Geometry: FINVEST/TUPPED
 Detector: WHOLE BODY
 Analysis limits: 25 to 505

Facility: PERRY NUCLEAR PLANT SW-15
 Elapsed Live Time: 0 00:05:00.00
 Elapsed Real Time: 0 00:05:00.51
 Count Rate: 51.13 131.3 0.00 0.00 0.00 0.00 0.00 0.00

Counter:
 Arrangement/Geometry: FINVEST/TUPPER
 Detector: LUNGS
 Analysis limits: 25 to 505

Facility: PERRY NUCLEAR PLANT SW-15
 Elapsed Live Time: 0 00:05:00.00
 Elapsed Real Time: 0 00:05:00.51
 Count Rate: 51.13 0.00 0.00 0.00 0.00 0.00 0.00 0.00

Counter:
 Arrangement/Geometry: FINVEST/TLOWER
 Detector: LOWER TORSO
 Analysis limits: 25 to 505

Facility: PERRY NUCLEAR PLANT SW-15
 Elapsed Live Time: 0 00:05:00.00
 Elapsed Real Time: 0 00:05:00.50
 Count Rate: 122.6 0.00 0.00 0.00 0.00 0.00 0.00 0.00

Peak Search Results for FINVEST/TUPPED

Nuclide	Energy (keV)	Activity (nCi)	%Error (2 SD)	%Gain	Fit	Area	Centroid (ch)	Comments
CS-137	660.92	76.6	8.5	1.09	2.33	4363	167.43	
CS-134	805.96	30.9	9.1	1.25	0.54	1500	201.38	
CO-58	807.29	28.6	8.6	-0.42	0.51	1932	201.71	
CO-60	1173.75	4.00	38.2	0.06	0.70	191	291.18	
K-40	1460.11	107.	17.0	0.89	0.90	464	361.88	

Nuclide Results for FINVEST/TUPPED

Nuclide	Activity (nCi)	%Error (2 SD)	Intake (nCi)	QA/L	DAQ-HR	HM50 (nrem)	Comments
K-40	107.	20.1	171.	0.0	0.0	0.000E+00	
CO-58	28.6	13.6	41.0	0.0	0.1	0.365	
CO-60	4.00	39.6	6.34	0.0	0.6	0.962	
CS-134	30.9	14.1	49.0	0.0	0.6	2.36	

Nuclide	Activity (nCi)	Error (2 SD)	Intake (nCi)	%LI	DAC-hr	ME50 (nrem)	Comments
CS-137	76.6	16.6	122.	0.1	1.9	3.92	
Totals:	245.		389.	0.1	2.2	7.83	

Energy Calibration Performed: 9-MAR-1995 14:51:28. FINEST/TUPPER Efficiency Calibration Performed: 9-MAR-1995 17:26:21.
 Libraries Used: NO_WBC_LIB:INHALATION.WLS,NO_WBC_LIB:INHALATION.WLS,NO_WBC_LIB:INHALATION.WLS
 Analyses By: GARDON V1.2,PEAKFIT V2.2,MID V3.0,WINMAN V1.7,MINACT V2.6

Peak Search Results for FINEST/TUPPER

Nuclide	Energy (keV)	Activity (nCi)	Error (2 SD)	%Gain	Fit	Area	Centroid (ch)	Comments
CS-137	664.80	62.2	12.6	0.47	2.70	1967	166.61	
K-40	1460.83	109.	23.8	0.01	1.16	293	260.03	
CS-134	769.13	25.0	13.0	0.42	0.89	717	199.70	
CS-138	804.21	25.0	19.2	-0.50	0.92	623	204.98	
CS-136	799.14	17.0	62.2	0.32	1.03	321	189.62	

Nuclide Results for FINEST/TUPPER

Nuclide	Activity (nCi)	Error (2 SD)	Intake (nCi)	%LI	DAC-hr	ME50 (nrem)	Comments
K-40	109.	26.4	317.	0.0	0.0	0.000E+00	
CS-137	62.2	16.7	188.	0.2	2.9	6.06	
CS-134	25.0	17.5	75.9	0.1	1.2	3.85	
CS-138	25.0	22.4	75.9	0.0	0.2	0.534	
CS-136	17.0	61.3	51.6	0.0	0.4	0.936	
Totals:	234.		709.	0.2	4.7	11.2	

Energy Calibration Performed: 9-MAR-1995 14:51:28. FINEST/TUPPER Efficiency Calibration Performed: 9-MAR-1995 17:20:10.
 Libraries Used: lib_dir:INHALATION,lib_dir:INHALATION,lib_dir:INHALATION
 Analyses By: GARDON V1.2,PEAKFIT V2.2,MID V3.0,WINMAN V1.7,MINACT V2.6

Peak Search Results for FINEST/FLOWER

Nuclide	Energy (keV)	Activity (nCi)	Error (2 SD)	Gain	Fit	Area	Centroid (ch)	Comments
CD-57	124.18	23.6	64.7	-7.59	0.60	295	30.81	
CB-137	671.66	89.3	8.7	1.31	1.44	2231	172.41	
CD	812.21	22.6	9.0	1.91	0.74	800	207.92	
Unknown	812.31		9.0		0.56	885	207.93	
CD-60	1172.36	4.97	49.2	0.01	0.06	109	298.94	
Unknown	1292.98		22.8		1.02	261	277.94	

Nuclide Results for FINEST/FLOWER

Nuclide	Activity (nCi)	Error (2 SD)	Intake (nCi)	SALE	DAO-hr	NRSD (nrem)	Comments
CD-57	23.6	71.4	0.000E+00	0.0	0.0	0.000E+00	
CD-58	23.6	14.7	0.000E+00	0.0	0.0	0.000E+00	
CD-60	4.97	50.2	0.000E+00	0.0	0.0	0.000E+00	
CB-137	89.3	17.6	6.74E+05	4150.2	*****	2.17E+05	SALE above investigate level
Totals:	180.		6.74E+05	4150.2	100007.2	2.17E+05	TOTAL SALE above investigate level

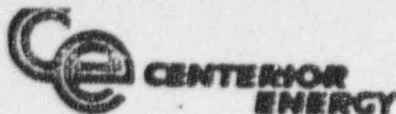
Verity Calibration Performed: 8-MAR-1995 14:59:21. FINEST/FLOWER Efficiency Calibration Performed: 8-MAR-1995 17:52:00.

Libraries Used: lib_dir:INMULATION,lib_dir:INMULATION,lib_dir:INMULATION

Analyses By: GMSUM V1.5,PEAKFF V2.2,WID V3.0,WMEAN V1.7,MIRACT V2.4

Reviewed by:

Date:



300 Madison Avenue
Toledo, OH 43652-0001
419-249-2300

John P. Stoltz
Vice President - Nuclear
Dovts-Besse

Docket Number 50-346

License Number NPP-3

Serial Number 1-1055

December 21, 1994

United States Nuclear Regulatory Commission
Document Control Desk
Washington, D. C. 20555

Subject: Response to Inspection Report 50-346/94010 (DRSS)

Gentlemen:

Toledo Edison has (TE) received Inspection Report 94010 (Log Number 1-3109) and the enclosed Notices of Violation; the responses to which are provided below. As stated in the management meeting held in the Region III office on November 14, 1994, TE recognizes the significance of the two Radiation Protection (RP) violations and the potential for repeat occurrences without comprehensive corrective actions. Although overall RP controls were improved and total exposure was reduced during the ninth refueling outage, TE is committed to correct the weaknesses identified by these events to further improve performance in these areas.

Violation 1: 10 CFR 20.1501 requires that each licensee make or cause to be made surveys that may be necessary for the licensee to comply with the regulation in Part 20 and that are reasonable under the circumstances to evaluate the extent of radiation levels, concentrations or quantities of radioactive materials, and the potential radiological hazards that could be present.

Pursuant to 10 CFR 20.1003, survey means an evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, or presence of radioactive material or other sources of radiation.

Operating Companies
Cleveland Electric Illuminating
Toledo Edison

9412290091 941221
FOR APPROVAL OF NRC

TEO/
1/1

Contrary to the above, on two occasions the licensee did not make surveys to comply with the regulations in Part 20. Specifically,

- a. On October 7, 1994, the licensee did not perform surveys to assure compliance with 10 CFR 20.1701, which requires that licensees use process or other engineering controls to control the concentration of radioactive material in air. Specifically, an evaluation of the contamination levels underneath insulation on the east once through steam generator hot leg was not performed to determine if engineering controls were required to control the concentration of radioactive material in air.
- b. On October 23, 1994, the licensee did not make surveys to assure compliance with 10 CFR 20.1201, which requires that licensees control the occupational total effective dose equivalent of adults to 5 rem annually. Specifically, a survey was not performed before workers entered the incore instrumentation tank drain line area on the 565' elevation of the Containment Building, which had radiation dose rate levels up to 12 rem/hour (0.12 Sv/hour) at 30 centimeters.

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

Response: Acceptance or Denial of the Alleged Violation

Toledo Edison accepts the alleged violation.

Reason for the Violation

The two examples identified in the violation were caused by failure to adequately evaluate and plan for changed or unexpected radiological conditions. Prior to the October 7, 1994 event, the potential for increased contamination under the insulation was not properly considered when the decontamination and mirror insulation removal plan was developed. As a result, the Radiation Work Permit (RWP) for mirror insulation removal inside containment did not provide specific guidance with respect to additional surveys under the insulation, application of process or engineering controls, or proper respirator use designation during the course of insulation removal. Lack of detailed surveys for the specific area and deficiencies in RP personnel performance allowed the actual conditions to become the source of internal contaminations.

During the October 23, 1994 event, inadequate performance of the incore instrument cutting tool produced a potential for changed radiological conditions. Planning for final draining of the incore instrument tank (IIT) did not consider the impact of irradiated pieces of incore instrument cable entering the drain line. Since the potential for increased radiation fields was not recognized, adequate surveys of the IIT drain line area were not performed.

Corrective Actions Taken and Results Achieved

Immediate corrective actions for the October 7 event were initiated by providing instructions in containment building RP logs. These instructions required additional personal dosimetry, increased RP technician coverage, additional surveys and additional engineering controls for control of airborne activity produced by the insulation removal activity. The RVPs for insulation removal were subsequently terminated and reissued with additional requirements. These requirements included additional assessment of radiological conditions, additional RP coverage, improved protective clothing requirements and increased contamination control requirements. A key change to the RVP was to change the respiratory protection requirement to conditional, dependent on the results of radiological surveys. Dose assessment was completed for the individuals involved. Meetings were held with the insulator personnel to reassure them of TE's commitment to their personal safety. Finally, RP personnel involved were counseled. As a result of immediate corrective action implementation, further unanticipated intakes did not occur.

Immediate corrective action for the October 23 event was taken by temporarily excluding two Operations personnel from access to the Radiological Restricted Area (RRA) until preliminary dose assessment was completed. The IIT drain line area was re-established as a Locked High Radiation Area. A plan was developed and implemented for retrieval and storage of the incore fragment. Interviews of all personnel involved were conducted for the event which included a time/motion re-enactment study, after which dose assignments were calculated for each worker involved. Actions upon receipt of an Electronic Dosimeter (ED) alarm were reinforced to all site personnel entering the RRA by signs posted at the RRA entrance. As a result of immediate corrective actions taken for this event, doses to individuals were maintained well within regulatory limits.

Corrective Actions to Prevent Recurrence

Toledo Edison believes the overall RP program is sound, and includes guidance on completion of surveys before and during work activities involving radiological hazards. However, a more conservative philosophy and approach to planning for potentially changing radiological conditions must be established at DBNPS. Procedures that facilitate this planning will be reviewed and modified as necessary, specifically with regard to potentially changing conditions and conditions that may transcend the boundary of proposed work activities.

Date When Full Compliance Will Be Achieved

Full compliance was achieved upon completion of appropriate surveys for the insulation removal activity and the IIT drain line area. Surveys for the insulation removal activity on the east steam generator hot leg were completed on October 7, 1994. Surveys for the IIT drain line area were completed on October 23, 1994 and the area was redesignated and posted as a Locked High Radiation Area on October 23, 1994.

Procedures that facilitate planning for work activities that may involve potentially changing radiological conditions will be reviewed and modified, as necessary, by May 1, 1995.

Violation 2: Technical Specification 6.8.1 requires that written procedures shall be established and maintained covering the applicable procedures recommended in Appendix A of Regulatory Guide 1.33, November 1972. Appendix A of this Regulatory Guide includes recommended procedures for limiting personnel exposures.

Procedure DB-HP-01109, Revision 3, "High Radiation Area Access Control," Step 4.1.3 states, in part, that personnel shall exit the area immediately if, a pre-set dose limit is reached as evidenced by alarming dosimetry, and/or if, a pre-set dose rate alarm is reached.

Procedure DB-HP-01901, Revision 3, "Radiation Work Permits," Step 4.1.2 states, in part, that all entries into radiologically restricted areas require the use of an RWP. Step 6.5.3 states that workers shall be cognizant of the requirements of their RWP each time they use their RWP.

Procedure DB-HP-00208, Revision 2, "Radiation Protection Program," Step 5.6.8 states that workers obey posted, oral, and written Radiation Protection instructions and procedures including instructions on Radiation Work Permits.

Contrary to the above, the licensee failed to follow written procedures recommended by Appendix A of Regulatory Guide 1.33, November 1972. Specifically,

- a. On October 23, 1994, two workers entered the incore instrumentation tank drain line area of the 565' elevation in the Containment Building on three separate occasions and failed to exit the area when either their electronic dosimeters alarmed for a pre-set dose limit and/or a pre-set dose rate alarm.
- b. On October 23, 1994, one employee worked in the incore instrumentation tank drain line area of the 565' elevation in the Containment Building and was not cognizant of the RVP requirements in that he was signed on an RVP which was not for access into the Containment Building.
- c. On October 23, 1994, two workers entered the incore instrumentation tank drain line area of the 565' elevation in the Containment Building without following posted instructions to notify Radiation Protection before crossing a high radiation area boundary.

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

Response: Acceptance or Denial of the Alleged Violation

Toledo Edison accepts the alleged violation.

Reason for the Violation

Each of the elements of this violation involved failure of personnel to follow written procedures for limiting radiation exposure to personnel. Overall, the performance of personnel did not demonstrate adequate discipline to ensure management expectations for radiation protection program procedural compliance were met. Contributing factors included lack of recognition of a potential radiation hazard and ineffective communication between Operations and RP personnel for entrance to the IIT drain line area. Conservative Electronic Dosimeter (ED) alarm

setpoints and the resultant frequent alarms caused a misperception of the significance of ED alarms. Coupled with this, confusion had developed among Operations personnel over when it is required to complete an operating evolution rather than exit the area in response to an alarming ED.

Corrective Actions Taken and Results Achieved

Corrective actions taken and results achieved are included in the response to Violation 1. In addition, personnel involved in these procedural violations were counseled.

Corrective Action to Prevent Recurrence

Management expectations and radiation worker practices for the use of EDs will be assessed to ensure all procedures and training are consistent. This review will focus on use of the ED, the philosophy behind establishment of the ED alarm setpoints and radiation worker response to ED alarms. Operator ED response will be tempered with additional guidance to address the importance of placing the plant in a safe operating condition to protect the health and safety of the public and plant personnel. Training on the use of EDs will be modified and provided through requalification and General Employee Training.

