

DIFFERING PROFESSIONAL OPINION

1. DPO CASE NUMBER

DPO-2006-004

**INSTRUCTIONS:** Prepare this form legibly and submit three copies to the address provided in Block 14 below.

2. DATE RECEIVED

5/30/2006

3. NAME OF SUBMITTER

James A. Gavula

4. POSITION TITLE

Senior Reactor Inspector

5. GRADE

14

6. OFFICE/DIVISION/BRANCH/SECTION

RH:OI

7. BUILDING

8. MAIL STOP

9. SUPERVISOR

Richard Paul

10. DESCRIBE THE PRESENT SITUATION, CONDITION, METHOD, ETC., WHICH YOU BELIEVE SHOULD BE CHANGED OR IMPROVED.  
(Continue on Page 2 or 3 as necessary.)

11. DESCRIBE YOUR DIFFERING OPINION IN ACCORDANCE WITH THE GUIDANCE PRESENTED IN NRC MANAGEMENT DIRECTIVE 10.159.  
(Continue on Page 2 or 3 as necessary.)

See attachment.

12. Check (a) or (b) as appropriate:

- ☒ a. Thorough discussions of the issue(s) raised in item 11 have taken place within my management chain; or  
☐ b. The reasons why I cannot approach my immediate chain of command are:

SIGNATURE OF SUBMITTER

DATE

5/22/06

SIGNATURE OF CO-SUBMITTER (if any)

DATE

13. PROPOSED PANEL MEMBERS ARE (in priority order):

1. Jack Grobe
2. Brian Sheron
3. Steve Reynolds

14. Submit this form to:

Differing Professional Opinions Program Manager

Office of:

Mail Stop:

15. ACKNOWLEDGMENT

THANK YOU FOR YOUR DIFFERING PROFESSIONAL OPINION. It will be carefully considered by a panel of experts in accordance with the provisions of NRCMD 10.159, and you will be advised of any action taken. Your interest in improving NRC operations is appreciated.

SIGNATURE OF DIFFERING PROFESSIONAL OPINIONS PROGRAM MANAGER (DPOPM)

Ronnie Pedersen

PRE-CONDITIONS MET

☒ YES

☐ NO

DATE OF ACKNOWLEDGMENT

6/5/2006

## Issue

A statement in FENOC's September 14, 2005, reply to an NRC Notice of Violation was not accurate and appeared to violate 10 CFR 50.9, "Completeness and Accuracy of Information." In addition, documents associated with the reply showed that FENOC failed to follow their procedure for "NRC Communications," by not verifying the accuracy of the statement in question. FENOC had specifically revised this procedure to require verification of statements, as corrective action to prevent future violations of 10 CFR 50.9, because of the violation to which they were replying.

However, the Office of Enforcement in conjunction with the Office of General Counsel determined that there was no violation of 10 CFR 50.9, because the statement in question was not considered material. Also, since the statement was associated with the denial of a violation, the Office of Enforcement's unwritten policy apparently allows licensees a wide latitude regarding the accuracy of that information. In addition, since FENOC's procedure for "NRC Communication" did not pertain to a safety related structure, system or component, it was determined there could be no violation of any 10 CFR 50, Appendix B criteria. Based on this, the agency took no regulatory action and had no concerns despite the deficiencies identified in FENOC's September 14, 2005, reply to a Notice of Violation.

*I disagree with the agency's lack of regulatory action in this matter.*

## Overview

In March 2002, FENOC personnel at the Davis-Besse plant identified significant degradation of the reactor vessel head. Soon afterward, the NRC implemented a Manual Chapter 0350 Oversight Panel for Davis-Besse and devoted significant inspection resources to review numerous concerns with FENOC's performance. Following extensive reviews and corrective actions by FENOC, Davis-Besse returned to service in March 2004.

