

May 15, 2009

MEMORANDUM TO: Mark A. Satorius, Regional Administrator

FROM: Anne T. Boland, Differing Professional Opinion (DPO) Panel Chair **/RA/**  
Steven A. Reynolds, DPO Panel Member **/RA by Anne Boland for/**  
R. Doug Starkey, DPO Panel Member **/RA by Anne Boland for/**

SUBJECT: DIFFERING PROFESSIONAL OPINION PANEL REPORT INVOLVING  
FENOC RESPONSE TO NRC REQUEST FOR INFORMATION (DPO-  
2008-002)

In a memorandum dated November 13, 2008, former Regional Administrator James Caldwell appointed us as members of a DPO Ad Hoc Review Panel (DPO Panel) to review a DPO. The DPO raises concerns that First Energy Nuclear Operating Company's (FENOC's) May 2, 2007, response to an NRC Request for Information (RFI) violated 10 CFR 50.9 in that it failed to provide information concerning a consultant's assessment of the Exponent Report, notwithstanding the NRC's request for any assessment of the Exponent Report provided to the licensee by others. The DPO Panel has reviewed the issues raised in accordance with the guidance in Management Directive 10.159, "The NRC Differing Professional Opinions Program."

The results of the DPO Panel's evaluation of the issues raised in the DPO are detailed in the enclosed DPO Panel Report. Based on our review, the DPO Panel concluded that the omission of the consultant's assessment from FENOC's May 2, 2007, response to the RFI did not constitute a violation of 10 CFR 50.9. However, the DPO Panel identified several recommendations associated with the implementation of the allegations process associated with this issue. The DPO Panel Report is enclosed for your consideration.

Please do not hesitate to contact us if you have any questions regarding the enclosed report.

Enclosure:  
DPO Panel Report

cc: DPO Submitter  
R. Pedersen, DVPM  
J. Heck, DVOL

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**\* Verbal approval received by Anne Boland 5/15/09**

OFFICE	RIII		RIII		RIII		RIII	
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DATE	05/15/09		05/15/09		05/15/09		05/15/09	

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**Differing Professional Opinion (DPO)  
Involving FENOC Response To NRC  
Request For Information  
(DPO-2008-002)**

**DPO Panel Report**

*/RA/*

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Anne T. Boland, Panel Chair

*/RA by Anne Boland for/*

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Steven A. Reynolds, Panel Member

*/RA by Anne Boland for/*

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R. Doug Starkey, Panel Member

May 15, 2009

Enclosure

## **Introduction**

On October 15, 2008, a staff member submitted a Differing Professional Opinion (DPO) which raised concerns regarding the completeness and accuracy of information submitted to the NRC by First Energy Nuclear Operating Company (FENOC) regarding the Exponent Report. On November 13, 2008, the former Region III Regional Administrator established the DPO Ad Hoc Review Panel (DPO Panel) to independently review the concern. Subsequently, on December 4, 2008, members of the DPO Panel met with submitter to establish a concise statement of the submitter's concern, and on December 11, 2008, the submitter approved the statement of the concern developed by the DPO Panel members.

For this effort, the DPO Panel performed its review of the concern through discussions with the submitter, conduct of interviews with involved members of the NRC, and review of relevant NRC and FENOC documentation and procedures.

## **Statement of Concern**

The submitter disagrees with the decisions of the July 16, 2007 and February 19, 2008, Allegation Review Boards (ARBs) relative to Concern 3 of Allegation Case No. RIII-2007-A-0046 (FENOC did not provide complete information in its May 2, 2007, response to an April 2, 2007, NRC Request for Information (RFI) letter in that a March 2007 consultant's assessment, entitled "Disposition of Exponent Report, H. Miller Assessment," was not provided to the NRC). The July 18, 2007, ARB concluded, and the February 19, 2008, ARB reaffirmed, the consultant's assessment was not an assessment or interpretation of the Exponent Report and thus was not required to be provided to the NRC as part of the May 2, 2007, FENOC response. Contrary to these conclusions, the submitter states that FENOC's May 2, 2007, response was materially incomplete and violated 10 CFR 50.9, "Completeness and Accuracy of Information," because FENOC did not provide the consultant's assessment of the Exponent Report that they had received prior to NRC's April 2, 2007, request.

