

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

1. DPO CASE NUMBER: **DPO-2008-002**  
 2. DATE RECEIVED: **10/16/2008**

3. NAME OF SUBMITTER <b>James A. Gavula</b>	4. POSITION TITLE <b>Senior Reactor Inspector</b>	5. GRADE <b>14</b>
6. OFFICE/DIVISION/BRANCH/SECTION <b>RH:OI</b>	7. BUILDING	8. MAIL STOP
		9. SUPERVISOR <b>Scott Langan</b>

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.)

**FENOC's May 2, 2007 response to an NRC's Request for Information was materially incomplete, and violated 10CFR50.9, "Completeness and Accuracy of Information." Although the NRC's preceding letter specifically requested any assessment of the Exponent Report, FENOC did not provide a consultant's assessment of the Exponent Report that they had received prior to the NRC's request.**

**The above concern was initially documented in the NRC's allegation system as RH-2007-A-0046. The initial Allegation Review Board (ARB), concluded that the document was not an assessment of the Exponent Report and consequently was not required to be provided to the NRC. Additional details were then provided to the NRC staff, reiterating the above concern. A subsequent ARB recommended the allegation remain closed, because there was no new information that would alter the initial ARB's conclusion.**

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

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 <i>James A. Gavula</i>	DATE <b>10/15/08</b>	SIGNATURE OF CO-SUBMITTER (if any)	DATE
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13. PROPOSED PANEL MEMBERS ARE (in priority order): 1. <b>Steve Reynolds</b> 2. <b>Thomas Kozak</b> 3. <b>Christine Lipa</b>	14. Submit this form to: Differing Professional Opinions Program Manager Office of: _____ Mail Stop: _____
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**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) <i>Renee Pedersen</i>	
	PRE-CONDITIONS MET <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	DATE OF ACKNOWLEDGMENT <b>10/22/2008</b>

**DIFFERING PROFESSIONAL OPINION  
(Continued)**

CONTINUE ITEM 10, ITEM 11, AND/OR ITEM 12 FROM PAGE 1. (Indicate the block number to which this information applies.)

**Deep Background**

In March 2002, FENOC personnel identified significant degradation of the Davis-Besse reactor vessel head. The NRC implemented a Manual Chapter 0350 Oversight Panel and devoted significant inspection resources to review numerous concerns with FENOC's performance. Following extensive reviews and corrective actions by FENOC, Davis-Besse resumed operation in March 2004, after receiving restart approval from the NRC.

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. In April 2005, the NRC issued a \$5,450,000 Civil Penalty to FENOC with nine enforcement actions, including four violations of 10 CFR 50.9, for incomplete and inaccurate information.

In responding to the violations, FENOC described actions they had taken to prevent recurrence of the 10CFR 50.9 violations. One of these corrective actions revised the site's "NRC Communications," procedure to include a detailed methodology for verifying information in submittals to the NRC. FENOC's response also noted that the NRC had recognized and accepted the adequacy and effectiveness of the corrective actions, as documented in NRC's restart approval. It is the adequacy and effectiveness of FENOC's corrective actions that are at issue, based on the concerns identified herein for additional 10 CFR 50.9 violations.

**Background**

Sometime after the head degradation event, FENOC filed an insurance claim in an attempt to recover some of the associated costs. In response to questions posed by their insurer, FENOC hired a consultant (Exponent Failure Analysis Associates) to show that the head degradation event met certain criteria, justifying their multi-million dollar insurance claim. The consultant's report attempted to establish technical bases showing the degradation was a "sudden, event of the moment," and an "event that happened by chance, was unexpected and unforeseeable."

To demonstrate this, Exponent provided analyses showing that the crack in the nozzle grew faster, which allowed boric acid to leak quicker, which caused more rapid corrosion than had previously been assumed. Using these analyses Exponent concluded that detectable nozzle leakage had not occurred until after the last opportunity to inspect the head in 2000.

However, the time line proposed in FENOC's insurance claim differed by more than four years with the time line documented in FENOC's 2002 root cause report for the head degradation event. Although FENOC apparently saw no need to share this conflicting information with the NRC, the insurer viewed Exponent's evaluation as a potential safety issue and urged its consideration, as such. Eventually, in early 2007, FENOC provided copies of Exponent's report to the NRC, which resulted in a series of questions being posed to FENOC.