In reviewing the corporation's actions surrounding the head degradation, the NRC identified a number of potential violations, including several associated with the completeness and accuracy of FENOC's submittals describing their previous reactor vessel head inspections. In April 2005, the NRC issued "Notice of Violation and Proposed Imposition of Civil Penalties - \$5,450,000" to FENOC with nine enforcement actions, including four associated with violations of 10 CFR 50.9, for incomplete and inaccurate information. Regarding individuals' actions associated with this incident, the NRC eventually issued Orders to five individuals banning their involvement in NRC licensed activities<sup>2</sup>. The Orders were issued for deliberately falsifying FENOC internal documents associated with the reactor vessel head inspections conducted in April 2000, and for deliberately falsifying information submitted to the NRC in 2001, describing FENOC's previous reactor vessel head inspections.

In parallel with the above civil actions, a criminal investigation by the NRC's Office of Investigations concluded that certain individuals had willfully provided false information in FENOC's submittals describing previous reactor vessel head inspections. The case was

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<sup>1</sup> NRC letter to FENOC dated April 21, 2005. (ML051090552)

<sup>2</sup> IA-05-021 (ML051090537), IA-04-052 (ML053560094), IA-05-053 (ML053560107), IA-05-054 (ML053560113), IA-05-055 (ML053560119)

referred to the Department of Justice, and in January 2006, three individuals were indicted by a federal grand jury for lying to the NRC<sup>3</sup>. In addition, a fourth individual and the FENOC corporation signed deferred prosecution agreements with the Department of Justice to avoid being indicted.<sup>4,5</sup>

## Background

Within one day after the discovery of the head degradation, the NRC questioned FENOC's submittals describing their past inspections of the reactor vessel head. By the end of March 2002, during a pre-exit briefing, members of the NRC's Augmented Inspection Team noted apparent discrepancies between statements in FENOC's submittals and the videotapes from previous head inspections. In September 2002, the NRC's Lessons Learned Task Force noted that FENOC's submissions regarding the reactor vessel head inspections were not consistent with task force's assessment of the information.<sup>6</sup> Ultimately, in October 2002, the NRC issued Inspection Report 50-346/02-008<sup>7</sup> documenting multiple examples of violations for inaccurate or incomplete information associated with FENOC's submittals describing their past reactor vessel head inspections.

As a result of the above concern, the NRC's 0350 Oversight Panel added Item 3.i to the Davis-Besse Restart Checklist regarding "Process for Ensuring Completeness and Accuracy of Required Records and Submittals to the NRC."<sup>8</sup> The Restart Checklist contained issues that, according to the Oversight Panel, needed to be resolved prior to the NRC's consideration of restart approval.

Following the addition of this restart item, FENOC conducted a root cause analysis of the apparent violations of 10 CFR 50.9 for incomplete and inaccurate information.<sup>9</sup> One of the root causes, identified by FENOC during this effort, noted that information used in the submittals had not been rigorously assessed, and went on to state that "development of the documents relied primarily on a discrete data set, subsequently determined to be unverified, which received inadequate analysis, as evidenced by the condition of the head."

One of FENOC's corrective actions from this root cause analysis, identified as a preventative action, was to revise the site's procedure for "NRC Communications," to include detailed methodology for verification of correspondence. Another corrective action for this issue, identified as a remedial action, was to review previous FENOC submittals to the NRC, to provide additional assurance of their completeness and accuracy. During this second effort,

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<sup>3</sup> United States of America v. David Geisen, Rodney Cook, and Andrew Siemaszko, filed January 19, 2006.

<sup>4</sup> Deferred Prosecution Agreement Between the United States of America and FirstEnergy Nuclear Operating Company, executed January 19, 2006.

<sup>5</sup> Deferred Prosecution Agreement between the United States of America and Prasoon Goyal, executed November 10, 2005.

<sup>6</sup> Davis-Besse Reactor Vessel Head Degradation Lessons-Learned Report, September 30, 2002 (ML022760414)

<sup>7</sup> Inspection Report 50-346/02-008, issued October 2, 2002. (ML022750524)

<sup>8</sup> Oversight Panel Restart Checklist, Revision 2, dated January 28, 2003 (ML030290155)

<sup>9</sup> Davis-Besse Nuclear Power Station, Root Cause Analysis Report, Apparent Violation of 10CFR50.9, Completeness and Accuracy of Information, CR2002-04919 dated 08-23-2002, Report dated 04-04-03.