## **Background**

In March 2007, the NRC staff became aware of the existence of a report which offered an alternate explanation for the timeline of the reactor vessel head wastage identified at FENOC's Davis Besse plant in 2002. The report, known as the Exponent Report, was commissioned by FENOC as part of its insurance claim for the costs associated with the Davis Besse head replacement and extended plant shutdown due to the head wastage event. Upon learning of the Exponent Report, the NRC staff was initially concerned that the report offered a much shorter timeline for the head wastage which was different from previous conclusions documented in the licensee's Root Cause Report. Ultimately, the staff was concerned with the impact the shorter timeline on the licensee's corrective actions, Davis Besse restart decisions, and the industry-wide reactor vessel head inspection program.

Based on the staff's concerns, on April 2, 2007, an RFI was sent to FENOC requesting specific information related to the Exponent Report. FENOC responded by letter dated May 2, 2007; however, based on continuing questions regarding the report's content, FENOC's handling of the report, and FENOC's position regarding the head wastage timeline, a Demand for Information (DFI) was issued on May 14, 2007. The DFI response was received on June 13, 2007, and a public meeting, chaired by the Deputy Executive Director for Reactor Programs and Preparedness was held on June 27, 2008. The Agency's action culminated with the issuance of a Confirmatory Order on August 15, 2007, which required FENOC to take a number of corrective

actions relative to safety culture at the corporate office and the handling of technical information in the corporate office. The staff's follow-up on the committed corrective actions is on-going.

### **Relevant Requirement**

10 CFR 50.9, Completeness and Accuracy of Information, states, in part, that information provided by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the licensee shall be complete and accurate in all material respects.

### **Evaluation**

Based on interviews of the staff involved and review of NRC and FENOC documentation, the DPO Panel established a timeline of events relevant to the issues raised by the DPO submitter. This timeline is provided as Appendix 1 to this report. The following discussion develops the facts and observations made by the DPO Panel during review of the concern.

The DPO submitter was detailed to the NRC Office of Investigations (OI) and the Department of Justice (DOJ) in support of the criminal case against FENOC associated with the head wastage event. During review of FENOC's response to the DFI, the DPO submitter identified a concern regarding the completeness and accuracy of FENOC's May 2, 2007, RFI response. Specifically, in response to Demand A of the DFI, FENOC quoted the perspective of an outside consultant which had been obtained by FENOC in March 2007 to provide an opinion to FENOC regarding (1) do the Exponent findings significantly change or impact the basis of the FENOC and NRC restart decisions, and (2) what, if any, reports should be made to NRC (such as revised root cause or licensee event reports) on the Exponent assessment. The DPO submitter questioned whether the consultant's assessment should have been included in FENOC's May 2, 2007, response to Question 1 of the April 2, 2007, RFI. Question 1 requested FENOC to "provide its 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 the licensee's May 2, 2007, RFI reply, FENOC discussed that the Exponent Report had been provided to the Nuclear Energy Institute and that an expert panel for the Materials Executive Oversight Group (MEOG) would be reviewing the report. The response further stated that since the matters discussed in the Exponent report are involved in the insurance arbitration and other litigation, there will be further assessments and interpretations to the report.