After several informal discussions, Region III's Regional Administrator eventually issued a letter on April 2, 2007, asking FENOC for additional information about Exponent's report. Item 1 from this letter stated: "Provide your perspective on the overall conclusions and assumptions in the Exponent Report, as well as any assessments or interpretations of the Exponent Report provided to you by others and your response(s) thereto."

In their May 2nd response to the above request regarding any assessments, FENOC noted that Exponent's report had been provided to the Nuclear Energy Institute in order to assess current inspection guidance in light of the report's conclusions. FENOC's response continued by stating that the results of this assessment were expected in several weeks and that further assessments and interpretations of the report would probably occur. There was no further discussion or mention of any other assessments in FENOC's response.

**Issue Details**

However, FENOC's May 2nd response failed to comply with 10 CFR 50.9, in that, an assessment of Exponent's report had been sent via email to multiple individuals at FENOC on March 29, 2007. The indications of the document's subject were the following:

## DIFFERING PROFESSIONAL OPINION (Continued)

CONTINUE ITEM 10, ITEM 11, AND/OR ITEM 12 FROM PAGE 1. (Indicate the block number to which this information applies.)

- The email's subject was listed as "Assessment of the Exponent report."
- The email's message stated, "Attached is a draft of my assessment."
- The email's attachment was listed as "Draft HJM Assessment of Exponent Report Disposition.doc."
- The title of the attached document was given as "Disposition of Exponent Report H. Miller Assessment."
- Within the body of the document, it stated "I assessed potential impact on...."

Based on the above, there is a prima facie case that the emailed document was an assessment of the Exponent report, was responsive to the NRC's April 2nd request, and therefore should have been provided to the NRC. However, FENOC did not provide the assessment and never revealed its existence to the NRC. All of the above information was separately provided to the NRC staff in the summer and again in the autumn of 2007. Both times, the information was reviewed by an Allegation Review Board, which concluded there was no violation of NRC requirements.

I disagree with the agency's lack of regulatory action for this situation.

### Regulatory Significance

The NRC previously applied escalated enforcement to FENOC's violations and civil penalties associated with incomplete and inaccurate information. FENOC took extensive corrective actions to prevent recurrence of these violations. Several FENOC employees involved in providing the incomplete and inaccurate information were found guilty in Federal Court for making false statements to the NRC. The recent request for additional information came from a Regional Administrator and pertained to a highly visible, potentially significant, ongoing technical issue. FENOC's response came from the Senior Vice President of Fleet Engineering. It would be difficult to assign any higher importance to this level of communication between the NRC and a licensee.

However, FENOC's corrective actions to prevent recurrence of providing incomplete information were apparently inadequate, in that, the revised procedures for validating information in submittals to the NRC were either not comprehensive or were not followed. Fortright and honest communication by FENOC would have dictated that the assessment be provided to the NRC. If there were any questions of relevance, then FENOC should have either openly discussed this with the staff or simply provided the assessment as a conservative measure. To do neither was wrong and indicative of comparable conduct that resulted in the prior violations, fines, and convictions.

By failing to acknowledge this problem, the NRC failed in its regulatory responsibility. The staff's inaction represents tacit approval of potentially deliberate action to withhold information specifically requested by a senior agency official. Failure to consistently enforce their regulations adversely affects the NRC's ability to protect the safety and health of the public, and sets an adverse legal precedent for current and future enforcement and criminal proceedings.

Furthermore, the after-the-fact argument, that the document did not need to be provided because it was not an assessment, were made, not by licensee personnel, but by the NRC staff. Not only does it appear to be acceptable to lie to the agency, but NRC managers and attorneys will apparently defend licensees that do.

### Required Action

Some type of regulatory action is needed. Although communication problems at this level of responsibility would dictate a cited violation, the violation could at least be considered minor, which would require disposition by the licensee's corrective action program. If FENOC chooses not to improve their communication process, then that would be their decision; but, for the NRC to not even make them aware of the problem, ensures communications will never improve.

The more critical action is to review the NRC's allegation process to determine why valid regulatory issues are being dismissed. The staff's rationalization of a licensee's untenable action gives the appearance of a loss of impartiality. The agency's inaction reinforces the perception of being in collusion with licensees and further erodes public confidence in the NRC's regulatory activities.