As stated in the response to Violation 1, procedures that facilitate planning for potentially changing radiological conditions will be reviewed and modified as necessary.

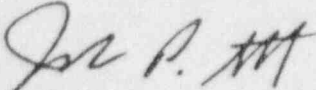
Date When Full Compliance Will Be Achieved

As a result of the immediate corrective actions implemented following the October 23, 1994 event, DBNPS has achieved compliance with the current procedures. Assessment of management expectations and radiation worker practices for the use of EDs will be completed by May 1, 1995. As stated in the response to Violation 1, procedures that facilitate planning for potentially changing radiological conditions will be reviewed and modified, as necessary, by May 1, 1995.

Docket Number 50-346
License Number NPF-3
Serial Number 1-1055
Page 7

Should you have any questions or require additional information,
please contact Mr. William T. O'Connor, Manager - Regulatory Affairs,
at (419) 249-2366.

Very truly yours,



DLM/eld

cc: L. L. Gundrum, NRC Project Manager
J. B. Martin, Regional Administrator, NRC Region III
S. Stasek, DB-1 NRC Senior Resident Inspector
Utility Radiological Safety Board

R. A. Greenwood, CHP, Supervisor - Health Physics

DATE October 10, 1994

FROM *Tony Mason*
T. R. Mason, Health Physicist

MAIL STOP 1029

SUBJECT Radiation Work Permit Clarification

PHONE 8122

DSR-94-00365
RP 1.11.7

Radiation Work Permits (RWPs) printed by the HIS 20 software unfortunately used a hard coded term "Prohibited" in the respiratory protection field when no respiratory protection has been evaluated to be necessary for the working conditions. The use of respiratory protection has been evaluated for each RWP and the combination of protective clothing and equipment chosen which will keep Total Dose to the worker As-Low as Reasonably Achievable (ALARA). For this reason, the term [respiratory protection "not required"] more accurately describes the intent of that portion of our work permits. The intent that no respiratory protection is required by the working conditions is not changed.

If work conditions change, the RWP must be re-evaluated by Radiation Protection (RP) to ensure requirements are proper. Both RP and the workers should be alert to changing or unexpected conditions so that the worker's TOTAL DOSE is kept ALARA. The pen and ink correction has been made to the affected RWPs.

TRM/ekg

Concurrence

R. A. Greenwood
R. A. Greenwood, CHP
Supervisor - Health Physics

Date

10/10/94

November 16, 1995

Mr. Ronald Grant
International Association of Heat
Frost Insulators and Asbestos Workers

RE: Dennis Maloney

Dear Brother Grant:

Please accept this as a Step II Grievance.

1. It is unlawful to take job action against a person who has filed a law suit concerning his exposure to radiation. It was thus unlawful for me to be removed from a job (and all future jobs) with Fischbach Power Services, Inc.).
2. At the time I filled out the papers necessary to perform the work of Fischbach Power Services, Inc., I was never asked whether I was in litigation with any other person or company. It was improper for Fischbach Power Services to take job action against me where they never asked for this information.
3. I want all back pay and other benefits to be restored to me. I also want the letter issued to me by Fischbach Power Services, Inc. stating that they treated me in an improper and unlawful manner, and that no job action should have been taken against me. I need this letter for future employment.

Very truly yours,

Dennis Maloney



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION III
801 WARRENVILLE ROAD
LISLE, ILLINOIS 60532-4351

November 23, 1994

Centerior Service Company
ATTN: Mr. John P. Stetz
Vice President - Nuclear
Davis-Besse
c/o Toledo Edison Company
300 Madison Avenue
Toledo, OH 43652

SUBJECT: SPECIAL RADIATION PROTECTION INSPECTION AT THE DAVIS-BESSE NUCLEAR
POWER STATION AND SUBSEQUENT MANAGEMENT MEETING HELD AT THE REGION
III OFFICE ON NOVEMBER 14, 1994

Dear Mr. Stetz:

This refers to the special safety inspection conducted by Mr. P. Loudon and Mr. R. Paul of this office on October 24 through November 3, 1994, and the subsequent management meeting held at the Region III Office on November 14, 1994. The inspection included a review of authorized activities at your Davis-Besse facility. At the conclusion of the inspection, the findings were discussed with those members of your staff identified in the enclosed report. These findings were further discussed with you and members of your staff during a management meeting held on November 14, 1994.

Areas examined during the inspection are identified in the report. Within these areas, the inspection consisted of a selective examination of procedures and representative records, interviews, and observation of activities in progress.

During this inspection, certain of your activities appeared to be in violation of NRC requirements, as specified in the enclosed Notice of Violation (Notice). These violations are of concern because they illustrate certain radiation protection program weaknesses. Although no regulatory dose limits were challenged during the events discussed below, these incidents, which led to the violations, illustrated weaknesses in the station's radiation protection program that necessitate management attention.

During insulation removal on the east steam generator, radiation workers were exposed to unplanned airborne radioactivity conditions. This event exhibited weaknesses within your planning and radiation work permit programs and were contributing factors to the failure to adequately evaluate the radiological hazards incident to the workers involved. This failure to determine radiological conditions led to the accomplishment of work without engineering controls or respirators thus leading to the unplanned intakes.

9412070042 3pp.

The second incident involved the inadvertent external exposures to workers in the drain line area of the Incore Instrumentation Tank. This event was caused by the failure of workers to recognize the potential for changing radiological conditions which led to their failure to adequately evaluate radiological conditions in the drain line area. Other problems noted during this incident were radiation workers' failure to notify radiation protection prior to entering a high radiation area; an occurrence of a radiation worker on the wrong radiation work permit; and confusion concerning the appropriate response radiation workers should have taken when they received alarms from their electronic dosimeters. The proper response to alarming electronic dosimeters is an expectation which must be clearly defined by station management and understood by all radiation workers.

We acknowledge your comments made during the November 14, 1994, management meeting of your recognition to these weaknesses and the actions you have already taken to address our concerns.

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. 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.

In accordance with 10 CFR 2.790 of the Commission's regulations, a copy of this letter, the enclosures, and your response to this letter will be placed in the NRC Public Document Room.

The response directed by this letter and the accompanying Notice are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, PL 96-511.

We will gladly discuss any questions you have concerning this inspection or the management meeting.

Sincerely,

Original Signed by W. L. Axelson

W. L. Axelson, Director
Division of Radiation Safety
and Safeguards

Docket No. 50-346

- Enclosures:
1. Notice of Violation
 2. Inspection Report
No. 50-346/94010(DRSS)
 3. Handouts from Management Meeting

cc w/encls:

D. C. Shelton, Senior
Vice President - Nuclear
J. K. Wood, Plant Manager
W. T. O'Connor, Manager
Regulatory Affairs
State Liaison Officer, State
of Ohio
Robert E. Owen, Ohio
Department of Health
A. Grandjean, State of Ohio,
Public Utilities Commission

NOTICE OF VIOLATION

Centerior Service Company
Davis-Besse Nuclear Power Station

Docket No. 50-346
License No. NPF-3

During an NRC inspection conducted on October 24 through November 3, 1994, violations of NRC requirements were identified. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," 10 CFR Part 2, Appendix C, the violations are listed below:

1. 10 CFR 20.1501 requires that each licensee make or cause to be made surveys that may be necessary for the licensee to comply with the regulations in Part 20 and that are reasonable under the circumstances to evaluate the extent of radiation levels, concentrations or quantities of radioactive materials, and the potential radiological hazards that could be present.

Pursuant to 10 CFR 20.1003, *survey* means an evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, or presence of radioactive material or other sources of radiation.

Contrary to the above, on two occasions the licensee did not make surveys to comply with the regulations in Part 20. Specifically,

- a. On October 7, 1994, the licensee did not perform surveys to assure compliance with 10 CFR 20.1701, which requires that licensees use process or other engineering controls to control the concentration of radioactive material in air. Specifically, an evaluation of the contamination levels underneath insulation on the east once through steam generator hot leg was not performed to determine if engineering controls were required to control the concentration of radioactive material in air.
- b. On October 23, 1994, the licensee did not make surveys to assure compliance with 10 CFR 20.1201, which requires that licensees control the occupational total effective dose equivalent of adults to 5 rem annually. Specifically, a survey was not performed before workers entered the incore instrumentation tank drain line area on the 565' elevation of the Containment Building, which had radiation dose rate levels up to 12 rem/hour (0.12 Sv/hour) at 30 centimeters.

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

2. Technical Specification 6.8.1 requires that written procedures shall be established and maintained covering the applicable procedures recommended in Appendix A of Regulatory Guide 1.33, November 1972. Appendix A of this Regulatory Guide includes recommended procedures for limiting personnel exposures.

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Procedure DB-HP-01109, Revision 3, "High Radiation Area Access Control," Step 4.1.3 states, in part, that personnel shall exit the area immediately if, a pre-set dose limit is reached as evidenced by alarming dosimetry, and/or if, a pre-set dose rate alarm is reached.

Procedure DB-HP-01901, Revision 3, "Radiation Work Permits," Step 4.1.2 states, in part, that all entries into radiologically restricted areas require the use of an RWP. Step 6.5.3 states that workers shall be cognizant of the requirements of their RWP each time they use their RWP.

Procedure DB-HP-00208, Revision 2, "Radiation Protection Program," Step 5.6.8 states that workers obey posted, oral, and written Radiation Protection instructions and procedures including instructions on Radiation Work Permits.

Contrary to the above, the licensee failed to follow written procedures recommended by Appendix A of Regulatory Guide 1.33, November 1972. Specifically,

- a. On October 23, 1994, two workers entered the incore instrumentation tank drain line area of the 565' elevation in the Containment Building on three separate occasions and failed to exit the area when either their electronic dosimeters alarmed for a pre-set dose limit and/or a pre-set dose rate alarm.
- b. On October 23, 1994, one employee worked in the incore instrumentation tank drain line area of the 565' elevation in the Containment Building and was not cognizant of the RWP requirements in that he was signed on an RWP which was not for access into the Containment Building.
- c. On October 23, 1994, two workers entered the incore instrumentation tank drain line area of the 565' elevation in the Containment Building without following posted instructions to notify Radiation Protection before crossing a high radiation area boundary.

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

Pursuant to the provisions of 10 CFR 2.201, Centerior Service Company is hereby required to submit a written statement or explanation to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington D.C. 20555, with a copy to the Regional Administrator, Region III, and a copy to the NRC Resident Inspector at the facility that is the subject of this Notice, 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" and should include for each violation: (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 to show cause why the license should not be modified, suspended, or revoked, or 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.

Dated at Lisle, Illinois
this 23th day of November 1994

U.S. NUCLEAR REGULATORY COMMISSION

REGION III

Report No. 50-346/94010(DRSS)

Docket No. 50-346

License No. NPF-3


Licensee: Toledo Edison Company
Edison Plaza
300 Madison Avenue
Toledo, OH 43652

Facility Name: Davis-Besse Nuclear Power Station

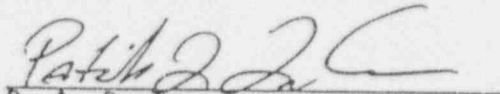
Inspection At: Davis-Besse Site, Oak Harbor, Ohio

Inspection Conducted: October 24 through November 3, 1994

Inspectors:

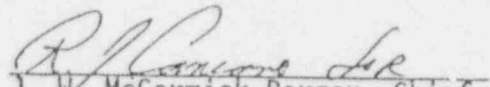

P. L. Loudon
Radiation Specialist

11/28/94
Date


R. A. Paul
Senior Radiation Specialist

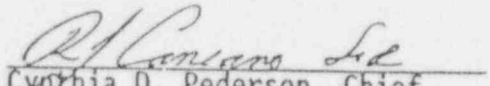
11/28/94
Date

Reviewed By:


J. W. McCormick-Barger, Chief
Radiological Programs Section

11/28/94
Date

Approved By:


Cynthia D. Pederson, Chief
Reactor Support Programs Branch

11/28/94
Date

Inspection Summary

Inspection on October 24 through November 3, 1994 (Report No. 50-346/94010 (DRSS))

Areas Inspected: Special radiation protection inspection to review two radiological events which occurred during the current ninth refueling outage. One event involved the unplanned intakes of radioactive material by workers while removing insulation from the east once through steam generator hot leg on October 7, 1994. The second event involved the inadvertent external exposure of radiation workers to unexpectedly high dose rate areas during the draining of the Incore Instrumentation Tank on October 23, 1994.

Results: Two violations of NRC requirements were identified. The first concerned two examples of failure by the licensee to adequately evaluate

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radiological hazards incident upon radiation workers. This failure led to the unplanned intakes of radioactive material by insulators in one case, and the inadvertent external exposure of radiation workers to high dose rate areas in another case. The second violation concerns three examples of radiation workers failing to follow procedures required by Technical Specifications. Several weaknesses were noted in association with the two events discussed above. Specifically,

- Weaknesses in the planning and radiation work permit programs which contributed to precautions not being provided to workers involved with the insulation removal.
- Failure on the part of the RP department to recognize the potential for irradiated material to be transported down the drain line from the tank.
- Confusion on the part of operations personnel as to the appropriate response to ED alarms balanced with maintaining safe operating conditions (evolutions) in the plant.
- Plant personnel not understanding the significance of changed radiological conditions. An operator made a survey of the drain valve and line, noted dose rates of 5 to 8 rem/hr (50 to 80 mSv/hr), but did not recognize the significance of this reading and continued working in the area.

The violations and weaknesses associated with the two radiological events illustrate a need for management attention to these areas within the radiation protection program at the station.

DETAILS

1. Persons Contacted

Toledo Edison Company

- # T. Barton, Corporate Radiological Assessor
- *S. Byrne, Manager, Plant Operations
- # J. Dillich, Manager, Radiation Protection Department
- # J. Feckley, Supervisor, Radiation Protection
- # R. Greenwood, Radiation Protection Manager
- # M. Hale, Supervisor, Radiation Protection Operations
- # L. Harder, Health Physicist
- # L. Lockard, Radiation Protection Training
- # C. McCaken, Radiation Protection Technician
- # D. Miller, Senior Licensing Engineer
- # J. Moyers, Manager, Quality Assurance
- *W. O'Connor, Manager, Regulatory Affairs
- # J. Polyak, Corporate Radiological Assessor
- # A. Rabe, Supervisor, Quality Engineering
- # J. Rogers, Manager, Maintenance
- # D. Schreiner, Supervisor, ISEG
- *R. Scott, Manager, Radiation Protection/Chemistry Departments
- # P. Smith, Supervisor, Licensing Compliance
- # M. Snee, Radiation Protection Technician
- *J. Stetz, Site Vice President, Nuclear
- *J. Wood, Plant Manager

Nuclear Regulatory Commission

- *W. Axelson, Director, Division of Radiation Safety and Safeguards
- *R. DeFayette, Director, Enforcement and Investigation Coordination Staff
- *J. Hopkins, Senior Project Manager, NRR
- *J. House, Senior Radiation Specialist
- *M. Kunowski, Senior Radiation Specialist
- *R. Lanksbury, Chief, Division of Reactor Projects Section 3B
- *R. Lickus, Chief, State and Government Affairs
- # C. Lipa, Resident Inspector
- *T. Martin, Deputy Director, Division of Reactor Projects
- *H. Miller, Deputy Regional Administrator
- *S. Stasek, Senior Resident Inspector

The inspectors also contacted other licensee personnel during the course of the inspection.