FENOC identified several other submittals to the NRC, which contained inaccurate or incomplete statements, including their response to Generic Letter 98-04. Subsequently, the NRC issued a Severity Level III Violation of 10 CFR 50.9 for this issue, and noted that, although the violation met the criteria permitting discretion to not issue a violation, a Notice of Violation was being issued to emphasize the importance of providing complete and accurate information to the NRC.<sup>10</sup>

In order to close the Restart Checklist item for completeness and accuracy, the NRC performed an inspection in October 2003 using a team consisting of a Senior Project Inspector, an NRR Project Manager and the Region III Counsel. The inspection report from this effort, 50-346/03-19<sup>11</sup>, concluded that FENOC had:

"taken appropriate corrective actions to ensure that future regulatory submittals are complete and accurate in all material respects. The procedures for regulatory submittals have been revised to ensure that submittals are properly validated before issuance. Site personnel, including the site supervisory personnel, have been given training to ensure that they are cognizant of the requirements of 10 CFR 50.9 and the implications of not complying with those requirements. New supervisory training includes management responsibilities related to completeness and accuracy. New employee training includes the requirements of 10 CFR 50.9 as part of the orientation.

On March 8, 2004, the NRC specifically noted the above special inspection as one of many efforts considered in approving the restart of the Davis-Besse Nuclear Power Station.<sup>12</sup>

#### New Potential 50.9 Violation

As noted in the overview above, the NRC issued several significant enforcement actions associated with the Davis-Besse head degradation in April 2005.<sup>13</sup> These included two Severity Level I violations of 10 CFR 50.9, with associated civil penalties totaling \$230,000, as well as a Severity Level III and a Severity Level IV violation of the same statute. On September 14, 2005, FENOC replied to the NRC's Notice of Violation, paid the entire amount of the civil penalties, but denied violation 1.E.<sup>14</sup> This violation was one of the Severity Level I violations of 10 CFR 50.9 associated with the incomplete and inaccurate information describing FENOC's past reactor vessel head inspections. Under the section "Reasons for the Denial of the Alleged Violation," the reply stated:

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<sup>10</sup> NRC Letter to FENOC dated May 7, 2004, Davis-Besse Nuclear Power Station - Notice of Violation NRC Inspection - Completeness and Accuracy of Required Records and Submittals to the NRC - Report No. 50-346/03-19 (ML041280232).

<sup>11</sup> NRC Letter to FENOC dated January 28, 2004 Davis-Besse Nuclear Power Station - NRC Special Inspection - Completeness and Accuracy of Information of Required Records and Submittals to the NRC - Report No. 50-346/03-19 (ML040280594)

<sup>12</sup> NRC Letter to FENOC dated March 8, 2004, Approval to Restart the Davis-Besse Nuclear Power Station, Closure of Confirmatory Action Letter, and Issuance of Confirmatory Order. (ML040641171)

<sup>13</sup> NRC Letter to FENOC dated April 21, 2005, Notice of Violation and Proposed Imposition of Civil Penalties - \$5,450,000 (ML051090552)

<sup>14</sup> FENOC Letter to NRC dated September 14, 2005, Reply to a Notice of Violation: EA-03-025; EA-05-066; EA-05-067; EA-05-68; EA-05-069; EA-05-070; EA-05-071; EA-05-072; [ & EA-06-044]

**"FENOC's reasons for denying this violation are more fully explained in its several reports and reviews previously provided to the NRC."**

The above statement is false and is the statement in question. The reports and reviews previously provided to the NRC did not more fully explain FENOC's reasons for denying the violation. To the contrary, these reports clearly admitted that incomplete and inaccurate information was contained in submittals to the NRC, even giving examples from other letters submitted after those cited in the Notice of Violation. Examples of statements from these reports<sup>15</sup> included:

"As a result, the October 30, 2001 letter also transmitted inaccurate information to the NRC about the plant's inspection history."

