NRC FORM 690 (11-2002) NRCMD 10.159

U.S. NUCLEAR REGULATORY COMMISSION

DIFFERING PROFESSIONAL OPINION -- APPEAL

FOR PROCESSING USE ONLY

1. DPO CASE NUMBER: DPO-2006-004

INSTRUCTIONS: *Prepare this form legibly and submit three copies to the address provided in Block 12 below.*

2. DATE APPEAL RECEIVED: 1/18/2007

3. NAME OF SUBMITTER	4. POSITION TITLE	5. GRADE
James A. Gavula	Senior Reactor Inspector	14

6. OFFICE/DIVISION/BRANCH/SECTION	7. BUILDING	8. MAIL STOP	9. SUPERVISOR
RIII:OI			Rich Paul

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

See attachment

11. DESCRIBE YOUR REASONS FOR SUBMITTING AN APPEAL (IN ACCORDANCE WITH THE GUIDANCE PRESENTED IN NRC MANAGEMENT DIRECTIVE 10.159). *(Continue on Page 2 or 3 as necessary.)*

See attachment.

SIGNATURE OF SUBMITTER	DATE	SIGNATURE OF CO-SUBMITTER *(if any)*	DATE
James A. Gavula	1/18/07		

12. SUBMIT THIS FORM TO:

Differing Professional Opinions Program Manager

Office of: Renee Pedersen

Mail Stop: OWFN 14E1

13. ACKNOWLEDGMENT

13. SIGNATURE OF DIFFERING PROFESSIONAL OPINIONS PROGRAM MANAGER (DPOPM)	DATE OF ACKNOWLEDGMENT
Renee Pedersen	1/25/2007

14. DECISION

		DATE
☐ Appeal sustained ☐ Appeal denied (see attached)	Differing Professional Opinion Closed	

January 18, 2007

MEMORANDUM TO: Luis A. Reyes
Executive Director for Operations

FROM: James A. Gavula, Senior Reactor Inspector
Division of Reactor Safety, Region III

SUBJECT: APPEAL FOR DIFFERING PROFESSIONAL OPINION DECISION REGARDING DAVIS-BESSE"S SEPTEMBER 14, 2006, REPLY TO A NOTICE OF VIOLATION (DPO-2006-004)

This is to document my appeal of the Office of Enforcement Director's Decision, dated December 18, 2006, for DPO-2006-004.

In its simplest terms, this issue can be viewed as follows:

> In response to a Level I violation for providing inaccurate information, FENOC personnel falsely claimed they had previously provided reports to the NRC, which more fully explained their reasons for denying this violation[1]. After detailed reviews of documentation and discussions with FENOC personnel, Region III inspectors verified that this statement was false, and that FENOC personnel had not followed their "NRC Communication" procedure[2], which ironically had been revised as a result of the original Level I violation for providing inaccurate information.
>
> However, while Region III inspectors were performing their reviews, an attorney representing FENOC called an NRC attorney in OGC and subsequently sent him a letter,[3] "...in an attempt to resolve an emerging issue reflected in a series of questions posed by NRC Region III inspectors...." Although the Region III inspectors had initially proposed new violations for inaccurate information and for failure to follow procedures, these violations were subsequently dropped because OGC and OE said the false statement was not considered material to the NRC[4]. The Office Director for OE then issued a letter to FENOC's attorney informing him that Region III's inspection "did not identify any additional violations or concerns."[5]
>
> Although I openly and vigorously argued the need for the NRC to take some type of regulatory action against FENOC during this time, none was taken. After OE issued the letter to FENOC's attorney, I filed a Differing Professional Opinion, again arguing that some type of regulatory action should be taken. However, the DPO panel concluded that OE and OGC still did not consider the statement to be material, and no regulatory action needed to be taken against FENOC.

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[1] See DPO Reference 14

[2] See DPO Reference 16

[3] See DPO Reference 31

[4] See DPO Reference 17

[5] See DPO Reference 18

If the NRC has learned anything from Davis-Besse's head degradation event, and if the agency has improved its regulatory effectiveness since the Davis-Besse head degradation event, and if the staff hopes to increase the level of public confidence shaken by the Davis-Besse head degradation event, then this decision will be overturned. To allow this decision to stand is to condone both FENOC's failure to change its corporate culture, and the NRC's failure to effectively regulate.