The DPO submitter provided the concern to the RIII Enforcement and Investigations Coordination Staff (EICS), and the issue was evaluated using the allegations process. The concern was provided to the Chief, Division of Reactor Projects (DRP), Branch 5, for review and development of a recommended resolution. The Senior Resident Inspector (SRI) was requested to coordinate with FENOC and review the consultant's report. The SRI interfaced with the licensee on two occasions and reviewed a document which was identified as "6/10 input on 3/30 hjm assessment rev1." The document was not copied or provided to the Region for their review. The SRI prepared a summary of the consultant's report which was submitted to the Branch Chief. The Branch Chief reviewed the summary and prepared the recommendation for presentation at the ARB. The Branch Chief concluded that the assessment was not a technical assessment and was, thus, not material to the NRC. The ARB agreed with the recommendation. The DPO submitter did not participate in the ARB due to restrictions imposed by the DOJ.

Upon learning of the ARB's decision, the DPO submitter, through DOJ, obtained a copy of the consultant's report. The copy of the consultant's report provided to DOJ indicated that the report was draft and had been transmitted to the licensee on March 29, 2007. The DPO submitter subsequently expressed dissatisfaction with the July 2007 ARB decision to EICS and requested reconsideration. Per the allegation process, the follow-up concern was forwarded to the DRP Branch chief for review. In a memorandum to EICS, the Branch Chief indicated that no new information had been provided by the DPO submitter and recommended re-evaluation by an ARB. A second ARB was conducted on February 19, 2008; however, the DPO Panel was unable to determine whether the Concern 3 was specifically discussed or the original decision reaffirmed. Subsequently, the Regional Council, in conjunction with the DRP Branch Chief, closed out the allegation file via a memorandum.

As part of the review of the DPO concern, the DPO Panel obtained documentation from FENOC regarding their verification and validation package for the May 2, 2007, RFI response, site procedures for preparation of correspondence to the NRC, the root cause report associated with the RFI and DFI responses, and selected correspondence between the consultant and the licensee on the Exponent Report. In addition, the DPO Panel reviewed the various versions of the consultant's report, including the final signed report which was dated June 7, 2007.

In the DPO Panel's view, at issue is the question - What was the staff seeking with respect to Question 1 of the April 2, 2007 and was the consultant's report relevant to the question being asked? During interviews, the DPO Panel asked those involved in the development of the April 2, 2007, RFI what they believed was the NRC's intent in asking Question 1. The consistent answer given during these interviews was that the staff was requesting from FENOC any technical assessment of the Exponent Report. Specifically, the staff was seeking to understand the technical basis for the conclusions presented in the Exponent Report. Interviewees stated, based on the characterization provided to them of the consultant's report, they concluded that it did not address the technical issues of the Exponent Report that the NRC was trying to understand. As such, even if FENOC had submitted the consultant's report in response to the RFI, it would not have been relevant to the outstanding technical question that the NRC had at the time regarding the Exponent Report. Several interviewees also indicated that although the consultant's report was not provided to the NRC in response to the RFI, the licensee did provide the information in response to the DFI. As such, the agency was ultimately provided the information for its consideration. The DPO Panel independently reviewed the various versions of the consultant's report and concluded that it did not include a technical assessment of the Exponent Report

The ARB concluded that the consultant's report was not material to the NRC. Due to the passage of time since these issues were reviewed by the ARB, recollection of the discussions which took place at the time were generally not recalled in detail. However, the staff present at the ARBs indicated during interviews that, at the time of the ARB, the Agency had concluded that the Davis Besse specific corrective actions (replacement of the reactor vessel head) and industry-wide corrective actions were adequate, regardless of the Exponent conclusions. As such, a detailed technical analysis of the Exponent Report was not needed to ensure safety. Therefore, opinions provided on the veracity of the Exponent Report would not have impacted an Agency decision and were not material in the context of 10 CFR 50.9.

## **Conclusion**

Based on the information gathered during this review, the DPO Panel concluded that the omission of the consultant's report from the May 2, 2007, FENOC response did not constitute a

violation of 10 CFR 50.9. The basis for this conclusion is that the consultant's report was not a technical assessment of the Exponent Report that the staff was seeking in the April 2, 2007, RFI and was not material to the NRC's decision making process relative to the determination of Davis Besse specific and industry wide corrective actions for the 2002 head wastage issue. In addition, the consultant's report was not finalized until June 7, 2007, after FENOC's May 2, 2007, response to the RFI.