"...failed to treat inputs and comments from the technical leads in a manner sufficient to maintain the completeness and accuracy of the letter."

"...the pictures submitted to the NRC were not a complete representation of the information available to FENOC."

"These submittals [October 17<sup>th</sup> and October 30<sup>th</sup>]...also contained errors of fact with respect to the results of previous inspections."

"As a result, the October 2001 letters also transmitted inaccurate information to the NRC about the plant's inspection history."

"The photo selection and addition of comments to those photos provided an incomplete representation of the status of nozzles on the Davis-Besse head."

The apparent purpose of the reports noted in FENOC's September 14<sup>th</sup> reply was to establish that the incomplete and inaccurate information was not provided willfully, and therefore, did not warrant criminal prosecution. However, in that regard, FENOC's September 14<sup>th</sup> reply stated:

"Nevertheless, we specifically are not addressing the allegations of willfulness contained in the April 21, 2005, transmittal letter because the NOV itself does not cite willfulness and a specific response to those allegations is not required."

Since FENOC's reply specifically did not address the willfulness aspect of the violations, and the previous reports clearly admitted the 50.9 violation, while attempting to explain why these violations were not willful, the sentence in question was inaccurate. There were no reports previously provided to the NRC that more fully explained FENOC's reasons for denying the violation. Based on this, in response to a 50.9 violation, FENOC apparently provided additional inaccurate information.

The resulting point of contention is not that FENOC denied the violation, but that their past corrective actions to prevent future 50.9 violations are apparently inadequate. Given the supposedly rigorous validation process that FENOC implemented in response to the previous

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<sup>15</sup> Letter FENOC to J.E.Dyer, dated June 6, 2003, Attachment 2B.

violations, apparently either individuals did not follow the procedure or the procedure was somehow flawed.

Based on the apparent inadequate corrective action, Region III conducted an inspection to review the validation package for FENOC's September 14<sup>th</sup> reply to the Notice of Violation. This inspection was comparable in nature to that conducted in October 2003 for closing Restart Checklist Item 3.i. In reviewing FENOC's validation package for this document, the specific sentence in question was not identified as a statement that needed to be verified, even though it appeared to meet the procedure's description of statements requiring verification.<sup>16</sup> However, a note was added to the validation package stating:

"Could not validate client privilege info (10CFR50.9 related documents related to NRC investigation & Dept of Justice hearing.)"

This note clearly applied to the sentence in question and showed recognition that the statement should have been validated, but it could not be, apparently because it contained "privilege" information. During subsequent discussions with NRC personnel, a FENOC attorney acknowledged he had provided the specific information in the submittal in an attempt to "balance" ongoing deliberations with the Department of Justice. Based on reviews of the validation package, and discussions with FENOC personnel involved in the submittal, the NRC inspection determined this represented a violation of 10 CFR 50.9 for incomplete and inaccurate information, as well as a violation of 10 CFR 50, Appendix B, Criterion V violation for failure to follow FENOC's new procedure for validation of NRC correspondence.

However, the Office of Enforcement and the Office of General Counsel, concluded that the specific statement in question was not material because the statement did not have the ability to influence the agency in the conduct of its regulatory responsibilities.<sup>17</sup> In addition, past agency policy has given licensees latitude in responding to violations, e.g. allowing them to deny violations for reasons considered weak or specious, without subjecting them to further sanctions beyond the underlying violation(s). Based on the above, the agency took no additional regulatory action against FENOC and had no concerns.<sup>18</sup>

**I disagree with the agency's lack of regulatory action in this matter for the following reasons:**

- 1) The statement in question was material to the NRC.