Do not be misled by your advisors that the statement was not material, since it could not have influenced the agency's decision. I am disappointed that this concept is coming from the NRC's legal staff, because it would be far more understandable had it come from the licensee's staff. FENOC attempted to use this logic as the basis for denying the violation, by stating that when considered together with the whole of the information, the statements in their Bulletin responses were not materially inaccurate. However, the staff rejected this approach and responded that all the violations were well founded. Yet, now, the NRC staff claims the statement was not material on the same basis as the licensee claimed in denying the violation. This misconception of materiality has been repeatedly tested by defense attorneys in the United States courts and it has been repeatedly rejected.

According to Management Directive 10.159(E)(1), my appeal of the Office Director's decision should focus on its perceived procedural and technical weaknesses. To that end, the following items are noted in three areas, with no order of importance.

A) <u>The following administrative deficiencies were noted in the DPO process:</u>

1) Contrary to DPO handbook 4(c)(ii), a third panel member was <u>not</u> chosen by the ad hoc panel chairperson from the list of three potential panel members submitted by the employee filing the DPO. **(Major Deficiency*** See definition below.)

   As I noted in my June 7, 2006, email to the DPOPM regarding the unavailability of my three proposed panel members, "...it is more important that someone with sufficient influence, who has personally lived through the Davis-Besse incident, be included on the panel." Later, in my June 28, 2006 email, I noted: "...they bring with them the experience of having lived through the Davis-Besse incident and would be able to review the issue in that context. If a person hasn't lived through the history, then they are much less likely to have learned from history. Historical performance is specifically considered in the agency's enforcement policy with respect to civil penalties. The distinction to be made in this case is the difference between reading about history versus living through it. I believe the proposed panel members listed on my DPO are knowledgeable and will provide an independent review of the issues." However, apparently because of DPO timeliness constraints, none of my proposed panel members were chosen. Although I did not reject the panel member proposed by the DPOPM, I never endorsed the panel member.

2) Contrary to DPO handbook 4(c)(iii), a fourth panel member was not chosen by the DOE even though the subject involved an enforcement issue. **(Minor Deficiency*** See definition below.)

   From a process perspective, it would be clearer if there was documentation on why the guidance in the handbook was not followed.

3) Contrary to DPO handbook 4(e), after the initial meeting on July 25. 2006, the panel did not have any "periodic discussions with the submitter...to provide the

submitter the opportunity to clarify his or her views and to facilitate the exchange of information." **(Major Deficiency)**

I received two emails on the same day from the DPO panel after the initial meeting. One was to get my approval of the "Statement of Concerns,"[6] and the other was to transmit a timeline which was apparently never used. I had to revise the statement of concerns because it failed to capture all of my issues. I received no feedback from the panel after this initial failure to understand my concerns. This same deficiency exists in the DPO panel's final report, in that, all of my concerns were not addressed even though they were incorporated in the revised statement of concerns. If "periodic discussions" had occurred, then perhaps the DPO panel would have addressed all of my concerns, instead of summarily dismissing two of them.

4) Contrary to DPO handbook 5(a), since the final DPO Report was not revised, the management decision was not provided within 10 calendar days after receipt of the panel's final report. **(Minor Deficiency)**

No further discussion required.

5) Contrary to EDO's memo to Johnson, dated August 18, 2006, based on the DPOPM's email justifying the new timeliness goals, OE did not submit to the EDO an extension request for the timeliness goals in accordance with the Management Directive 10.159. **(Minor Deficiency)**

No further discussion required.

6) Contrary to the timeliness goals established in Appendix G of DPO Program 2005 Program Review, the DPO decision was neither issued within 38 calendar days of the DPO report nor within 190 calendar days of the DPO's acceptance. **(Minor Deficiency)**

No further discussion required.

B) <u>The following administrative deficiencies were noted in the DPO Panel Report:</u>

1) Incorrect date of licensee's response on page 4. **(Minor Deficiency)**

No further discussion required.

2) Incorrect date DPO panel met with submitter on page 1 **(Minor Deficiency)**

No further discussion required.

3) Misquoted OE Director's April 4, 2006, statement to FENOC's attorney on page 3. **(Major Deficiency)**

This item goes along with A(3) above and C(1) below. I specifically quoted this statement by the OE Director, when I commented on my revision of the DPO

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[6] Email from M. Tchiltz to J. Gavula dated August 1, 2006

panel's initial "Statement of Concerns."[7] Yet, the DPO panel curiously excluded the phrase "or concerns" from the OD's statement in their final report. Apparently, the panel intended to avoid my concerns by failing to include this phrase.

4) ADAMS Profile for DPO Panel report gives incorrect date. **(Minor Deficiency)**

No further discussion required.

C) The following technical deficiencies were noted in the OD's decision.