The DPO Panel determined that throughout the communications with FENOC on the Exponent Report staff concern existed regarding how the utility dealt with, communicated, and handled the conclusions of the Exponent Report. These concerns were the basis for the issuance of a Confirmatory Order requiring specific corrective actions of FENOC. The staff did not articulate any specific issue which constituted a violation of 10 CFR 50.9. In the DPO Panel's view, the issuance of this Order and the verification that the licensee's corrective actions get to the root of the DPO submitter's concern, i.e., assurance that FENOC communicates openly with the NRC in a complete and accurate manner.

## **Observations**

In reviewing this issue, the DPO Panel had the following observations. The DPO Panel recognizes the allegation process was used as the vehicle to process the concerns raised by the DPO submitter, even though the concerns may not have met the definition of an allegation. However, the DPO Panel believes that if the allegation process is used to review, document, and store records associated with an issue, the rigor applied should be similar to issues which meet the definition of an allegation.

1. The DPO Panel found it difficult to reconstruct the discussions and decisions of the ARB due to the lack of detailed minutes of the ARB discussions.
2. The DRP Branch Chief and ARB members did not appear to handle the allegation raised by the DPO submitter with a sensitivity commensurate with the NRC's broader concerns regarding FENOC's handling of and communications associated with the Exponent Report. The NRC's senior management was concerned regarding FENOC's performance to the extent a Confirmatory Order was issued; however, the ARB record does not indicate that the implications of the DPO submitter's concerns were fully considered in this context.
3. The Branch Chief and members of the ARB did not review the consultant's report. A recommendation was formulated by the Branch Chief for the ARB without reading the consultant's report or without an independent assessment by the one individual (the SRI) who did review it.
4. The DPO Panel was unable to determine if the second ARB actually reviewed and discussed the issue raised by the DPO submitter. Although re-evaluation by the ARB was recommended by the responsible Branch Chief, ARB participants couldn't specifically recollect addressing the issue and ARB minutes did not document a review.
5. The DPO Panel identified one major inaccuracy in the ARB minutes, i.e., the incorrect statement that the SRI at Davis Besse had reviewed the consultant's report and determined that it was not an assessment of the Exponent Report. In fact, the SRI never provided an assessment of the Exponent Report. This is important because, in reading the ARB minutes, it would appear that the ARB's resolution of the concern was based entirely on the SRI's assessment, when in fact, the Branch Chief performed the assessment.
6. The disposition of the concern raised was complicated due to the role of the DPO

submitter in the criminal DOJ case. Communications were hampered due to the individual's inability to fully communicate with the staff. As such, there may not have been a common understanding of the basis for decision making relative to the concern.

## **Recommendations**

The following recommendations are offered for consideration:

1. The issue raised by the DPO submitter involved an enforcement issue. Once the ARB determines that wrongdoing is not apparent, these types of issues should be redirected to the enforcement process, e.g., an enforcement panel.
2. Unless it is not feasible to do so, the ARB should review the actual background documents involved in the concern being reviewed. In this case, the ARB relied solely on the SRI's review of the consultant's report with no independent assessment of the content or relevance of the information.
3. Additional scrutiny should be exercised on the content and accuracy of ARB documentation (e.g., the ARB chair and EICS representative, or others as appropriate, could be asked to review the ARB minutes and close-out actions to ensure that the minutes clearly and accurately reflect the actions taken by the ARB.) A number of errors and ambiguities were identified in the ARB minutes related to attendees, conclusions, and bases for ARB decision-making.