The NRC Enforcement Manual<sup>19</sup>, Section 5.6.7, "Licensee Response to Civil Penalty," specifies:

"If the licensee denies the violation...but pays the civil penalty, the region is to

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<sup>16</sup> Memorandum to J. Heller from C. Lipa dated February 28, 2006, Review of Allegation No. RIII-2005-A-0105.

<sup>17</sup> Allegation Review Board Minutes from follow-up ARB on March 22, 2006, with attached emails from B. Berson and C. Nolan

<sup>18</sup> Letter from M. Johnson to J. Gutierrez dated April 4, 2006 (ML060950104)

<sup>19</sup> NRC Enforcement Manual, (unavailable in ADAMS, but available through [www.nrc.gov/reading-rm/basic-ref/enf-man/manual.pdf](http://www.nrc.gov/reading-rm/basic-ref/enf-man/manual.pdf) contrary to MD3.14)

review the licensee's points of contention. If the licensee presents additional information not previously disclosed, then careful consideration should be given to the appropriateness of the original proposed action....Even if the licensee's response does not present new information, an error identified in the enforcement action must be corrected."

The statement in question was the first sentence in FENOC's reply to the 50.9 violation under the section "Reason(s) for the Denial of the Alleged Violation." As specified by our enforcement manual, this section had to be reviewed in order to ensure the enforcement action was correct.

With regard to the materiality of the statement in question, the published information, implementing the final rule for Completeness and Accuracy of Information stated:

"The Commission decided materiality is to be judged by whether the information has a natural tendency or capability to influence an agency decision maker."<sup>20</sup>

The statement in question was required to be evaluated by the NRC to determine if the enforcement action was valid. The statement in question was not an opinion, but a factual statement about the contents of reports previously provided to the NRC. The contents of these reports were falsely portrayed as providing fuller explanations for FENOC's reasons for denying the violation. The reference to "reports and reviews" implied a level of rigor and detail in support of FENOC's denial, when in reality, these efforts corroborated the violation. Based on this, it is clear that the statement had the capability to influence an agency decision maker.

In addition, the published information, implementing the final rule for Completeness and Accuracy of Information stated:

"The fact that a licensee considers information to be significant can be established, for example, by the actions taken by the licensee to evaluate that information. Thus, even though the rule contains a subjective test in requiring reporting of information a licensee recognizes as significant, there are objective indicia of recognition that can be used by the NRC in determining whether a licensee in fact recognizes the significance of the information in question."<sup>21</sup>

It is in this regard that the notation in FENOC's validation package indicates that they thought the information was material. The note stated the information could not be verified implying they thought it should be verified. The note did not state that the information did not need to be verified. On this basis, FENOC considered the information to be material because they apparently thought it needed to be verified.

The bases for lack of materiality cited by OE was that:

"...it would be hard to argue that this information was material to the agency

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<sup>20</sup> 52 FR 49362, December 31, 1987, Completeness and Accuracy of Information, Final rule and statement of policy.

<sup>21</sup> Id.

since we had already taken our actions, compliance was restored, corrective actions had been taken and we were willing to extend the response until the criminal issues were resolved."<sup>22</sup>

This statement appears to imply that a licensee's reply regarding the validity of a violation is immaterial to the NRC. Apparently, once the NRC has taken actions, no further consideration is given to the appropriateness or correctness of the enforcement, contrary to the statement in the NRC Enforcement Manual. If this is the case, the NRC Enforcement Manual should be revised to reflect the way business is conducted. In addition, although FENOC implemented corrective actions, these were shown to be inadequate, as demonstrated by the false statement in FENOC's reply. FENOC knowingly chose not to comply with the revised "NRC Communication" procedure, by not verifying a statement that they clearly felt they should. Apparently, this also is immaterial to the NRC.