1) The OD's decision only specifically addressed one of the three issues raised in the DPO. **Major Deficiency.**

This was noted in my November 2, 2006, email to the DPOPM[8]; however, the points discussed therein were neither acknowledged nor addressed in the OD's decision. After addressing my first concern, the DPO Panel summarily dismissed my other two issues by stating: "Given the Panel's conclusions concerning the reply to violation 1.E, the submitter's other contentions and his request for other actions are moot."

One of my other contentions dealt with FENOC's failure to comply with their "NRC Communication" Procedure by not verifying each statement of fact in their response. OE's initial determination was that there could be no procedure violation or corrective action violation since the procedure did not pertain to a structure, system or component. If this was a valid determination, then I questioned the basis for the NRC MC0350 Panel's closure of Restart Checklist Item 3.I, "Process for Ensuring Completeness and Accuracy of Required Records and Submittals to the NRC." As clearly noted in my DPO, the basis for closing this item was FENOC's compliance with its "NRC Communication" Procedure. If the agency's position is that failure to comply with that procedure is not a regulatory concern, then the basis for closing this item by the MC0350 Panel is invalid and needs to be redone. This concern cannot be dismissed based on the DPO Panel's lack of materiality determination.

*My other contention specifically referred to the OE Director's April 4, 2006 statement to the FENOC attorney, that our recently concluded inspection "...did not identify any additional violations **or concerns.**" [emphasis added] Since the OE Director distinguished between violations and concerns, I expected the DPO Panel to evaluate this. The agency's enforcement tools include regulatory items or concerns which are not violations . If there was no violation, then perhaps there was a deviation, in that, FENOC had committed to comply with their "NRC Communication" Procedure as part of their corrective actions to prevent recurrence. However, the DPO Panel summarily dismissed this concern even though I specifically pointed out that the issue pertained to concerns and not violations.*

2) The OD's decision failed to address the Region III Allegation Closure Information (DPO Ref. 17) which stated that there was "no procedure violation, even though

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[7] Email from J. Gavula to M. Tschiltz, dated August 2, 2006.

[8] Email J.Gavula to R. Pedersen, dated November 2, 2006.

the procedure did not ensure accurate info[rmation] provided to NRC, because, at most it would be minor since the info[rmation] was not material." **(Major Deficiency.)**

It appears that the official record that closed the associated allegation stated there was a minor violation associated with FENOC's response to the NRC. According to the Enforcement Manual, minor violations are below the significance of Severity Level IV violations and are typically not the subject of enforcement action. Nevertheless, the root cause(s) of minor violations must be identified and appropriate corrective action(s) must be taken to prevent recurrence.[9] Based on the available documentation, this was not done. In any event, a minor violation is still a violation. As a minimum, the documentation needs to be reconciled for this aspect.

3) The OD's decision failed to address the Region III Allegation Closure Information (DPO Ref. 17) that stated there was "no crit XVI violation since, although a very important 0350 related process, it is not related to an SSC, therefore Crit XVI does not apply." **(Major Deficiency)**

This is related to Item C(1) above, except that the official record that closed the associated allegation stated that the process to ensure accurate information would be provided to the NRC was a very important 0350 related process. If FENOC's failure to ensure the accuracy of the information was not considered a concern by the OE Director, then as a minimum, the documentation needs to be reconciled to note that this process was <u>not</u> important.

4) The OD's decision relied on an obtuse basis for determining materiality. **(Major Deficiency.**

This was also noted in my November 2, 2006, email to the DPODM[10]; however the points discussed therein were neither acknowledged nor addressed in the OD's decision. With respect to "materiality," the criminal courts, which have a higher burden of proof than the NRC's civil enforcement, have stated the following:

...the test for materiality concerns "the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." United States v. Goldfine, 538 F.2d 815, 820-821 (9th Cir. 1976). Thus, the fact that the victim discovers the truth after the false statement is made, or knows about it in advance, generally does not make the statement any less material. See, e.g., United States v. Johnson, 139 F.3d 1359, 1364 (11th Cir. 1998), cert. denied, 119 S. Ct. 2365 (1999); United States v. LeMaster, 54 F.3d 1224, 1230-1231 (6th Cir. 1995), cert. denied, 516 U.S. 1043 (1996); United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987) (citing cases).

The rationale provided by the DPO Panel that the statement was not material appears to be that FENOC informed the NRC that their response "would be worded in a manner that would avoid compromising FENOC's position..." in the criminal case. FENOC could have accomplished this without lying. They could

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[9]Enforcement Manual page 1-3

[10]Email J. Gavula to R. Pedersen, dated November 2, 2006.

have admitted that incomplete and/or inaccurate information was provided, but that it was not done willfully. However, FENOC chose to completely deny that there was any violation of 50.9 and lied by stating that their "reasons for denying the violation are more fully explained in its several reports and reviews previously provided to the NRC."