## **Appendices**

1. Timeline of Key Events
2. List of Documents Reviewed
3. List of Individuals Interviewed by the DPO Panel

## Timeline of Key Events

<u>DATE</u>	<u>ACTIVITY</u>
03/20/2007	Transmittal of the Exponent Report to the NRC.
03/9-22/2007	Conduct of Conference Calls with FENOC on the Exponent Report
03/29/2007	Draft "Assessment of the Exponent" submitted to licensee (corporate and site) by Hub Miller. The assessment attempted to answer two questions: (1) do Exponent findings significantly change or impact the basis of FENOC and NRC restart decisions, and (2) what, if any, reports should be made to the NRC on the Exponent assessment.
04/02/2007	RFI to FENOC which included a request for FENOC to provide information on the overall conclusions and assumptions in the Exponent Report as well as any assessments or interpretations of the Exponent Report provided to FENOC by others and FENOC's response thereto.
05/02/2007	FENOC's responded to RFI. In summary, FENOC responded to the question that they provided the report to NRC and NEI. NEI organized a review by an expert panel for the MEOG to assess current inspection guidance. The report summarizing the MEOG panel expected to be completed in mid-May.
05/14/2007	DFI issued to FENOC. The DFI included Demand A which required FENOC to submit a "detailed discussion of the process used, the specific information evaluated, and the conclusions reached as part of FENOC's assessment of the Exponent Report, upon receipt or subsequently, to determine if the Exponent report assumptions, analyses, conclusions, or other related information, should have been reported to the NRC in a prompt manner...."
06/07/2007	Hub Miller assessment is finalized, signed, and dated.
06/13/2007	FENOC provided response to NRC's Demand for Information. The response to Demand A (Page 9) included the following reference: "In the last week in March, FENOC obtained an opinion from an industry consultant with extensive regulatory experience on the issue of:...His conclusion for question (1) was the Exponent Report does not raise issues that would undercut the basis for NRC's restart approval.. Replacement of the reactor vessel head essentially eliminated this as an issues....His conclusion for question (2) was whether a supplemental LER is needed or not is a close call.....Supplementing the LER on a voluntary basis might be prudent to avoid questions on the matter...:
06/25/2007	OGC (Jones) forwarded concerns from DOJ regarding the accuracy of prior FENOC correspondence – Concern 3 involved the Hub Miller report.

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Concern 3 stated: 'FENOC's DFI response on Page 9 discussed their actions associated with the Exponent report and stated: In the last week of March, FENOC obtained an opinion from an industry consultant....' Based on the format of the letter, it appears that the consultant's conclusions were in writing. The NRC's April 2, 2007 RFI specifically asked FENOC to provide any assessment or interpretations of the Exponent Report provided to you by others and your responses (thereto). It would appear that FENOC did not provide complete information in their May 2, 2007 response to the RFI, in that, the assessment described in the DFI response was not provided to the NRC.

06/26/2007	EICS (Chyu) provides the allegation to DRP (Burgess).
06/27/2007	Public Meeting with FENOC held to discuss Exponent Report. As described in the August 7 <sup>th</sup> meeting minutes, NRC concerns were expressed and the licensee responded regarding their previous NRC responses on this issue and the need to improve their processes for preparing correspondence to the NRC.
07/12/2007	DRP (Burgess) prepared action plan for the 3 concerns and forwards to EICS.
07/12/2007	PDA document from SRI documenting his review of the Hub Miller report, specifically "6/10 input on 3/30 hjm assessment rev1." The document indicates that the Hub Miller assessment was reviewed "last month".
07/13/2007	EICS (Heller) schedules ARB for July 16 <sup>th</sup> .
07/16/2007	First ARB held on three concerns. The 3 <sup>rd</sup> concern stated that Page 9 of FENOC's DFI response stated that in late March, FENOC obtained the opinion from an industry consultant; however, this information was not provided in response to the April 2008 RFI. The ARB was chaired by West and attended by Heck, Heller, O'Brien, Burgess and Boland. The ARB package documented that the Davis Besse SRI interfaced with the licensee and ultimately reviewed the correspondence. The review determined that the information provided in the response to the DFI was consistent with the attachment to the Hub Miller's email. The review also determined that it did not contain any assessment or interpretation of the Exponent Report. Since the correspondence did not include an assessment or interpretation of the Exponent Report, it was not required to be [by] provided to the NRC as part of the May 2, 2007 RFI response. The ARB agreed with the recommendations "Based on the reviews of the correspondence (email from a contractor) by the SRI the correspondence as assessment or interpretation of the Exponent Report but rather a review of the NRC inspection process."