#Indicates those present at the exit interview on November 3, 1994.

*Indicates those present at the management meeting held in the Region III office on November 14, 1994.

2. Licensee Actions to Previous Inspection Findings (83750 & 84750)

(Closed) Inspection Follow-up Item No. 50-346/93008-01: The licensee was to prepare a secondary system water sample with chloride (Cl^-), fluoride (F^-), and sulfate (SO_4^{2-}) at concentrations of about 20 parts per billion (ppb). The licensee analyzed the samples for the anions using both laboratory and inline ion chromatographs and reported the values to the Region III office for comparison with the NRC reference laboratory's results. The licensee's average results for Cl^- and F^- were 22.1 and 20.2 ppb, respectively, and were in good agreement with the NRC reference laboratory's results (i.e. 25 ppb Cl^- and 22 ppb F^-). Because of poor statistical accuracy in the NRC's sulfate analysis, the sulfate results could not be compared. This item is closed.

3. Reviews of Radiological Events

During the current refueling outage, two significant radiological events occurred which were reviewed by the inspectors. The first event involved the unplanned exposures of radiation workers to airborne radioactivity and the subsequent internal doses received by the workers. The second event involved the external exposure of radiation workers to unexpectedly high dose rate areas while manipulating a valve on the drain line from the Incore Instrumentation Tank (IIT) following the cutting of incore detector cables.

Unplanned Intake Event

During the midnight shift on October 7, 1994, a crew of five insulators reported to the containment control point to remove mirror insulation from the hot leg area of the once through steam generator (OTSG). The work was delayed so current survey information could be gathered by the radiation protection (RP) staff. Surveys indicated smearable contamination levels between 80 and 800 mrad/hr/100 cm^2 (0.8 to 8 mGy/hr/100 cm^2) on the outside surface of the mirror insulation. A decontamination crew was sent to the area to wipe down the mirror insulation. Decontamination efforts reduced the contamination levels to approximately 10,000 to 40,000 dpm/100 cm^2 (166.67 to 666.67 Bq/100 cm^2). Radiation levels in the area ranged from 10 to 60 mrem/hr (.10 to .60 mSv/hr). The insulation crew was assembled and briefed by the lead radiation protection technician (RPT) responsible for the area. The briefing included specifics for entry into a high radiation area but did not address the need for surveys under the insulation after the first piece was removed. The pre-job brief also did not address the need for a RPT to be present during the insulation removal nor was the need for engineering controls, air monitoring, or respiratory protection evaluated.

The insulators entered the area and commenced to remove the mirror insulation. One insulator donned a dust mask of his own volition. Upon exiting the area, an RPT in the area "quick frisked" the worker's dust mask which indicated a direct reading of 60 mrad/hr (0.6 mGy/hr) on the outside of the mask. The insulators were sent to the personnel whole

body friskers located near the decontamination facility. Four of the five crew members alarmed the whole body friskers and all five were instructed to take a shower. The crew was subsequently whole body counted. Four of the five workers displayed positive whole body counts and were instructed to return in twenty-four hours for additional countings. Whole body counts were continued for seven days which indicated the presence of Cobalt-58, Cesium-134, Cesium-137, and very low levels of Cobalt-60 radioisotopes. Dose assignments were computed for the workers which ranged from 0 to 212 mrem (0 to 2.12 mSv) CEDE. Deep Dose Equivalents for the workers ranged from 22 to 62 mrem (.22 to .62 mSv).

Licensee Response to the Event

The licensee immediately gathered statements and information regarding the event and a full investigation was conducted by the Radiation Protection Manager. The licensee's investigation noted four weaknesses which led to the unplanned intakes. The following briefly summarizes the identified weaknesses:

- a. The radiation work permit (RWP) did not specifically identify areas for insulation removal. Rather, it was a single broad RWP for all insulation work within containment.
- b. Detailed surveys were not recorded of the specific area in question. This area was not decontaminated during the initial containment decontamination which took place at the beginning of the outage.
- c. The RWP did not include instructions for workers to stop work after the first piece of mirror insulation was removed so that RP could perform surveys under the insulation to evaluate the radiological conditions. Had these surveys been performed, the high levels of contamination (later found in the rad (10+ mGy) smearable range) would have prompted the need for engineering controls or the use of respiratory protection.
- d. The lead RPT failed to followup on the insulation removal by sending another RPT into the area. The RPT's statement suggested that the work activity at that time was hectic and he lost track of the workers removing the insulation.

Regional Review of the Event

The inspectors review of the event included an assessment of the licensee's investigation and interviews conducted with licensee personnel involved in the event. Interviews with the cognizant RPT in charge of that area of the containment indicated that he was aware of the potential for higher contamination levels underneath the insulation but failed to ensure that an RPT was assigned to the work crew to evaluate the contamination conditions after the first piece of insulation was removed. The root causes and corrective actions

discussed in the licensee's investigation appeared to adequately address the event. The inspectors verified the licensee's calculations of CEDEs assigned to the workers. No problems were noted with respect to the internal dose assignments. The failure to perform an adequate evaluation of the radiological conditions under the mirror insulation is a violation of 10 CFR 20.1501. Specifically, the licensee's failure to perform a survey led to the failure to use to the extent practicable, process or other engineering controls to control the concentrations of radioactivity in air as required by 10 CFR 20.1701. (Violation 50-346/94010-01a)

Inadvertent Exposures During Incore Instrumentation Tank (IIT) Draining

On October 23, 1994, the licensee was performing cleaning operations in the IIT following the cutting of 25 incore detector cables which was performed a few days earlier. During the cutting process pieces of the incore cables had fallen out of the holding cask and to the bottom of the tank. Foreign object search and retrieval (FOSAR) equipment was used to locate the pieces which were subsequently retrieved and placed into the holding cask. The tank was further surveyed and cleaned via an underwater vacuum. Draining of the tank commenced during the afternoon of the same day.

An equipment operator (Op A) was sent to open a valve (DH-93) located below the tank in the drain flow path to complete the draining process. Op A attempted to use a reach rod device (located remotely on another elevation) to manipulate the valve. Due to Op A's uncertainty of the valve's position, he proceeded to the immediate area of the valve to physically verify its position. The area where the valve was located was a posted high radiation area. Op A was wearing an electronic dosimeter (ED) which had alarms set at 25 mrem (0.25 mSvs) for accumulated dose and 100 mrem/hr (1 mSv/hr) dose rate. No extremity dosimeters were worn into the area and the location of Op A's ED was on his chest. Op A entered the area, placed the valve in a one-third open position, and left the area. At this point his ED was alarming for both dose and dose rate. He returned to the equipment hatch area of containment to log out of an exclusion area where he had been earlier in the shift and was preparing to inform RP of his alarming ED. RP personnel approached Op A while he was logging out of the exclusion area and told him to exit the containment and report to the RP desk.

During this time, the water in the IIT had reached the six inch level and a survey was conducted by the RPT covering the job. He noted dose rates in one area of the tank in the 2 to 6 rem/hr (20 to 60 mSv/hr) range. This didn't prompt any immediate concern because the As-Low-As-Reasonably-Achievable (ALARA) briefing contained a 10 rem/hr (100 mSv/hr) hold point. Following this survey another equipment operator (Op B) was sent to close the valve opened by Op A. He entered the immediate area of the drain valve with about 2 mrem (.02 mSvs) remaining below his ED alarm set point for dose. His ED settings were the same as Op A's.

Op B attempted to close the valve but could feel something binding the valve and never got the valve to close. During this time his ED went into alarm for both dose and dose rate. Op B left the area and went to the containment access point to reset his ED. While resetting his ED he noticed that it was approximately 12 mrem (.12 mSvs) over his alarm set point. This prompted him to approach an RPT and convey his noted dose to the RPT. The RPT offered to accompany him to the area because the dose rates in the area appeared, based on his ED results, to be much higher than anticipated. Op B and an RPT proceeded back to the drain valve area. During this time, plans were being made to flush the drain valve which was sticking during Op B's initial entry to close the valve. As Op B and the RPT approached the area, the RPT was paged and told to report to another area of containment. The RPT told Op B that he would be back in a few minutes and asked if he was "meter qualified". Op B acknowledged that he was "meter qualified" and the RPT handed him his tele-detector and left the area. Op B entered the area and surveyed the drain line and the valve. The highest dose rate reading Op B noted was a contact reading of about 5 to 8 rem/hr (50 to 80 mSvs/hr) on the drain valve. Op B noted his ED alarming for dose rate during this time. Op B placed the meter in a nearby area and communicated to the decontamination crew to start flushing the valve. While Op B was in the area to communicate to the decontamination crew, he noted that his ED stopped alarming. Op B then went back over to the valve to attempt to close it. During this time the RPT returned to the area and heard Op B's ED alarming. The RPT took his meter and began surveying the drain pipe. At this point he noted contact readings on the pipe in a localized area about 450 rem/hr (4.5 Sv/hr) and immediately motioned to Op B to leave the area. At this time both the RPT's and Op B's EDs were in alarm for dose and dose rate. Followup surveys performed on the pipe indicated a contact reading as high as 650 rem/hr (6.5 Sv/hr) on the bottom of the pipe and a 30 cm measurement as high as 12 rem/hr (.12 Sv/hr). The hot spot was very localized and general area dose rates were in the 1 to 2 rem/hr (10 to 20 mSvs) range.

ED logs for the three individuals involved (Op A, Op B, and the RPT) indicated the following:

	Dose	Highest Dose Rate
Op A	47 mrem (.47 mSvs)	334 mrem/hr (3.3 mSvs/hr)
Op B	110 mrem (1.1 mSvs)	3.3 rem/hr (33 mSvs/hr)
RPT	25 mrem (.25 mSvs)	2.9 rem/hr (29 mSvs/hr)

Licensee Response to the Event

The licensee took immediate corrective actions by excluding the two operators access to the radiologically restricted area (RRA) and provided appropriate controls to the drain line area by designating it a locked high radiation area. The licensee did not immediately perform formal dose evaluations for the workers but performed "back of the

envelope" computations to ascertain approximate external dose hazards. During the next five days, the licensee conducted interviews with all individuals involved in the event and subsequently performed a time/motion re-enactment study with the operators and RPT involved to determine if whole body and extremity dose assignments for these workers needed to be modified from those doses measured by the EDs which were worn on their chests. Final dose assignments to the workers involved based on the re-enactment were as follows:

	TEDE	Extremity
Op A	75 mrem (.75 mSvs)	105 mrem (1.05 mSvs)
Op B	154 mrem (.15 mSvs)	300 mrem (3.0 mSvs)
RPT	25 mrem (.25 mSvs)	None Assigned

The licensee was still finalizing short and long term corrective actions at the conclusion of the inspection.

Regional Review of the Event

The inspectors were onsite the day following the event and initiated an independent review of the incident. Interviews were conducted with station workers involved, RP management and station senior management. Additional contact was made with the Site Vice President through a phone call from the Region III Director of Radiation Safety and Safeguards. Regional review of the event indicated a violation of 10 CFR 20.1501 for failure to adequately evaluate radiological condition incident upon the workers who entered the drain line area (Violation 50-346/94010-01b). Procedural violations were also noted including; both operators entered a high radiation area without notifying the RP department as required by the radiological postings in the DH-93 valve area; both operators did not leave the work area immediately upon receiving an alarm from their EDs; and Op B was on the wrong RWP for containment access (Violation 50-346/94010-02a, 02b, and 02c). Weaknesses identified by the inspectors included the following:

- Failure on the part of the RP department to recognize the potential for irradiated material to find its way down the drain line from the tank. It was known that material had spilled out of the holding cask, which led to an extensive cleanup effort to retrieve all the cut material and debris. However, the overview of the job appeared to focus on the tank itself and did not take into account the potential for material to migrate from the tank into the drain line once draining of the tank commenced.
- Confusion on the part of operations personnel as to the appropriate response to ED alarms. Training specifically states that any alarm should be reported to RP. However, in practice, during normal operations, operators may have periodically encountered dose rate areas which may have caused a dose rate

alarm from their ED. The operators would then back out of the high dose rate area if it was previously discussed with R. P. This confusion suggested that the licensee may need to re-think their decision process for establishing appropriate alarm set points for EDs. Additionally, this confusion was compounded by Op B's hearing his alarm but, because he had a dose rate meter with him, believed he understood the radiological hazards and remained in the area.

- Similar to the preceding weakness, confusion was also identified concerning the perception operators may have with respect to not leaving an evolution until it is completed. Apparently, Operations Department supervision has frequently reminded operators of their responsibility to see an evolution through completion. This topic was normally addressed to mitigate spills of radioactive water but appears to have been taken by the operators to include all actions taken within the plant.
- A weakness on the part of the RPT who upon being requested by Op B to accompany him to the drain valve area because he believed dose rates had risen, left the operator and provided him with his meter. This part of the incident also suggests an apparent perception problem with the licensee's meter qualification program for operators. This weakness was further illustrated during Op B's use of the meter. He apparently surveyed the valve and noted higher than expected dose rates but this did not prompt him to recognize anything unusual and leave the area, instead he continued with his assigned task.
- The licensee initially took a less than aggressive approach in investigating the incident. Particularly, regarding ascertaining whole body and extremity doses of the workers involved, and a review of the appropriateness of the ALARA hold point which was used for the draining evolution.
- Both operators apparently did not have confidence in the use of the reach rod which was available to remotely manipulate the valve. At the end of the inspection the functionality of the reach rod was still in question, however, it raised the question as to how effectively ALARA tools, such as reach rods, are used when available.

Two violations of NRC requirements were identified.

4. Management Meeting

A management meeting was held in the Region III Office on November 14, 1994, following the inspection. Licensee management presented the results of their investigations and proposed corrective actions to the two radiological events discussed in Section 3 of this report. A third event was briefly discussed which involved a welder working in containment. The welder received higher than planned external exposures

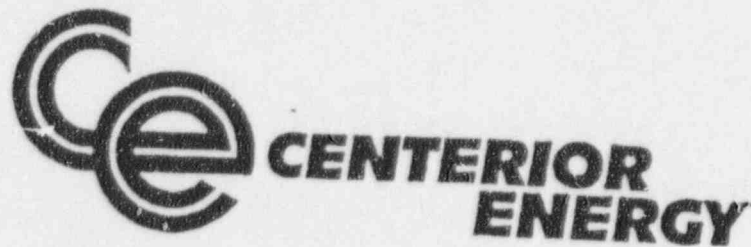
because he could not hear his ED alarming due to the high noise conditions in the area.

Other non-radiological issues were also discussed during the meeting. These issues included the mis-positioning of a fuel assembly during fuel movements; movement of the spent fuel pool gate while the emergency ventilation was inoperable; foreign material exclusion problems; refueling canal cleanliness inspection issues; and nozzle dam temporary modifications.

5. Exit Meeting

The scope and findings of the inspection were discussed with licensee representatives (Section 1) at the conclusion of the inspection on November 3, 1994. Licensee representatives did not identify any processes or documents reviewed during the inspection as proprietary. Specific items discussed at the meeting were as follows:

- Apparent violations and circumstances surrounding the intake events.
- Apparent violations and weaknesses noted with respect to the draining evolution of the Incore Instrumentation Tank.