The statement in question was material to the NRC.

The NRC Enforcement Manual, 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 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."*[11]

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."*

[11] See DPO Reference 20.

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. However, the DPO Panel failed to consider this aspect in determining the materiality of the statement.

The DPO Panel's report stated:

> *"Because OE and OGC were fully aware of the factual and legal backdrop against which FENOC replied to the Notice, they did not view the information provided in violation 1.E as material."*

The staff's awareness of FENOC's pending criminal prosecution should not influence whether complete and accurate information is provided in a response to a notice of violation. FENOC specifically stated that their response would not address the willfulness aspect of the violations and thereby would not have compromised its position with DOJ. As illustrated by abundant case law, prior knowledge of the agency <u>does not</u> affect the materiality of the statement. The DPO panel, similar to the OE & OGC's original determination, mistakenly viewed the materiality of the information as whether it actually influenced the agency's decision instead of whether is was capable of influencing the agency decision maker. It is surprising that OE, OGC and now the DPO panel are using arguments typically employed by defense attorneys as the basis for materiality, since these arguments have been repeatedly rejected by the courts.

5) The OD's decision did not reconcile the deficiencies in the NRC's enforcement policy that the acceptance of the DPO Panel's Report introduced. Specifically, the Panel's Report stated that FENOC's response "was not being offered to seriously dispute the facts set forth in violation 1.E or to influence the agency's conclusions regarding the validity of this violation." **(Major Deficiency)**

I find it difficult to imagine that the Panel actually made the above statement and that the OE Director did not have a problem with it. FENOC's response was to a Level I violation with a $120,000 civil penalty for lying to the NRC. FENOC's response was submitted under oath, where, as noted in RIS 2001-018, "[t]he primary purpose of oath or affirmation is to heighten the signer's awareness of the legal obligation to tell the truth." I can think of very few more serious situations where it would be more important to tell the truth, and yet, by arbitrary attributions, the DPO Panel rationalized that it was acceptable to again lie to the NRC.

6) The OD's decision was based on interviews of only headquarters personnel and did not include Region III personnel, who according to the agency's Enforcement Manual were responsible for evaluating the adequacy of FENOC's response to the Notice of Violation. **(Major Deficiency)**

The DPO Panel implied that OE was the decision maker in this instance. This is inconsistent with NRC Enforcement Manual, Section 5.6.7, "Licensee Response to Civil Penalty," which states:

> *"If the licensee denies the violation...but pays the civil penalty,* ***the region*** *[emphasis added] is to 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."

Therefore, the region was to determine the validity of the licensee's response. The DPO Panel's failure to interview the regional personnel who were responsible for reviewing FENOC's response was a significant deficiency. In that regard, neither OE nor OGC personnel had any knowledge of the specific reports referenced by FENOC in their NOV response, and therefore, could not review the licensee's points of contention. Furthermore, how can OGC determine materiality when they aren't determining the adequacy of a licensee's response? How do they know whether the information influenced or could have influenced the decision? Since the technical reviewers are the decision makers they should have been considered during the DPO process.

*Minor Deficiency:	Likely would not have changed the OD's decision or recommendations. However, should be addressed as a lessons-learned for future DPOs, .or should be corrected to ensure accuracy of current DPO.
*Major Deficiency:	Likely would have changed the OD's decision or recommendations. Should be specifically addressed by OD and addressed as a lessons-learned for future DPO's or revisions to the DPO process.

Conclusion

Arguably, one of the contributors to the Davis-Besse incident was FENOC's failure to provide complete and accurate information to the NRC for Bulletin 2001-01. After investigating, the GAO was very critical of the NRC regarding the Davis-Besse incident, and in response, the NRC's main defense was that FENOC had not provided complete and accurate information. However, the NRC has now failed to take any enforcement action, even though the statement was false and FENOC failed to follow their newly revised procedure for ensuring the statement was true, because the NRC's legal staff considered the statement to not be material. Was the statement as critical as those in FENOC's Bulletin response? No, but that does not mean it wasn't a violation, or that their corrective actions weren't adequate.

As stated on the NRC's Web Page under How We Regulate,

> "...enforcement action is used as a deterrent to emphasize the importance of compliance with regulatory requirements and to encourage prompt identification and prompt, comprehensive correction of violations."

As Mr. Lochbaum recently noted in a presentation to NRC staff, the regulations are adequate, but the NRC has not adequately enforced these regulations. Hopefully, this situation will not become another example for Mr. Lochbaum to cite.