The bases for lack of materiality cited by Region III counsel as agreed to by OGC was that:

"The paragraphs immediately following the sentence in question explain why the licensee denied the violation. So, to ask a rhetorical question, since the licensee set forth the reasons for the denial in its NOV, how could we be influenced by whether the licensee's position was previously expressed in prior documents or not?"<sup>23</sup>

This argument ignores the licensee's obligation to provide complete and accurate information in all material respects. The capability of the statement in question to influence an agency decision maker centers on the impression that FENOC's reasons were more fully explained in other reports and reviews. The discussion following the statement in question was nine sentences long. Clearly, if FENOC's reasons for denying this violation were more fully explained in several reports and reviews, this would consist of more than nine sentences, and there would be considerable substance behind their reasons. The discussion in FENOC's reply would logically be a summary of these reports and, as set forth in the Enforcement Manual, careful consideration was to be given to licensee's points of contention. However, the statement was false, because there were no reports provided to the NRC that ever explained, much less, more fully explained FENOC's reasons for denying the cited violation. The statement in question had the capability to influence an agency decision maker; therefore, it was material.

For the Region III Counsel to further argue that the statement was not material, because it ultimately did not influence the NRC's conclusion regarding the validity of the cited violation, is irrelevant since materiality pertains to the capability of influencing an agency's decision. While this argument may be a criteria for determining significance of the violation, it is not the established standard with which to judge whether a violation occurred. This argument continues to ignore the licensee's obligation to provide

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<sup>22</sup>C. Nolan email to K. O'Brien dated March 17, 2006. (Attached to Allegation Minutes for RIII-2005-A-0105).

<sup>23</sup> B. Berson email to J. Heller, dated March 22, 2006. (Included in Allegation Minutes for RIII-2005-A-0105)



complete and accurate information in all material respects.

- 2) The licensee's failure to comply with their NRC Communication procedure should have resulted in some type of regulatory action.

The precedent established through NRC Inspection Report 50-346/03-19 demonstrated that FENOC's compliance with their "NRC Communication" procedure was a regulatory concern. The basis for closing the Restart Checklist item for "...Ensuring Completeness and Accuracy of Required Records and Submittals to the NRC," was FENOC's compliance with their NRC Communication procedure. As noted in the inspection report, the inspectors performed a detailed review to assess the quality of work and conformance to procedures for validating correspondence. If a demonstrated failure to comply with this procedure is now not a regulatory concern, then the entire basis for closing this restart checklist item is invalid.

FENOC's initial incomplete and inaccurate information ostensibly occurred because no one verified the statements provided by an engineer regarding their past head inspections. Although FENOC repeatedly reiterated that their re-reviews of the past head inspection videotapes had not identified any problems, this effort was supposedly done by only one engineer and was purportedly never verified by anyone else. The degree of the discrepancy was not minor. Any reasonably detailed review would have identified the inconsistencies between the videotapes and the statements in FENOC's submittals. In order to prevent this from recurring, FENOC revised their "NRC Communication" procedure to require a rigorous validation process to verify the accuracy of submittal statements.

However, FENOC did not comply with their revised procedure. In that regard, FENOC specifically noted that certain statements could not be verified, because the referenced reports had restricted access. Instead of finding an independent person who had access to the reports in order to verify the statements, FENOC chose to submit the information to the NRC knowing that the statements had not been verified. While the ultimate consequences of their actions may be different, FENOC's behavior was the identical to that in the fall of 2001. If FENOC knowingly chose not to verify the accuracy of information in the response to a 50.9 violation, then there is no reasonable assurance that they will similarly choose not to verify other information in the future. Since FENOC's process did not ensure submittals were complete and accurate, the NRC either needs to have FENOC address the problem, or the NRC itself needs to perform its own detailed verification of every FENOC submittal.

- 3) The lack of regulatory action demonstrates the NRC's continued high tolerance for incomplete and inaccurate information until the next incident occurs and the NRC again responds with righteous indignation.