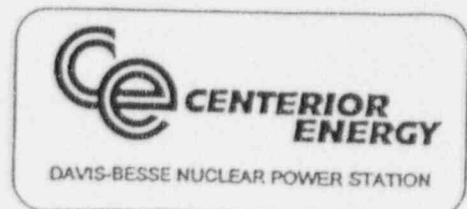


TE/NRC
9RFO INFORMATIONAL
MEETING

NOVEMBER 14, 1994

INTRODUCTION

- Discuss Radiation Protection Events
- Causes and Lessons Learned
- Corrective Actions
- Overall Outage Performance



35-456

INSULATION REMOVAL

EVENT

- Insulation removal resulted in unplanned internal contaminations

CAUSES

- Planning
 - Radiation Work Permits
 - Decontamination plan
 - Respirators



Phot 56

INSULATION REMOVAL

CAUSES - cont.

- Control of Work
 - Survey requirements
 - Preventive measures
 - ALARA briefing
 - RP coverage

- Adequacy of RWP
 - Survey requirements
 - Respirator use designation

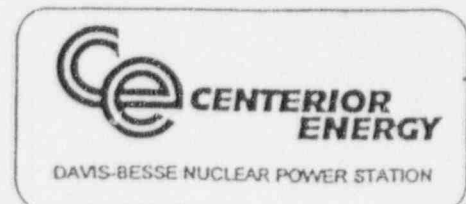


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INSULATION REMOVAL

CORRECTIVE ACTIONS

- Night Orders issued to add additional monitoring and preventive measures
- Meetings with insulators
- Revised RWPs for insulation removal with additional instructions
 - radiological condition assessment
 - protective clothing requirements
 - contamination control requirements
 - continuous RP coverage
- Counseled RP Personnel



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INSULATION REMOVAL

RADIOLOGICAL SIGNIFICANCE

- Worker dose was a small fraction of federal limit

INDIVIDUAL DOSES

WORKER	CEDE (mrem)	% ALI	DDE (mrem)
A	102	2.04	25
B	0	0	62
C	212	4.24	31
D	21	0.42	41
E	3	0.06	22
F	3	0.06	28
G	18	0.36	28
H	33	0.66	33
I	3	0.06	0



390A 56

INCORE TANK FLUSH

EVENT

- Incore Tank draining and subsequent drain pipe flushing captured a hot particle which resulted in a potential for higher than expected doses

CAUSES

- Incore cutting tool performance
- Planning for potentially changing radiological conditions during the incore tank flush
- Response to actual changing radiological conditions



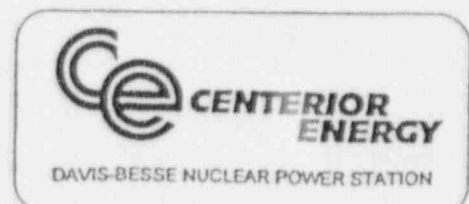
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INCORE TANK FLUSH

RADIOLOGICAL SIGNIFICANCE

- Worker dose

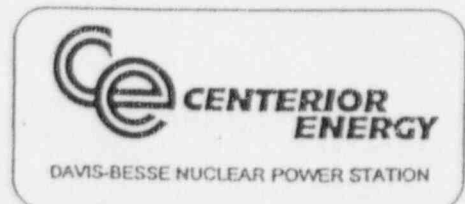
WORKER	A	B
EAD RECORDED EXPOSURE (mrem)	46	107
CALCULATED WHOLE BODY (mrem)	74	155
CALCULATED EXTREMITY (mrem)	60	120
TOTAL OUTAGE CALCULATED WHOLE BODY (mrem)	130	263



INCORE TANK FLUSH

LESSONS LEARNED

- Operation of Incore Tank drain valve (DH93)
- Use of electronic alarming dosimeters
- Operations/RP Interface
- RWP control
- Operator radiation meter qualification
- Management sensitivity and response to RP issues



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INCORE TANK FLUSH

CORRECTIVE ACTIONS

- Posted and controlled the area as a Locked High Radiation Area
- Performed dose assessment
- Denied access to involved personnel
- Retrieved and stored the particle
- Formal dose assessment
- Operations personnel briefed including revised expectations



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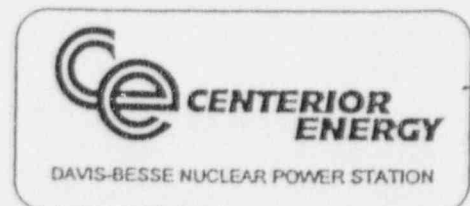
WHIP RESTRAINT MODIFICATION WELDING

EVENT

- Welder working on pressurizer surge line whip restraint received more dose than expected

CAUSES

- Job planning
- RP controls



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WHIP RESTRAINT MODIFICATION WELDING

RADIOLOGICAL SIGNIFICANCE

- Worker dose

	DDE
PLANNED DOSE (mrem)	300
ACTUAL DOSE (mrem)	256
ADMINISTRATIVE LEVEL (mrem)	1300

- Administrative level had been adjusted

CORRECTIVE ACTIONS

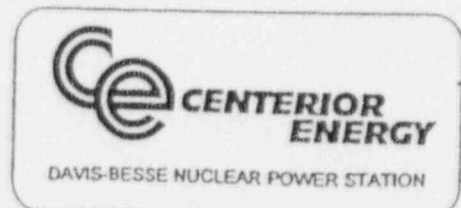
- Detailed investigation



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RP OVERVIEW

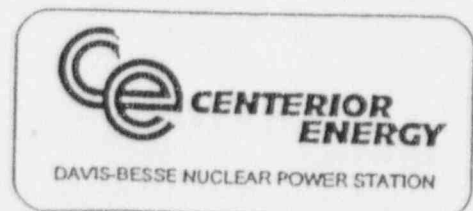
- Events identified some weaknesses
- Management concerns
- Overall RP performance
 - High quality technical staff
 - Positive contractor feedback
 - 9RFO RP improvements



44st 56

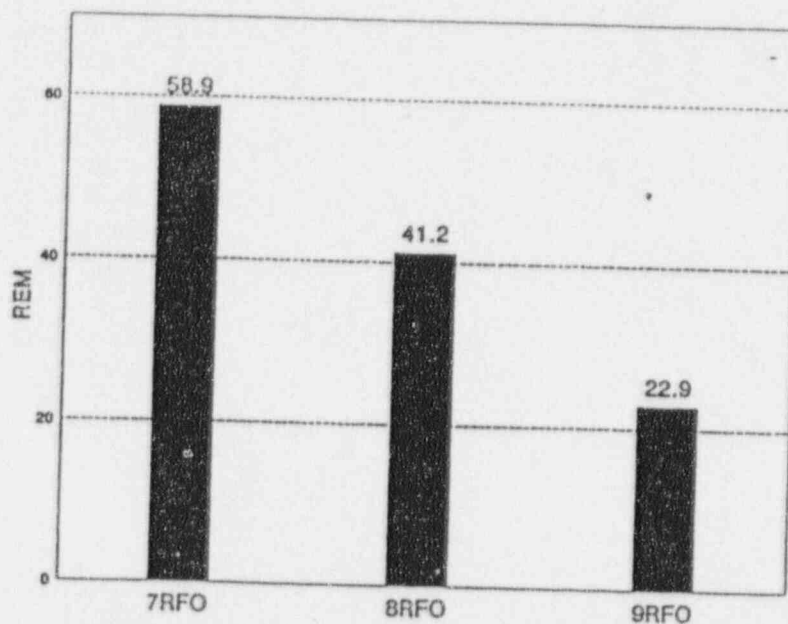
9RFO OVERVIEW

- Advanced radworker training
- Increased use of mockups
- Aggressive planning
- Installed teledosimetry and remote monitoring
- Increased use of temporary shielding
- Containment decontamination
- Improved dose tracking

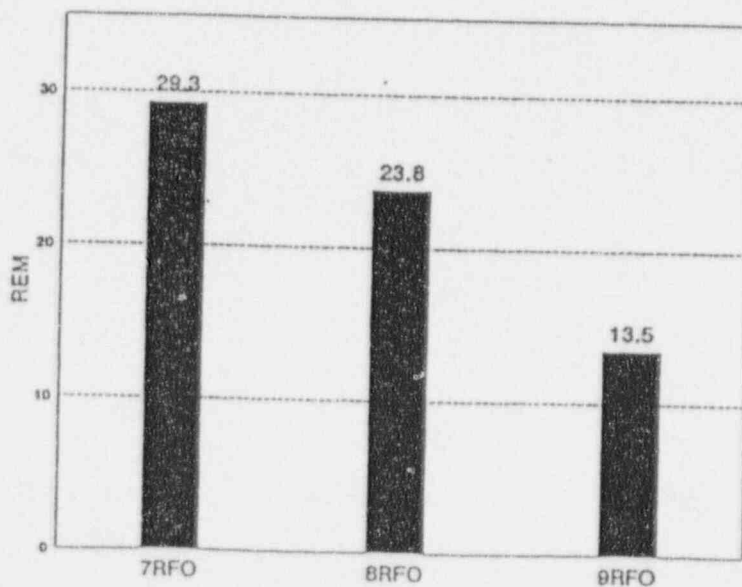


COMPARATIVE DOSES

REACTOR HEAD WORK



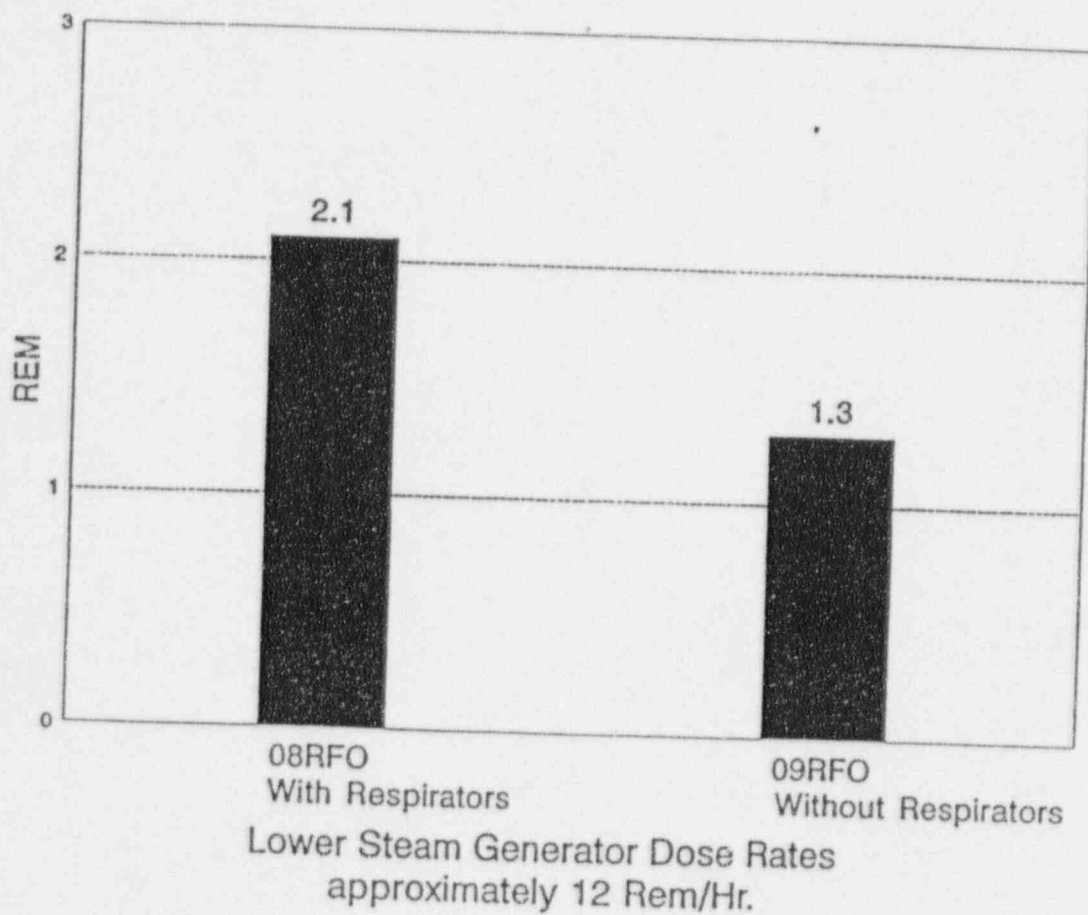
STEAM GENERATOR WORK



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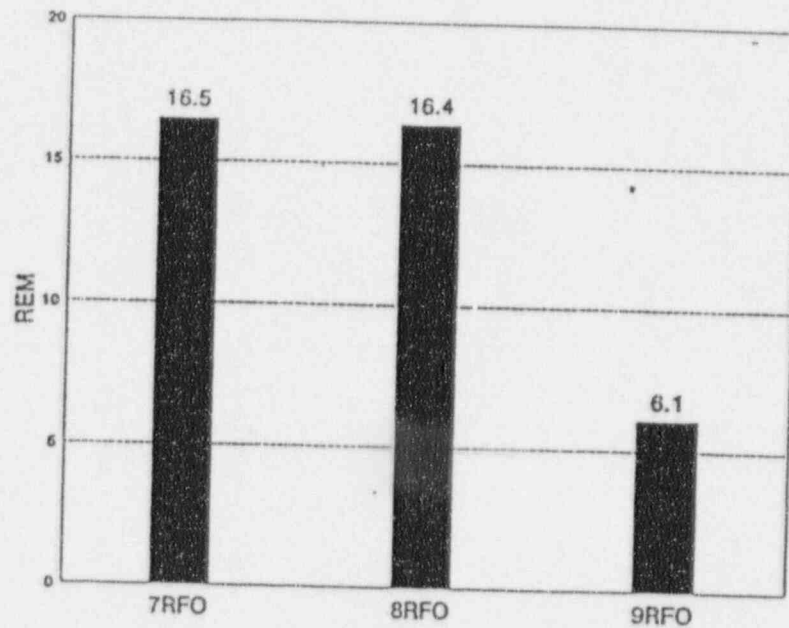
COMPARATIVE DOSES