The GAO report 04-415 regarding the Davis-Besse Incident<sup>24</sup> was critical of the NRC's oversight of the licensee. In response to this criticism, the NRC attributed the oversight program's lack of complete and accurate information on plant conditions to FENOC's

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<sup>24</sup> U.S. Government Accounting Office Report GAO-04-415, "Nuclear Regulation, NRC Needs to More Aggressively and Comprehensively Resolve Issues Related to the Davis-Besse Nuclear Power Plant Shutdown," May 2004, p9, (ML041420142 (non-publicly available in ADAMS but publicly available through GAO website))

failure to provide such information.<sup>25</sup> The EDO's cover letter commenting on the draft report stated that the GAO did not acknowledge the NRC's heavy reliance on licensees to provide complete and accurate information. This point of contention was also the focus of the first two comments about the draft GAO report. As a result, the GAO report was revised as follows:

"While we have added information to this report on the requirement that licensees provide NRC with complete and accurate information, we believe the NRC's oversight program should not place undue reliance on this requirement."

"While we do not want to diminish the importance of this responsibility on the part of the licensee, we believe that NRC also has a responsibility in designing the oversight program to implement management controls, including inspection and enforcement, to ensure that it has accurate information on and is sufficiently aware of plant conditions. In this respect, it was the NRC's decision to rely on the premise that the information provided by FirstEnergy was complete and accurate."

"We believe that management controls, including inspection and enforcement, should be implemented by NRC so as to verify whether licensee-submitted information considered to be important for ensuring safety is complete and accurate as required by regulation."

Since typical Notices of Violation require licensee responses to be submitted under oath or affirmation, it would appear the NRC considers licensee responses to violations important information. By responding to a Severity Level I violation for incomplete and inaccurate information with additional incomplete or inaccurate information, FENOC demonstrated either a flippant attitude toward regulatory compliance or the inadequacy of its previous corrective actions. Either of these should have been a concern for the NRC, but neither of these were addressed by any regulatory action.

If the NRC is going to rationalize to the GAO that the condition of the plant was not known because FENOC did not provide accurate information, then the NRC needs to take some action when FENOC doesn't provide them with accurate information. The NRC's inaction for this issue is inconsistent with the spirit of our enforcement policy:

"accuracy and forthrightness in communications to the NRC by licensees and applicants for licenses are essential if the NRC is to fulfill its responsibilities to ensure that utilization of radioactive material and the operation of nuclear facilities are consistent with the health and safety of the public and the common defense and security."<sup>26</sup>

If no action is taken to address a submittal with inaccurate information, then the NRC should inform the GAO that the NRC's comments to the GAO report were insincere and self-serving.

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<sup>25</sup> NRC letter from W. Travers to US Government Accounting Office, dated May 5, 2004 (ML041060635 & ML041060662).

<sup>26</sup> 52 FR 49362, December 31, 1987, Completeness and Accuracy of Information, final rule and statement of policy.

As a somewhat tangential issue, although the GAO report noted that the Davis-Besse Lessons Learned Task Force made a recommendation to strengthen guidance for verifying information provided by licensee, this was not strictly true. The task force's recommendations only addressed verification of specific licensee submittals: generic communications and licensing documents. The task force made no recommendation for generally verifying information provided by licensees. This point may need to be clarified with the GAO, with an additional caveat that, even if the NRC identifies inaccurate information and shows that a licensee's process to ensure accuracy does not work, no action will be taken.

**The Office of Enforcement's and/or the Office of General Counsel's recent response to this issue may have been made with prejudice.**

- 1) Within several days of receiving FENOC's September 14<sup>th</sup> reply to the NRC's Notice of Violation, it was pointed out to the Region III DRP Branch Chief that the statement in question was inaccurate. According to the Branch Chief, the issue was then discussed with OE and it was decided to not address the issue in the NRC's acknowledgment letter. However, the letter was modified to indicate that Region III was reviewing the details of the associated corrective actions.

As a technical assistant to the Office of Investigations, I was tasked with identifying potential violations based on information disclosed during the ongoing Davis-Besse investigation. It was in that capacity that this concern was identified. Knowing that no other member of the NRC staff had the detailed knowledge of the reports referenced in FENOC's reply, I documented the potential violation to OI's Region III Field Office Director.<sup>27</sup> My point in documenting this issue was not to challenge FENOC's denial of the violation, but to point out the apparent inadequacy in their corrective actions. Specifically, FENOC's process to validate submittals to the NRC appeared to be inadequate because the statement in question was false. The issue to be resolved was whether the inadequacy was because of a flaw in the procedure or because the procedure was not followed.