NOZZLE DAM INSTALLATION

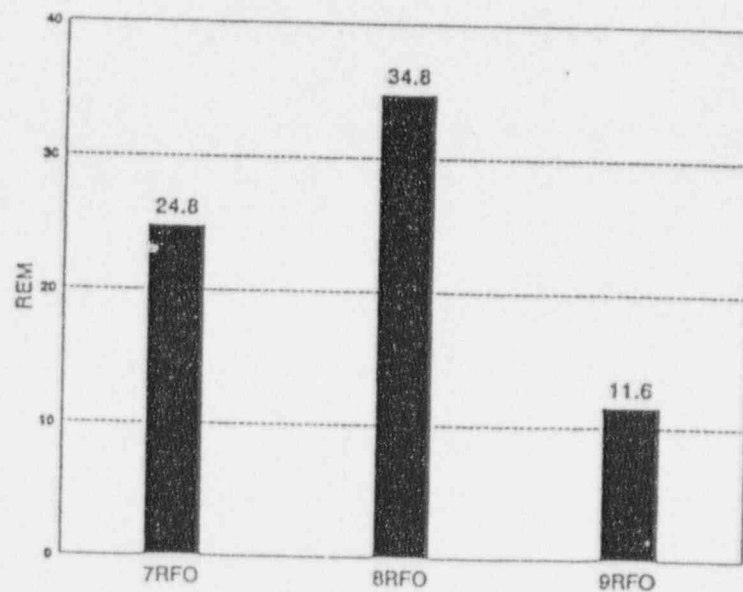


COMPARATIVE DOSES

INSERVICE INSPECTION

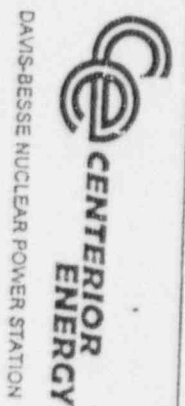


SCAFFOLD SUPPORT



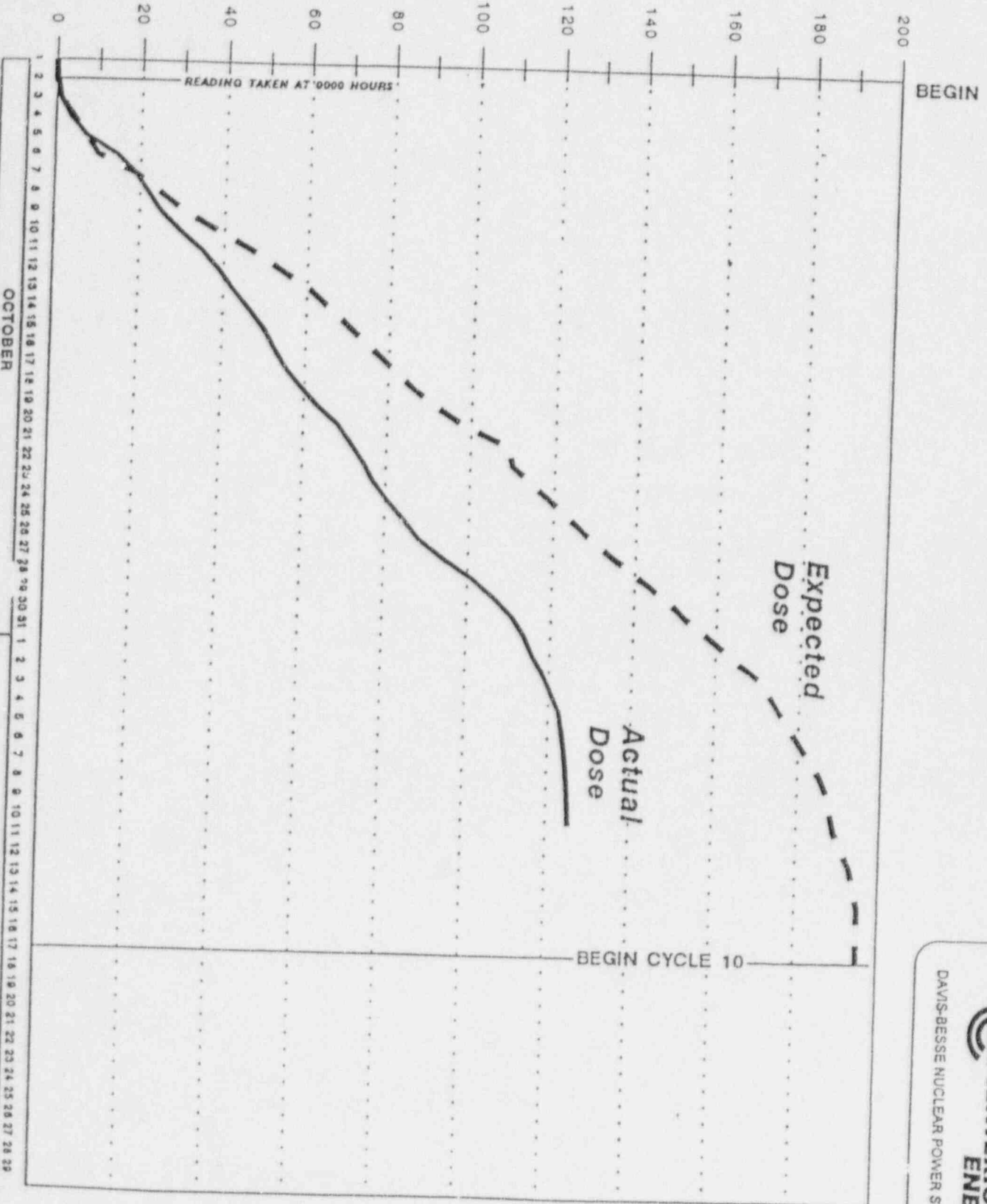
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9RFO EXPOSURE



510A56

MAN REM



ISSUES

EVENT

- One fuel assembly and 3 control rods out of planned positions

CAUSES

- Fuel Assembly indexing error
- Inadequate independent verification

SAFETY SIGNIFICANCE

- Shutdown Margin

Required
 $K_{eff} \leq 0.95$

Actual
 $K_{eff} = 0.91$

- Adequacy of T.S. 3.9.1

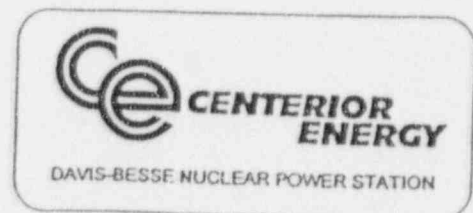


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ISSUES

CORRECTIVE ACTIONS

- Returned core to planned configuration
- Video inspection to confirm configuration
- Reviewed event and reinforced significance with refueling crews
- Performed confirmatory analysis which demonstrated no margins exceeded
- Initiated PCAQRs and assembled independent review team



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ISSUES

- **SPENT FUEL POOL GATE**
 - Spent fuel pool gate moved while emergency ventilation inoperable
- **FOREIGN MATERIAL EXCLUSION**
- **REFUELING CANAL CLEANLINESS INSPECTION**
- **NOZZLE DAMS TEMPORARY MODIFICATION**
 - Shutdown Risk enhancement by adding computer alarm in addition to annunciator



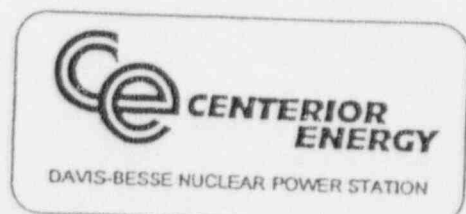
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9RFO OVERVIEW

- **Shutdown on 10/01/94 after 356-day Run**
 - Scheduled 46-day outage

- **Major Outage Activities**

- Replace low pressure turbine rotors
- Steam generator tube inspection and preventive sleeving
- 906 maintenance work activities
- Generic letter 89-10 MOV testing
- Fuel inspections



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9RFO OVERVIEW

- **Emergent Issues**

- Polar crane
- Feedwater heaters
- Main steam isolation valve
- Modified core design
- Reactor coolant pump 2-1 seal replacement

- **Results**

- Within one day of schedule
- Outage scope increased by 13% due to emergent work
- Only 3% of originally planned work was deferred



EXHIBIT 4

FILED
25 AUG -7 PM 1:16

NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

135 CV 1732

OWEN McCAFFERTY, DENNIS MALONEY,
SEAN KILBANE, TERRY McLAUGHLIN,
SEAN McCAFFERTY, AND
ROBERT PROHASKA

Plaintiffs,

v.

CENTERIOR SERVICE COMPANY and
TOLEDO EDISON COMPANY

Defendants.

) CASE NO.

) JUDGE:

) COMPLAINT

) (Jury Demand Endorsed Hereon)

Now come plaintiffs OWEN McCAFFERTY, DENNIS MALONEY, SEAN KILBANE, TERRY McLAUGHLIN, SEAN McCAFFERTY, AND ROBERT PROHASKA, and state for their Complaint as follows:

I. PARTIES

1. Plaintiffs OWEN McCAFFERTY, DENNIS MALONEY, TERRY McLAUGHLIN, SEAN McCAFFERTY AND ROBERT PROHASKA are current residents of Cuyahoga County, Ohio.

2. Plaintiff SEAN KILBANE is a current resident of Lorain County, Ohio.

3. Together these plaintiffs bring claims arising out of their unwarranted exposure to radioactive materials at the Davis-Besse Nuclear Power Station in Oak Harbor, Ohio.

4. Defendant Centerior Service Company is a corporation existing under the laws of Ohio with its principal place of business at 6200 Oaktree Boulevard, Independence, Ohio.

5. Defendant Toledo Edison is a corporation organized and existing under the laws of the State of Ohio with its principal place of business at 300 MADISON AVENUE, TOLEDO, OHIO 43652. Toledo Edison owns and operates the Davis-Besse Nuclear Power Station ("Davis-Besse") in Oak Harbor, Ohio.

II. JURISDICTION

6. Jurisdiction over this matter is appropriate pursuant to the Price-Anderson Act, 42 U.S.C. §2210. The Plaintiffs' exposure to radioactive materials, as further described in this Complaint, was a "nuclear incident" as defined by 42 U.S.C. §2014(q). Venue is proper in this Court.

III. STATEMENT OF FACTS

7. All Plaintiffs are insulators working in the Davis-Besse Nuclear Power Station at all times relevant to this Complaint. None of the Plaintiffs were an employee of the Defendant.

8. On and after October 7, 1994, Plaintiffs were working as contractors at Davis-Besse. Their work assignment was to remove insulation from the steam generator.

9. The work activity was delayed at the control point entrance to the radiologically restricted area in the containment building by the radiation protection staff employed and/or controlled by Defendants Toledo Edison and/or Centerior Service Company. The delay was allegedly to collect radiation survey information from the work area so that the radiation protection technician could brief the plaintiffs on safe work

practices prior to entry into a high radiation work area.

10. The pre-entry work safety briefing by the radiation protection technician failed to address and evaluate:

- a. the need to survey underneath the mirror insulation after the first panel was removed;
- b. the need for the radiation protection technician supervision of the work assignment;
- c. the need for engineering controls to minimize radioactive contamination or radiation exposure;
- d. the need for air monitoring of radiation exposure during the work assignment, and;
- e. the need for respiratory protection to prevent inhalation of radioactive contamination and internal radiation exposure.

11. Plaintiffs entered the high radiation work area without radiological respiratory protection and commenced their respective work assignments, which included the removal of insulation.

12. During removal of the insulation panels, highly radioactive contamination from underneath the panels was released into the work area, became airborne, and was taken internally into Plaintiffs by inhalation.

13. Plaintiffs received external and internal exposure to Cobalt-58, Cobalt-60, Cesium-134, and Cesium-137 radioisotopes.

14. Davis-Besse Procedure DB-HP-00208, Revision 2, "Radiation Protection Program", Step 5.6.8 requires all plant workers to obey posted, oral and written Radiation Protection instructions and procedures, including instructions on Radiation Work Permits.

The Radiation Work Permit for the work performed by Plaintiffs expressly prohibited Plaintiffs from using respiratory protection equipment.

15. Defendant Toledo Edison is the Licensee for Davis-Besse under the United States Nuclear Regulatory Commission ("NRC") License No. NPF-3, Docket No. 50-346, effective April 22, 1977.

16. On November, 2nd 1994, the NRC issued a Notice of Violation to Defendant Centerior for the unwarranted radiological exposure to the named Plaintiffs described above and more specifically as follows:

On October 7, 1994, the licensee did not perform surveys to assure compliance with 10 CFR 20.1701, which requires the licensees use process or other engineering controls to control the concentration of radioactive material in air. Specifically, an evaluation of the contamination levels underneath insulation on the east once through steam generator hot leg was not performed to determine if engineering controls were required to control the concentration of radioactive material in air.

This is a Severity Level IV violation (Supplement IV)

IV. COUNT ONE

Medical Monitoring Fund

17. The allegations contained in Paragraphs 1 through __ inclusive are hereby incorporated as though fully rewritten herein.

18. As a result of the internal doses of the radioactive materials Plaintiffs were unwarrantedly exposed to, Plaintiffs are entitled, pursuant to Ohio common law, to the establishment of a fund to effect the medical testing necessary to diagnose and properly treat any adverse human health effects resulting from their exposure to these radioactive materials.

V. COUNT TWO

Negligence

19. The allegations contained in Paragraphs 1 through ___ inclusive are hereby realleged as though fully rewritten herein.

20. Through their respective acts and omissions at the Davis-Besse Nuclear Power Station, Defendants Centerior Service Company and Toledo Edison have been negligent, and this negligence has proximately caused each of the plaintiffs to be injured. Although Defendants knew, or should have known, that these Plaintiffs were likely to be injured as a consequence of their exposure to radioactive materials, Defendants failed to conform its conduct to the standard of reasonable care in light of these risks.

21. Defendants owe a duty of care toward the plaintiffs. Defendants have breached that duty by failing to take the necessary precautions to prevent Plaintiffs' unwarranted exposure to radioactive materials, when Defendants knew, or in the exercise of reasonable care should have known, that these radioactive materials presented an actual or potential health hazard to the Plaintiffs.

22. Defendants knew, or in the exercise of reasonable care should have known, that there was radioactive contamination underneath the mirror insulation panels which Plaintiffs removed and/or handled under the work assignment.

23. Defendants failed to exercise reasonable care by:

- a. failing to decontaminate underneath the mirror insulation prior to Plaintiffs implementing the work assignment to remove the mirror insulation panels, and;

- b. failing to perform radiological surveys under the mirror insulation after the first panel was removed.
- c. prohibiting the use of respiratory protection as Edison's Radiation Work Permit which Plaintiffs were required to obey in accordance with Defendant Toledo Edison's Radiation Protection Program,

24. Defendants failed to exercise reasonable care by failing to address and evaluate:

- a. the need to survey beneath the first mirror insulation panel removed;
- b. the need for the radiation protection technician supervision of the work assignment;
- c. the need for engineering controls to minimize radioactive contamination or radiation exposure, and;
- d. the need for air monitoring of radiation exposure during the work assignment, and;
- e. the need for respiratory protection to prevent inhalation of radioactive contamination and internal radiation exposure.

25. Defendants knew, or in the exercise of reasonable care should have known, that by prohibiting the use of respiratory protection, the radioactive contamination underneath the mirror insulation panels presented actual and/or potential health hazards to the plaintiffs, and that by their acts and omissions, it unreasonably exposed the plaintiffs to radiation which increased their risk of contracting illness, and interferes with their comfortable enjoyment of life.

26. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will continue to suffer harm in the form of:

- a. Emotional distress;
- b. Increased risk of future bodily harm;
- c. Loss of future income;
- d. Economic and financial harm due to additional medical diagnosis and treatment required, and;
- e. Other consequential, incidental, general and special damages, the full extent of which has not yet been determined.

27. Plaintiffs seek money damages to compensate them for these wrongs.

VI. COUNT THREE

Strict Liability in the Conduct of an Ultrahazardous Activity

28. The allegations contained in Paragraphs 1 through __ inclusive are hereby realleged as though fully rewritten herein.

29. From 1977 and continuing until the present, Defendants owned and/or operated the Davis-Besse Nuclear Power Station at Oak Harbor, Ohio.

30. The operation of a nuclear power station or plant is an ultrahazardous activity under Ohio law. The mirror insulation panel removal activity Plaintiffs engaged in at the direction of and under the control of Defendants is an ultrahazardous activity under Ohio law.

31. The release of Toledo Edison's radioactive materials into Plaintiffs' work area by the work activities performed by Plaintiffs at the direction and under the control of Defendants constitutes an ultrahazardous activity for purposes of strict liability, constituting an absolute nuisance or nuisance per se.

32. As a direct and proximate result of Defendants' ultrahazardous activities, Plaintiffs have suffered, are suffering, and will continue to suffer harm. Plaintiffs seek money damages to compensate them for these wrongs.

VII. COUNT FOUR

Intentional Infliction Of Emotional Distress

33. The allegations contained in Paragraphs 1 through __ inclusive are hereby realleged as though fully rewritten herein.

34. Defendants knew of the existence of a dangerous process, instrumentality or condition within its respective business operation.

35. Defendants knew that if the Plaintiffs were subjected by their work to such dangerous process, instrumentality or condition, then harm or injury to the plaintiffs is a substantial certainty.

36. Defendants, under such circumstances, and with such knowledge, did act to require the Plaintiffs to continue to perform the dangerous task.

37. Defendants had actual knowledge of the presence of and accumulation of radioactive contamination beneath the mirror insulation panels from experience gained during the Refueling Outage in which Plaintiffs were injured (RFO#9), the Refueling

Outage immediately preceding (RFO#8) and prior Refueling Outages.

38. Defendants had actual knowledge of the fact that Plaintiffs would perform the dangerous task without respiratory protection and that performing the task would cause an airborne release of the radioactive contamination present beneath the mirror insulation and that Plaintiffs would each receive an internal dose of these radioactive materials into their unprotected lungs by inhalation.

39. Defendants had actual knowledge of the exact dangers which ultimately caused the plaintiffs' injuries.

40. Defendants' conduct was extreme and outrageous, and so beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

41. As a direct and proximate result of Defendants' intentional, tortious misconduct, Plaintiffs have suffered, are suffering, and will continue to suffer harm in the form of emotional distress. Plaintiffs seek money damages to compensate them for these wrongs and punitive damages so as to deter the defendants from this future reprehensible conduct.

VIII. COUNT FIVE

Reckless and Wanton Misconduct

42. The allegations contained in Paragraphs 1 through __ inclusive are hereby realleged as though fully rewritten here.

43. By requiring Plaintiffs to perform a dangerous task and prohibiting them from wearing respiratory protection while performing such dangerous task, Defendants intentionally and knowingly, recklessly and wantonly disregarded the injurious consequences

to the Plaintiffs and have acted in a manner presenting a risk of grave injury to the Plaintiffs.

44. As a direct and proximate result of these intentional or reckless activities by Defendants, the Plaintiffs have suffered, are suffering and will continue to suffer harm.

45. The Plaintiffs seek money damages to compensate them for these wrongs, and seek punitive damages to deter the Defendants from this future reprehensible conduct.

IX. COUNT SIX

Negligent Infliction Of Emotional Distress

46. The allegations contained in Paragraphs 1 through __ inclusive are hereby realleged as though fully rewritten herein.

47. Defendants owe a duty of care toward the Plaintiffs. This duty is based in part on the special relationship between the Defendants Centerior and Toledo Edison and the Plaintiffs where Plaintiffs are entitled to some measure of protection from Defendants.

48. Defendants breached that duty by failing to take the necessary precautions to prevent Plaintiffs' unwarranted exposure to radioactive materials, when Defendants knew, or in the exercise of reasonable care should have known, that these radioactive materials presented an unreasonable risk of harm to the Plaintiffs.

49. Through their respective acts and omissions at the Davis-Besse Nuclear Power Station, Defendants have been negligent, and this negligence has proximately caused each of the Plaintiffs to be physically injured.

50. Plaintiffs have each suffered a physical invasion of their bodies by inhaling

radioactively-contaminated particulate matter into their lungs and subsequently have suffered a contemporaneous physical injury by exposure to internal doses of radiation.

51. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will continue to suffer emotional distress.

52. Plaintiffs seek money damages to compensate them for these wrongs.

X. COUNT SEVEN

Negligent Infliction Of Severe and Debilitating Emotional Distress

53. The allegations contained in Paragraphs 1 through ___ inclusive are hereby realleged as though fully rewritten herein.

54. Defendants owe a duty of care toward the plaintiffs. This duty is based in part on the special relationship between the Defendants and the Plaintiffs where Plaintiffs are entitled to some measure of protection from Defendants.

55. Defendants breached that duty by failing to take the necessary precautions to prevent Plaintiffs' unwarranted exposure to radioactive materials, when Defendants knew, or in the exercise of reasonable care should have known, that these radioactive materials presented an unreasonable risk of harm to the Plaintiffs.

56. Through their respective acts and omissions at the Davis-Besse Nuclear Power Station, Defendants have been negligent, and this negligence has proximately caused each of the plaintiffs to suffer harm.

57. Notwithstanding the contemporaneous physical injury alleged above in Count Seven, as a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have

suffered, are suffering, and will continue to suffer harm in the form of serious emotional distress that is both severe and debilitating.

58. Plaintiffs seek money damages to compensate them for these wrongs.

WHEREFORE, the Plaintiffs pray that:

(A) the Plaintiffs recover from the Defendants their past and future monetary damages and such funds necessary to establish a medical monitoring fund under Ohio law, as alleged in Count One; and

(B) the Plaintiffs recover from the Defendants the general and special compensatory damages as alleged in Counts Three, Four and Five in the amount of Ten Million Dollars (\$10,000,000.00); and

(C) the Plaintiffs recover from the Defendants the general and special compensatory damages as alleged in Counts Two, Six and Seven in the amount of Ten Million Dollars (\$10,000,000.00); and

(D) the Plaintiffs recover from each of the Defendants punitive damages as alleged in Counts Three, Four and Five in the amount of Ten Million Dollars (\$10,000,000.00); and

(E) the Plaintiffs recover from the Defendants the costs of suit, including, without limitation, their attorney's fees and expert witness fees under Ohio law; and

(F) the Court grant such other, further and different relief as may be deemed just and proper.

Respectfully submitted,

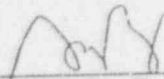


Steven D. Bell (0031655)
ULMER & BERNE
Bond Court Building, Suite 900
1300 East Ninth Street 900
Cleveland, Ohio 44114-1583
(216) 621-8400

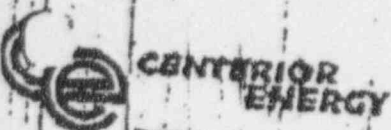
Counsel for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand a trial by jury.



Steven D. Bell (0031655)



PERRY NUCLEAR POWER PLANT

CENTER ROAD
PERRY, OHIO 44081
(616) 238-3737

MAIL ADDRESS
P.O. BOX 97
PERRY, OHIO 44081

October 13, 1995

Mr. Richard A. Cline
Fishbach Power Services, Inc.
c/o Perry Nuclear Power Plant
10 Center Road, TP-1
Perry, Ohio 44081

Subject Contract: S 137643

Dear Mr. Cline:

Due to the fact that Centerior is currently involved in litigation with the following six individuals we cannot, at this time, allow any one of them to work at any Centerior facility.

<u>Name</u>
McGafferty, Owen
McGafferty, Sean
Kilbane, Sean
McLaughlin, Terrance
Maloney, Dennis
Prohaska, Robert

Social Security Number



Please ensure none of these individuals are currently assigned to the Perry Nuclear Power Plant. In addition, please do not assign any one of them to the Perry plant at least until this litigation is resolved.

Sincerely yours,

Robert V. Schauder
Director, Perry Nuclear Services Department

RVS/ljb

The Cleveland Electric Illuminating Company
Perry Nuclear Power Plant

REVOCATION OF UNESCORTED ACCESS

RIHPD No. 8903 Rev. 11/83

Company <u>Cleveland Electric Illuminating Company</u>	Date <u>10/16/95</u>
Notified By <u>James H. Brough</u>	Received By <u>[Signature]</u>

From: Perry Nuclear Power Plant
Site Protection Section
10 N. Center Road
P.O. Box 97
Perry, OH 44081
Phone: (216) 259-3737

CHECK ONE

<input type="checkbox"/> PROTECTED AREA	<input checked="" type="checkbox"/> SITE & PROTECTED AREA
---	---

Employee(s) Name	Social Security No.	*Reason Code	Badge/K. Card
<u>Deanna M. Mason</u>	<u>[Redacted]</u>	<u>002</u>	<u>1635</u>

* Reason Codes

- | | |
|--|--|
| 001 Laid Off-Eligible for Rehire | 005 Temporary suspension (explain below) |
| 002 Terminated from Company | 006 Unescorted Access No Longer Required |
| 003 Terminated for cause (explain below) | 007 Leave of Absence |
| 004 Transfer to another job site | |

Comments: _____

For CEI, Site Protection Use Only

Revoked on Date _____ By: _____

EXHIBIT 5

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220
412 644-5754



DATE: June 11, 1996

CASE NO: 96-ERA-6

In the Matter of

OWEN McCAFFERTY,
DENNIS MALONEY,
SEAN KILBANE,
TERRY McLAUGHLIN,
SEAN McCAFFERTY, AND
ROBERT PROHASKA,
Complainants

v.

CENTERIOR ENERGY,
Respondent

Appearances:

Steven D. Bell, Esq.
Lynn Rogozinski, Esq.
For the Complainants

Mary E. O'Reilly, Esq.
David R. Lewis, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 and the regulations promulgated thereunder at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C.A. § 2011, et seq. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

This proceeding involves complaints filed on October 26, 1995 by complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, against Centerior Energy ("Centerior") alleging that Centerior discriminated against them in violation of Section 211 of the ERA¹ by barring complainants from employment at any Centerior facility, and by revoking a security clearance that had been granted to complainant, Dennis Maloney. The complaints assert that the sole basis for the adverse actions was the commencement of a proceeding by the complainants against Centerior under the Atomic Energy Act of 1954 in the United States District Court for the Northern District of Ohio.

The October 26, 1995 complaints were investigated by the District Director of the Cleveland, Ohio, regional office of the Wage and Hour Division of the United States Department of Labor. The District Director notified Centerior by letter dated January 9, 1996 that its fact finding had determined that the complainants were protected employees engaging in a protected activity within the scope of the ERA and that discrimination as defined by the ERA was a factor in the aforesaid actions taken against the complainants.

Centerior filed an appeal with the Office of Administrative Law Judges on January 16, 1996. Complainants filed a cross-appeal on January 16, 1996, requesting additional relief to that ordered by the District Director. Specifically, complainants requested back pay and benefits equivalent to their loss because of the discriminatory actions of Centerior.

A hearing was held on February 26 and 27, 1996 in Cleveland, Ohio. Post-hearing briefs were received on April 5, 1996.

FINDINGS OF FACT

Centerior Energy Corporation is the parent holding company of the Cleveland Electric Illuminating Company, The Toledo Edison Company and Centerior Service Company. Cleveland Electric Illuminating Company and Centerior Service Company are jointly licensed by the NRC as the operator of the Perry Nuclear Power Plant. The Toledo Edison Company and Centerior Service Company are jointly licensed by the NRC as the operator of the Davis-Besse Nuclear Power Station.

¹ The employee provisions of the ERA were originally located at § 210 of the ERA but when the ERA was amended in 1992, the employee protection provision were redesignated as § 211.

Complainants are insulators who are members of Local 3 of the Heat and Frost Insulators and Asbestos Workers Union in Cleveland, Ohio.

Periodically, approximately every 18 months to two years, nuclear power plants are shut down for refueling and maintenance. During these outages, Centerior performs substantial maintenance and modification work that can not be done while the facility is operating. Nearly all of this work is performed in radiologically-restricted areas, that is, areas where there is exposure to radiation. During the fall of 1994, complainants were performing outage work at the Davis-Besse Nuclear Plant in Oak Harbor, Ohio as employees of Gem Industrial Services, a contractor at Davis-Besse. Their work included removing mirror insulation from steam generators and other components of the plant. Mirror insulators are removable panels made out of stainless steel with reflective insulation on both sides. (Tr. 19) On October 7, 1994, complainants were exposed to radioactive materials after removing a piece of the insulation. The exposure was unplanned as the area where they were working was supposed to be "clean," in that a survey of the area supposedly determined that they would not encounter radioactive materials.

The exposure by complainants to the radioactive materials prompted an investigation by the NRC. Following the investigation, the NRC issued a notice of violation to Centerior. The notice of violation asserted that Centerior did not take the steps necessary to assure compliance with the regulations requiring engineering controls to control the concentration of radioactive material in the air. Specifically, the notice stated:

On October 7, 1994, the licensee did not perform surveys to assure compliance with 10 C.F.R. 20.1701, which requires that licensees use process or other engineering controls to control the concentration of radioactive material in air. Specifically, an evaluation of the concentration levels underneath insulation on the east once through steam generator hot leg was not performed to determine if engineering controls were required to control the concentration of radioactive material in air. (Respondent's Exhibit No. 2, enclosure 1, p. 2)

In response, Centerior accepted responsibility for the violation. (Complainant's Exhibit D, p. 2)

Complainants continued to work at the plant for another six weeks, when they were laid off because the refueling outage was completed.

Complainants filed a civil complaint against Centerior in the United States District Court for the Northern District of Ohio on August 7, 1995. Jurisdiction was asserted under the Price-Anderson Act, 42 U.S.C. § 2210. The Price-Anderson Act is a part of the Atomic Energy Act. The complaint alleged, inter alia, that Centerior breached a duty owed to the complainants by failing to take the necessary precautions to prevent complainants' unwarranted exposure to radioactive materials when Centerior knew or should have known that the radioactive materials presented an unreasonable risk of harm to the complainants. The complaint includes multiple counts, including claims of negligence, strict liability, intentional infliction of emotional distress, and negligent infliction of emotional distress.

In September, 1995, one of the complainants, Dennis Maloney, was hired by Fishbach Power Services, Inc. ("Fishbach") to perform maintenance work at Centerior's Perry Nuclear Power Plant in Perry, Ohio. Maloney had worked at several nuclear and non-nuclear facilities owned or operated by Centerior including Perry Nuclear Powerhouse, Avon Powerhouse, East Lake Powerhouse, East 72nd Street, Astabula and Davis-Bessie. (Tr. 18) Maloney has had no discipline problems while working for Centerior. No complaints have been filed against him and no concerns were raised regarding his professionalism. (Tr. 19)

Maloney was working for Fischbach removing insulation and otherwise doing the same sort of work at Perry as he had been doing at Davis-Besse. (Tr. 34) Maloney was permitted to enter into restricted areas, which require safety clearances and certain training. (Tr. 37) He testified to meeting with a member of the radiological protection staff and submitting a suggestion on minimizing risk of exposure to radiation which was appreciated and accepted. (Tr. 40, 41) Complainant did not refuse any jobs, did not stage any protests, and did every thing he was told.

On October 16, 1995, Maloney was called from his job by the field superintendent for Fishbach and informed that his access to Perry had been revoked by Centerior. Maloney could not get a reason for the revocation until he talked to Don Timms, the plant ombudsman, during the exit process. The ombudsman asked Maloney the reason for the revocation. Maloney replied that he did not know, except that he was involved in litigation with Centerior. Timms offered to find out the reason. After making a telephone call, Timms informed Maloney that the reason was "biting the hand that feeds you." (Tr. 42) Maloney understood Timms to mean that he was out because he had filed the lawsuit. (Tr. 43)

Timms testified that he made a telephone call to Jim Featherstone, the Fishbach representative to determine why Maloney's employment was being terminated. Timms was informed by

Featherstone that he had received a letter stating Maloney should be let go. (Tr. 274)

About two days later while at his union hall Maloney was shown a letter dated October 13, 1995 from Robert Schrauder, Director, Perry Nuclear Services Department, to Richard Cline of Fishbach stating:

Due to the fact that Centerior is currently involved in litigation with the following six individuals we cannot, at this time, allow any one of them to work at any Centerior facility. [Six complainants named] Please insure none of these individuals are currently assigned to the Perry Nuclear Power Plant. In addition, please do not assign any of them to the Perry Plant at least until this litigation is resolved. (Complainants' Exhibit B)

The Ombudsman's statement and Schrauder's letter provided the only reasons given to Maloney for being fired from Perry.