As a result, an allegation review board directed the Davis-Besse Resident Inspector to review the associated validation package and interview FENOC personnel involved in the reply. This effort initially concluded that the statement in question was inaccurate, resulting in a 50.9 violation, and that FENOC had not followed their validation procedure, resulting in an Appendix B, Criterion V violation.<sup>28</sup>

As a result of the Resident Inspector's reviews, a FENOC attorney apparently called OGC in March 2006 and questioned the basis for Region III's above inspection. The attorney followed-up by sending a letter to OGC with a recap of FENOC's position regarding their initial response to violation 1.E, "in an attempt to resolve an emerging

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<sup>27</sup>Memorandum R. Paul to K. O'Brien, "Referral of Potential 10 CFR 50.9 Violation at Davis-Besse," dated November 18, 2005. Contained in Allegation File RIII-05-A-0105.

<sup>28</sup> Memorandum C. Lipa, to J. Heller Review of Allegation RIII-05-A-0105 (Davis-Besse), dated February 28, 2006.

issue reflected in a series of questions posed by NRC Region III...<sup>29</sup> Afterward, OE and OGC took the position that the statement in question was not material and consequently there could be no 50.9 violation. This, in turn, negated the Criterion V violation, since the failure to follow procedures did not cause a 50.9 violation. In addition, it was OE's position that since FENOC's corrective actions for the 50.9 violation did not relate to a structure, system or component, there could be no violation of 10 CFR 50, Appendix B, Criteria XVI, Corrective Action.

The above letter contained a paragraph discussing conversations that occurred between the FENOC attorney and OGC prior to the initial denial of violation 1.E. The extent of the discussion in the letter indicated that this was more than a brief conversation. The letter also indicated some coordination between OGC and OE with respect to FENOC's reply. By being pre-conditioned with FENOC's perspective on their response, OGC's recent conclusion, regarding the lack of materiality for the statement in question, may have been made with respect to the legalities of the initial violation denial and not with respect to the adequacy of the licensee's corrective actions. In this regard, both OGC's and OE's recent responses to this issue may have been made with prejudice.

Based on the above, OE issued a letter responding to FENOC's attorney, stating that the NRC's inspections associated with the response to Violation 1.E did not identify any violations or concerns.<sup>30</sup>

As a closing comment, it is disturbing to note that the FENOC attorney's original letter, trying to resolve issues in an ongoing Region III inspection, was not made a publicly available document. This appears inconsistent with the NRC's adherence to the principle of Openness, in that, the public was not informed of this apparent attempt to influence NRC decisions. This has the appearance of impropriety and is comparable to FENOC's actions during the Bulletin 2001-01 responses where an attorney representing FENOC arranged for presentations to be made to the Commissioners' Technical Assistants on their bases for not shutting down to perform the nozzle inspections.

#### Agency Actions Needed to Correct the Current Situation

- 1) Issue a Notice of Violation to FENOC for the inaccurate information in their September 14, 2005 reply to the NRC. The NOV should also cite inadequate corrective actions from FENOC's initial 50.9 violation..
- 2) Initiate an investigation into the circumstances surrounding FENOC's submission of the September 14<sup>th</sup> letter to determine if the inaccurate information was wilfully provided.
- 3) Initiate a self-assessment of the NRC's lack of regulatory action in this matter to identify programmatic or organizations changes needed prevent this from occurring in

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<sup>29</sup> Letter J. Gutierrez to L. Chandler, Summary of Inspection Activities Related on FENOC's Response to Violation 1.E, dated March 8, 2006 (ML060750675 (non-publicly available))

<sup>30</sup> Letter from M. Johnson to J. Gutierrez dated April 4, 2006 (ML060950104)

the future.