Pat Volza is the site radiation protection manager at Perry. On about the 5th or 6th of October, 1995, he was informed by a member of his staff that Maloney had requested a copy of Maloney's incoming whole body count. Whole body count is a monitoring program whereby any employee who is going to be subjected to external or deep dose radiation is required to undergo a bioassay to determine the level of radioactive material, if any, he is bringing with him. It allows for the establishment of a baseline prior to the incoming employee being exposed to radioactivity. (Tr. 150, 151) Maloney's request was considered unusual by someone on Volza's staff; it prompted the staff member to alert Volza of the request and of Maloney's involvement "in the insulator issue at the Davis-Bessie plant." (Tr. 151) Volza in turn contacted, Ron Scott, his counter part at Davis-Bessie to discuss Maloney's involvement in the insulator matter. Volza testified that Scott told him about Maloney's civil complaint against Centerior and a discussion ensued regarding whether, in light of the allegations of the complaint, Maloney would suffer emotional distress on the job or would in some way have a problem with complying with Centerior's programs and policies. (Tr. 152) Volza testified that he then contacted Schrauder to express concerns about Maloney's request for whole body count levels and the possibility Maloney might make use of such information to buttress his lawsuit, and also the concerns he had discussed with Scott regarding whether the allegations of the lawsuit meant Maloney could not comply with Centerior's programs and procedures. (Tr. 152, 168)

Schrauder subsequently instructed Fishbach to remove Maloney from employment at Perry, and to not hire for work at any Centerior facility the plaintiffs to the Davis-Bessie lawsuit.

When Fishbach requested the instructions in writing, Schrauder forwarded the aforesaid October 13, 1995 letter to Richard Cline, identified as Complainant's Exhibit No. 2. (Tr. 207) Schrauder testified that he terminated Maloney's employment and barred the other complainants from working for Centerior because of allegations in the complainants' lawsuit against Centerior. He stated that he took the complainants' word that they had been debilitated and suffered emotional distress as a result of the unplanned exposure at Davis-Bessie. (Tr. 207, 208)

Schrauder testified that he did not convey his "full rationale" in the October 13, 1995 letter because he wanted to keep the letter short, (Tr. 209) and that he only barred the complainants until the litigation was resolved because he thought that by that time they may have overcome their concern regarding the use of respirators. (Tr. 209)

Protected Activity

The initial question is whether the complainants' civil lawsuit against Centerior in the United States District Court for the Northern District of Ohio constitutes protected activity under § 211 of the ERA.

Section 211 provides:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.), if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);

(D) commenced, caused to be commenced or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954 as amended (42 U.S.C. § 2011 et seq.) or a proceeding for the administration or enforcement of any

requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 et seq.).

42 U.S.C. § 5051(a).

Complainants' civil complaint against Centerior asserts jurisdiction under the Price-Anderson Act, 42 U.S.C. § 2210. The complaint alleges, inter alia, that Centerior breached a duty owed to the complainants by failing to take the necessary precautions to prevent complainants' unwarranted exposure to radioactive materials, when Centerior knew or should have known that these radioactive materials presented an unreasonable risk of harm to the complainants. The Price-Anderson Act, enacted in 1957, added Section 170 to the Atomic Energy Act, 42 U.S.C. § 2210.

As complainants' civil complaint against Centerior is an action under the Atomic Energy Act, it would appear that there could be little room for argument that filing the complaint is protected activity under subsections (D) and (F) of § 211 of the ERA, that is, that the civil action constitutes a proceeding, or "any other action" under the Atomic Energy Act. Centerior, however, argues that § 211 does not mean what it says. Centerior argues that Congress only intended § 211 to protect notifications to the NRC or licensee management of safety concerns or regulatory violations, in order to protect the free flow of safety information to government regulators. In support of its construction of the statute, Centerior presents three arguments: (1) the ERA has never been applied to protect private lawsuits filed under the Atomic Energy Act; (2) the courts have found the definition of the term "proceeding" to be ambiguous and undefined, therefore the legislative history of the ERA must be considered to determine the intent of Congress; and (3) protecting private tort actions under the Atomic Energy Act would not serve the purpose for which the ERA was promulgated.

Centerior is correct that there is no history in the case law of § 211 being applied to a private action under the Atomic Energy Act. However, it is more than likely that prior to the instant case, no employer had fired an employee because of the employee's filing of a civil suit under the Atomic Energy Act.

It is a basic tenet of statutory construction that if statutory language is clear and unambiguous on its face then it must be given its plain meaning and no resort to the underlying legislative history is appropriate. Kansas & Electric Co. v. Block, 780 F.2d 1505, 1510 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); Chevron, U.S.A. v. Natural Resources Defense Council, 932 F.2d 985 988 (D.C.Cir. 1991), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Centerior's argument that a review of the legislative history of § 211 is necessary to interpret the meaning of the term "proceeding" because the Courts have held its meaning to be ambiguous is rejected. Centerior is correct that some courts have found ambiguity in the term. However, in every instance, the court's intent was not to narrow the definition to exclude a specific legal proceeding such as the present civil action, but to expand the definition to include activity not normally considered a proceeding or action. In Kansas & Electric Co. v. Block, supra, the Court held that the intent of Congress is reflected by an expansive reading of the term "action" to include the filing of internal complaints. Id. at 1413. The Court in Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995), interpreted the term "proceeding" and the phrase "any other action" to include raising particular concerns about safety with an employer. Id. at 931-933. In Passaic Valley Sewerage Com'rs v. United States Department of Labor, 992 F.2d 474 (3d. Cir. 1993), the Court interpreted the term proceeding as used in the whistle blower provision of the Clean Water Act to include intracorporate complaints. Id. at 478. The whistleblower provision of the Occupational Safety and Health Act, 29 U.S.C.A. § 651, which provides that "the institution of a proceeding" is protected activity, has been interpreted to cover a complaint to an employee's union, Donovan v. Diplomat Envelope Corp., 587 F.Supp. 1417 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (2d Cir. 1985), a communication with a newspaper, Donovan v. R.D. Anderson, 552 F.Supp. 249 (D.Kansas 1982), and a decision to retain counsel to represent him in rectifying what he considered to be unsafe working conditions.

Accordingly, the case law interpreting the meaning of a "proceeding" or "any other action" as used by § 211 of the ERA reveals no ambiguity about their application to a civil action under the Act. Thus, a resort to the ERA's legislative history is not appropriate. Moreover, even if its legislative history is considered there would be no reason to deviate from the plain meaning of the ERA. The complainants point out in their post-hearing brief that a review of the legislative history of the 1992 amendments to § 211 confirms that Congress intended the ERA to protect employees who file a civil suit under the Atomic Energy Act. Its legislative history provides in part:

This provision [§ 211] adds a new section to the Energy Reorganization Act of 1974. This section offers protection to employees who believe they have been fired or discriminated against as a result of the fact they have testified, given evidence, or brought suit under that act or the Atomic Energy Act. Any worker who is called upon to testify or who gives information with respect to an alleged violation of the Atomic Energy Act or a related law by his employer or who files or institutes any proceeding to enforce such law against an employer may be subject to discrimination.

S.Rep.No. 848, 95th Cong., 2nd Sess. at 29-30, U.S. Code Cong. & Admin, News 198, pp. 7303, 7304. (emphasis added)

Centerior also argues that Congress could not have intended § 211 to apply to a private action under the Atomic Energy Act because "until amendments in 1988, Price-Anderson did not create any federal cause of action or Federal jurisdiction for injury relating to nuclear incidents."² Centerior's argument fails for two reasons. Initially, a private right of action did exist under Price Anderson prior to the enactment of the ERA in 1974. Price-Anderson was amended in 1966 to provide for a private right of action for extraordinary nuclear occurrences. See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) where the court noted that the 1988 amendments expanded the reach of 42 U.S.C. § 2210(n)(2) to provide for removal of, and original federal jurisdiction over, claims arising from any 'nuclear incident' instead of actions arising from only extraordinary nuclear occurrences. Secondly, when § 211 was amended in 1992 Congress had the opportunity to remove civil actions under the Atomic Energy Act as a protected activity. Instead, the amendments expanded the activities protected.

Centerior also argues that Congress would not have intended to protect the filling of private civil actions under the Atomic Energy Act because no purpose would be promoted thereby. However, protection of the public is one of the reasons for prohibiting an employer from discriminating against an employee because the employer was the recipient of a civil action under the Atomic Energy Act alleging a breach of duty by failing to take the necessary precautions to prevent unwarranted exposure to radioactive materials. The Court in O'Conner, discussed Price-Anderson's role in Congress' attempt to both encourage private sector involvement in the nuclear industry and simultaneously to protect the public. O'Conner, supra, 13 F.3d 1090 at 1105. See 42 U.S.C. §§ 2012, 2013.

² Centerior's post-hearing brief p. 20.

Accordingly, it is determined that the plain language of § 211 precludes Centerior from taking retaliatory action against complainants because they filed the civil action against Centerior under the Atomic Energy Act.

Prima Facie Case

The requirements for establishing a prima facie case under Section 211 of the ERA were set out by the Secretary of Labor in Darty v. Zack Co. of Chicago, Case No. 82-ERA-2, Secretary of Labor, April 25, 1983, slip op. at 8. They are: (1) the complainant engaged in protected activity; (2) the complainant was subject to adverse action; and (3) that the respondent was aware of the protected activity when it took the adverse action against him. The complainant must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action.

As previously discussed, complainants engaged in protected activity under § 211 when they filed the civil action under the Atomic Energy Act against Centerior.

ADVERSE ACTION

Complainant, Maloney suffered an adverse action by Centerior when Schrauder instructed Fishbach to remove him from employment at Perry. The other five complainants suffered adverse actions by Centerior when Schrauder instructed Fishbach to not hire them for work at Perry. See Complainants' Exhibit B.

KNOWLEDGE OF PROTECTED ACTIVITY

Complainants must show that Centerior had knowledge of their protected activity at the time of the adverse employment action. Hassell v. Industrial Contractors, Inc., Case No. 86-CAA-7, Secretary of Labor, February 13, 1989. That Centerior had such knowledge is undisputed.

Volza testified that he was alerted to complainants' lawsuit against Centerior on about the 5th or 6th of October, 1995, and that it prompted him to contact Schrauder to express his concerns that the allegations of the law suit indicated that Maloney could not comply with the Centerior's programs and procedures. Schrauder took the action terminating Maloney's employment and barring the other complainants from working at any Centerior facility within a few days after his conversation with Volza.

REASON FOR TERMINATION

Complainants have shown that they engaged in protected activity and that they suffered adverse action when they were subsequently fired or banned, and that Centerior knew of the

protected activity when it took such actions. Complainants must, to establish a prima facie case, present evidence to raise the inference that the protected activity was the likely reason for the adverse actions. Dean Dartey v. Zach Company of Chicago, Case No. 82-ERA-2, slip op., Secretary of Labor, April 25, 1983. Stack v. Preston Trucking Co., Case No. 86-STA-22, slip op., Secretary of Labor, February 26, 1987 and Haubold v. Grand Island Express Inc., Case No. 90-STA-10, slip op., Secretary of Labor, April 27, 1990.

The temporal proximity of the adverse actions to the protected activity is sufficient in itself to raise the inference that the protected activity was the reason for the adverse actions. The Court of Appeals in Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) held that the temporal proximity of "roughly thirty days" is sufficient as a matter of law to establish an inference of retaliatory motivation. See also the Secretary's decision in Goldstein v. Ebasco Contractors Inc., Case No. 86-ERA-36, Secretary of Labor, April 7, 1992.

Also, Schrauder's October 13, 1995 letter states that the Complainants' lawsuit was the reason for Maloney's termination and the ban on the other complainants' employment.

Respondent's Reason for Termination

As the complainants have established a prima facie case, Centerior has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981). Dartey v. Zack Company of Chicago, Case No. 82-ERA-2, Secretary of Labor, April 25 1983. Once a respondent satisfies its burden of production, the complainant then may establish that respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated respondent. Shusterman v. EBASCO Services, Inc., Case No. 87-ERA-27, Secretary of Labor, January 6, 1992.

Centerior contends that it had legitimate non-discriminatory reasons for terminating Maloney's employment and barring the other complainants from further employment at any of Centerior's facilities. Centerior stated reasons are that it was concerned that complainants would be unwilling to work without respirators, that complainants claimed to be suffering from severe and debilitating emotional distress stemming from exposures which federal regulations specifically permit and which complainants would likely again receive, and that the complainants might

therefore seek to pick and choose the work they would perform, and that this could disrupt the busy outage schedule. Centerior's argument relies solely on the averments of the complaint in complainants' civil action. The argument assumes from the averments of the complaint that the complainants' employment at Perry would be disruptive and proceeds to offer case law showing that disruptive employees may be denied employment even if they engaged in protective activities.

Centerior attempts to argue the merits of the complainants civil case in this proceeding. The gist of Centerior's argument is that the dosage of radiation received by the complainants because of the October 7, 1994 incident was within the level approved by the NRC, therefore complainants' averments in the civil suit that they suffered injury and emotional distress compel the conclusion that complainants in the future may suffer emotional distress, refuse to wear a respirator or insist on a change of job even though the potential radiation dosage to which they will be subjected is within NRC approved limits. For example, Centerior argues that "Centerior cannot hire individuals who appear unwilling to accept the NRC's regulations, the radiation philosophy underlying those regulations, or Centerior's radiation protection program. Centerior is required to implement its program in accordance with NRC requirements and has no leeway to violate those requirements in order to accommodate an employee's personal views and preferences."¹

Centerior has not produced any evidence to support its contentions. Each of the complainants continued to work at the Davis-Bessie plant after the October 7, 1994 incident until early December when their work was completed and they were laid off. Nothing that could be considered disruptive occurred. No complaints were brought to the attention of their union. (Tr. 112) Their supervisor complimented them on doing a good job and told them they were welcome to return to work on future outages. (Tr. 28, 29) Maloney worked without incident at Perry until his job was terminated. Volza agreed that nothing in Maloney's behavior indicated any emotional problems that would effect his work. (Tr. 172) Neither Volza nor Schrauder interviewed complainants, or in any other way attempted to determine if their past behavior was disruptive or predictive of disruptive behavior in the future. Volza contacted Scott, his counterpart at Davis-Bessie plant, to discuss Maloney's status as a plaintiff in the civil complaint. Volza testified that Scott told him about Maloney's civil complaint against Centerior and a discussion ensued regarding whether, in light of the allegations of the complaint, Maloney would in some way have a problem with complying with Centerior's programs and policies. (Tr. 152)

¹ Centerior's post-hearing brief, p. 26.

However, Volza did not discuss with Scott, Maloney's actual understanding of and willingness to abide by Centerior's respirator policy. (Tr. 154)

To support its argument that the actions of Centerior toward the complainants were made dispassionately, Centerior asserts in its brief that the record shows not one whit of evidence of hostility towards the complainants. Centerior overlooks the reason given by the plant ombudsman to Maloney for his discharge, and the testimony of Schrauder on his reason for terminating Maloney's employment. The ombudsman told Maloney that he was out because he was "biting the hand that feeds you." (Tr. 42) Schrauder was asked on direct examination why he didn't interview Maloney before having his employment terminated. Schrauder answered:

Q. Why didn't you seek for example to interview Mr. Maloney [one of the complainants]?

A. I didn't feel I had a need to. I read the complaint and I thought the complaint was clear enough that someone that needed 30 million dollars to compensate for a low level of radiation and that they had debilitating and emotional stress over that I didn't think I needed that kind of person working the outage for me. (Tr. 209-210)

The dosage level of radiation received by the complainants on October 16, 1995 is not relevant to this proceeding, nor is the extent of injury caused thereby. Nevertheless, Centerior argues that the dosage level of radiation received by the complainants and the complainants' resulting request for damages for emotional distress is a predictor that the complainants will claim future emotional problems and is therefore a legitimate basis for the firing. Centerior's argument shows a lack of understanding or concern for the basis of complainants' lawsuit. Maloney testified generally to his reaction to the October 16, 1995 radiation incident. His emotional distress did not result from knowledge of the level of the radiation but the total circumstance surrounding the incident. Maloney was asked how he first knew he was the subject of an unplanned exposure to radioactivity. Maloney responded that at the completion of their shift, when they left their worksite, undressed and approached the portable monitors, they set them off without even being around them. "All the monitors were going off and the RP's and the HP's...came running down to the area where we exit and they made us shower several times, clean out our noses. They took masks. They had high count ratings on everything." Maloney testified that they continued to set off alarms for approximately a month. When complainants arrived at the plant they showed a slip of paper which permitted them to enter and exit the plant

without going through the monitors because they would set them off before they got to them. At the end of the shift, complainants left earlier than the other workers so they wouldn't jam up their fellow employees passing through the monitors. "We couldn't go within a couple of feet of them without setting those monitors off." (Tr. 93)

Maloney was asked:

Q. And in your complaint when you say that you've had emotional distress does the fact that you set off every alarm in the plant for a month after the incident have anything to do with your emotional distress.

A. Yes, that's where the emotional distress is. I mean it goes to bed with you at night. You think of your family. You think of everything that it could possibly could be doing inside of you no matter what they tell you. You don't know. Especially if you're setting monitors off before you even walk in them, that's not something they teach in those classes. (Tr. 93)

If Centerior's argument is found to prevail in this case, and Maloney's firing is found to result not from his filing of the civil action, but from a legitimate, nondiscriminatory motive because the injury Maloney alleged in the civil action may be considered a predictor of future injury, and inconsistent with an "employer's legitimate demands for loyalty, cooperation and a generally productive work environment," then all protected actions that include an allegation of injuries to the employee could no longer be protected. Mere allegations of injuries in a complaint by an employee against his employer, even if the complaint was protected by "whistleblower" statutes such as the ERA, as here, OSHA, or Title VII of the Civil Rights Act, would constitute cause for terminating the employee.

Accordingly, it is determined that the complainants have met their burden of showing that Centerior's proffered reasons for the firing of Maloney and banning of the other complainants are pretextual. They have shown by the clear preponderance of the evidence that Centerior's actions terminating Maloney and banning the other five complainants were a deliberate retaliation for their filing the civil complaint under the Atomic Energy Act.

DAMAGES

42 U.S.C. § 5851(b)(2)(B) provides that once discrimination that is prohibited by the Act is found:

...the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The Court in Deford v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983), interpreted the above-quoted section as permitting an award of reinstatement to a former job; restoration of all back pay, benefits and entitlements; compensatory damages insofar as they are thought to be appropriate; and reasonable attorney fees and costs.

REINSTATEMENT

Christopher Scarl is the business manager for the Asbestos Workers Heat and Frost Insulators Union, Local 3, of Cleveland Ohio. He testified that a refueling outage is scheduled to commence at Davis-Bessie on April 8, 1996, as soon as Perry goes back on line, and the complainants would have been eligible to work that job but for the October 13, 1995 letter barring their employment pending the outcome of their lawsuit. (Tr. 112)

If Centerior commenced the work at Davis-Bessie testified to by Scarl, or any work for which the six complainants would have been hired but for the October 13, 1995 letter barring their employment, the six complainants shall be immediately hired for those insulator positions as if Centerior had never issued the ban on their employment with Centerior.

Centerior contends that Sean McCafferty is not qualified to work at Centerior's nuclear plants because he falsified a self-disclosure questionnaire by failing to disclose a prior drug test. In support of its contention, Centerior refers to November 28, 1994 letters to McCafferty and Gem Industrial stating that McCafferty is denied access to the Davis-Besse Nuclear Power Station due to falsification of a Toledo Edison Self Disclosure Questionnaire. Initially, the record does not support Centerior's argument as the aforesaid letters refer only to denial of access to Davis-Bessie, not all of Centerior's

nuclear plants, or Perry. Moreover, McCafferty testified that he was eligible for reinstatement after a year from the issuance of the November 28, 1994 letter, and was told by Centerior that he would be reinstated upon the completion of a professional assessment to determine whether a treatment program is required. McCafferty has not requested the professional assessment because of Centerior's ban on his employment as a consequence of his lawsuit under the Atomic Energy Act.

Accordingly, Sean McCafferty's eligibility to work at Centerior shall be reinstated as if the October 13, 1995 letter barring his employment had never been issued. His reinstatement shall comply with NRC requirements. If those requirements mandate a professional assessment before his reinstatement, he shall be given the opportunity to pursue the assessment.

BACK PAY

Dennis Maloney

Had Maloney's employment not been terminated on October 16, 1996, he would have been working on the outage at Perry on the day of the hearing, February 26, 1996. He was the fourth man hired out of about thirty or thirty-five. (Tr. 47) Maloney testified that work on the outage was projected to continue until April 6, 1996. (Tr. 260)

Richard Cline testified for Centerior. Cline is the site project manager for Fishbach Power Services at Perry. Cline testified to the work of insulators employed by Fishbach from copies of records submitted to the local union for payment of benefits. Cline testified that six insulators worked on site until October 30, 1995 when the number was increased to eleven. These eleven insulators worked until December 18, 1995, when they were laid off for two weeks. (Tr. 281) According to Cline, they worked a 40 hour week at straight time. (Tr. 279) Maloney testified that his wage rate was \$31.48 per hour. Thus, Maloney lost ten weeks of work at \$1,259.20 per week (40 X \$31.48 = \$1,259.20) during the period October 16, 1995 through December 22, 1995 for a total of \$12,592.00.

Cline testified that the insulators were called back to work on January 2, 1996. His records show that the average insulator worked 29 straight time hours, 9 time and a half hours, and one double time hour per week. It is assumed that Maloney would have worked a full 40 hour straight time week and would have earned the overtime the average insulator earned during that period, that is, 9 time and a half hours and one double time hour per

week, for a total of 55.5 hours (40 + 13.5 + 2) per week.⁴ There were six weeks during the period January 2 through February 11, 1996. Thus, Maloney lost 333 hours of work at \$31.48 per hour, or \$10,482.84 from January 2 through February 11, 1996.

Cline projected that the insulating work would continue until April 6, 1996 with a steady decreasing number of insulators from a high of sixty to eighteen the last two weeks. (Tr. 281) As Maloney was the fourth hired it can reasonably be assumed that he would have been one of the last eighteen on the job. Cline testified that the work would be done on a 60 hour a week basis (40 hours of straight time and 20 hours of time and a half, or 70 hours of compensation). As there are eight weeks during the period February 11, 1996 to April 6, 1996, Maloney lost 560 hours of work (8 weeks X 70 hours) at \$31.48 per hour, or \$17,628.80

Accordingly Maloney lost a total of \$40,703.64 (\$12,592.00 + \$10,482.84 + \$17,628.80) because he did not work at Perry during the period October 16, 1995 through April 6, 1996.

Centerior argues that Maloney should not recover the full union wage of 31.48 per hour because he would not be required to make contributions for union dues, apprenticeship fund or pension. Christopher Scarl, the business manager for Local 3, testified that the union assesses a dues payment to its members of 4.9%, and an apprenticeship fund payment of \$0.05 per hour. Scarl does not believe that the union assesses those payments against an award of damages; he does not know whether an assessment would be made for the pension. (Tr. 117, 118) Centerior's argument is rejected. These fees subtracted from the complainants' wages derive from arrangements between the complainants and their union for the upkeep and betterment of the union. They are paid with monies earned by the complainants. Centerior has no say in such an agreement. The purpose of a union policy to not tax damage awards should not enure to the benefit of the employer.

Maloney testified that he worked for BP Oil Company Refinery in Toledo, Ohio from October 24, 1995 until January 5, 1996 and for other employers from January 6, 1996 until the date of the hearing. His compensation during that period equaled \$16,152.64 and must be subtracted from his lost earnings to determine wages lost. Also, any wages that Maloney earned between the date of the hearing and April 6, 1996 must be subtracted from the compensation lost because of not working at Perry.

⁴ Maloney testified that he was available for work at all times from October 16, 1995 until the hearing. He was not on vacation or ill. (Tr. 88)

Maloney testified that traveling to Toledo, Ohio to work at BP Oil resulted in additional expenses of travel of 10,500 miles at \$0.30 per mile or \$3,150. Maloney is entitled to reimbursement for his travel expenses. Maloney also requests compensation for the time that it took him to travel to Toledo, Ohio, 125 hours, at an hourly rate of \$31.48 per hour. However, Maloney offers no rationale for such compensation. It does not compensate for a loss of earnings or opportunity for earnings. Maloney is receiving credit for working more than an eight hour work day at Perry, including a ten hour day after January 2, 1996 whereas the earnings at Perry are offset by only eight hour days at BP Oil Company. Maloney's request for compensation for the time he took to travel to BP Oil is denied.

As additional back pay damages, Maloney is entitled to reimbursement for wages he would have earned if he would had returned to work at a Centerior plant after April 6, 1996 but for the ban on his employment.

Thus, Maloney's damages from loss of pay are:

\$40,703.64
-\$16,152.64
<u>+\$ 3,150.00</u>
\$27,701.00

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Five Complainants Barred From Employment

Maloney testified that if the other five complainants had not been barred from employment at Centerior, they would all have been working at Centerior on the date of the hearing. He was certain of this because his union had called in "travelers" from sister unions in other areas to work at Perry, and travelers would not be called in as long as there were local members available to work. At the time of hearing there were about 20 to 25 travelers working at Perry.

Cline testified that six insulators worked on site until October 30, 1995 when the number was increased to eleven. It is assumed that the other five complainants would have been brought on at that time. There is no way of determining from the record whether the seniority of the complainants would have enabled them to be hired on October 30 or on December 19, 1995 when an additional 19 insulators were hired. However, because "recreating the past will necessarily involve a degree of approximation and impression all doubts are to be resolved against the proven discriminator rather than the innocent employee." Woolridge v. Marlene Industries Corp., 875 F.2d 540,

546 (6th Cir. 1989). Under the same reasoning, the five complainants are considered to be among the eighteen insulators who worked until April 6, 1996. Accordingly, the five banned complainants are considered to have lost work at Perry from October 30, 1995 until April 6, 1996, minus the two weeks from December 22, 1995 to January 2, 1996 when all the insulators were laid off. Their wages are determined to be the same as Maloney, \$40,703.64, minus the two weeks from October 16 to October 30, or \$40,703.64 minus \$2,518.40 = \$38,185.24.

Robert Prohaska

Robert Prohaska's loss of wages from Perry are offset by income of \$19,139.84 up to February 27, 1996 at PCI Michigan. He had expenses for living in Detroit of \$3,000.00 (\$250 per week for 12 weeks) that must be deducted from the offset. Prohaska's damages from loss of pay are:

\$38,185.24
-\$19,139.84
<u>+\$ 3,000.00</u>
\$22,045.40

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Owen McCafferty

Owen McCafferty's loss of wages from Perry are offset by income of \$20,147.20 up to February 27, 1996. McCafferty's damages from loss of pay are:

\$38,185.24
-\$20,147.20
\$18,038.04

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Terry McLaughlin

Terry McLaughlin's loss of wages from Perry are offset by income of \$13,599.36 up to February 27, 1996. McLaughlin's damages from loss of pay are:

\$38,185.24
-\$13,599.36
\$24,585.88

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Sean Kilbane

Sean Kilbane's loss of wages from Perry are offset by income of \$24,176.64 up to February 27, 1996. Kilbane's damages from loss of pay are:

\$38,185.24
- \$24,176.64
\$14,008.60

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Sean McCafferty

Sean McCafferty's loss of wages from Perry are offset by income of \$6,552.00 up to February 27, 1996. McCafferty's damages from loss of pay are:

\$38,185.24
- \$ 6,552.00
\$31,633.24

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

INTEREST

Interest is assessed on back wages in order to make whole the employees who have suffered an economic loss as a result of an employer's illegal discrimination. Interest is calculated in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. Blackburn v. Metric Constructors, Inc., 86-ERA-4, Secretary of Labor, October 30, 1991.

ATTORNEY FEES

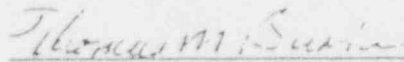
Attorney Fees under the ERA in cases where the Administrative Law Judge issues a recommended decision on the merits finding that the respondent violated an employee protection provision are awarded to the complainant from the respondent as fees reasonably incurred. In calculating attorney fees under the statute, the Secretary employs the lodestar method, which requires multiplying the number of hours reasonably expended in pursuing the litigation by a reasonable hourly rate.

See § 5851 (b)(2)(A) and (B); Gaballa v. The Atlantic Group, 94-ERA-9, Secretary of Labor Interim Order, December 7, 1995; Tinsley v. 179 South Street Venture, 89-CAA-3, Secretary of Labor Order of Remand, August, 1989.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT Respondent, Centerior Energy, be ordered to:

1. Remove denial of access flag from all records of the complainants.
2. Reinstate complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, in accord with the directives under Reassignment, at pages 15 and 16, herein.
3. Pay to the complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, back pay in accord with the directives under Back Pay, at pages 16 through 20, herein.
4. Pay to the complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621; and
5. Pay to complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, all costs and expenses, including attorney fees, reasonably incurred by them in connection with this proceeding. Thirty days is hereby allowed to complainants' counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon the respondent and complainants must accompany the application. Respondent has ten days following receipt of such application within which to file any objections.


THOMAS M. BURKE
Administrative Law Judge

TMB:mr

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. The Administrative Review Board was delegated jurisdiction by Secretary Order dated April 17, 1996 to issue final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978 (1996).

SERVICE SHEET

Case Name: OWEN McCAFFERTY, DENNIS MALONEY, SEAN KILBANE,
TERRY McLAUGHLIN, SEAN McCAFFERTY AND
RICHARD PROHASKA

Case No.: 96-ERA-6

Title of Document: RECOMMENDED DECISION AND ORDER

I hereby certify that on June 11, 1996, a copy of the above-captioned document was mailed to the following parties:

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