<u>DATE</u>	<u>ACTIVITY</u>
07/16/2007	FENOC submits supplemental DFI response to NRC as an outcome of the public meeting.
08/07/2007	Meeting Summary issued for the Public Meeting with FENOC.
08/15/2007	Confirmatory Order Issued – the order confirmed commitments by FENOC to improve its process for submitting regulatory documents, to conduct a root cause analysis of the need for the DFI, and to conduct training of staff on the importance of regulatory communications, among others.
08/28/2007	Consultant's report draft report with March 29 <sup>th</sup> email was provided to the OGC/DOJ.
12/18/2007	EICS received information from DPO submitter expressing concerns with the prior ARB. Regarding concern 3, the DPO Submitter indicates that he has reviewed the Hub Miller report and describes that it references "assessment" in various parts of the correspondence. He states: "It is utterly incomprehensible, that FENOC did not consider this document to be responsive to the NRC's April 2, 2007, RAI. It is even more incomprehensible that after reviewing this correspondence, the SRI could have determined that it did not contain an assessment of the Exponent Report. Either the SRI was not shown the above information or some is very radically wrong here." Information provided to DRP (Burgess) for evaluation).
01/30/2008	DRP provides analysis of additional information to EICS (Heller). Burgess indicates that he "did not identify any comments that could be construed as allegations....The majority of the comments appear to argue with the conclusions stated in the allegation closure memorandum regarding why the agency believes that the issues were not 50.9 issues."
02/19/2008	2 <sup>nd</sup> ARB reviewed concern 4. Information relative to concerns 1-3 were provided for information. ARB was chaired by Pederson, with Heck, Burgess, Heller, and Jones in attendance. The ARB minutes note that DPO Submitter may not participate due to his DOJ activities and actions were prescribed for closure documentation to be generated by Heck and Burgess. The ARB minutes further annotated that NRR did not perform a technical review of the report and the insurance claim had been dropped. No ARB conclusion regarding Concern 3 is documented.
02/20/2008	Draft closure letter provided to Heck from Burgess. Relative to concern 3, the memo stated: "To close this allegation, an independent review of the relevant information was conducted, specifically focusing on whether or not the information could be materially significant.....The allegation was closed after our review identified that no material false statements were substantiated...."
04/02/2008	Heck provides revised closure memo which states, relative to concern 3, "the ARB did not attempt to definitively establish whether those allegations were true, nor did it undertake a detailed evaluation of the accuracy of

statements made in the Exponent Report. Instead, the ARB concluded that the allegations, even if true, did not show that FENOC provided materially inaccurate or incomplete information in its DFI

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response....FENOC's DFI response was not considered materially incomplete or inaccurate because it was not necessary to the NRC's decision whether its existing vessel head inspection program remained sufficient, nor was it necessary in determining whether 'new or different corrective actions' were needed to address the technical root causes of the Davis Besse degradation event. Accordingly, with the agreement of OGC and OD, the ARB decided that pursuing enforcement action against FENOC under 50.9 was not warranted."

04/08/2008

Closure of Allegation Case file.

## **Listing of Documents Reviewed**

Allegation Case File No. RIII-2007-A-0046  
NRC Request for Information (RFI), dated April 2, 2007 (ML070930162)  
FENOC Response to RFI, dated May 2, 2007 (ML071290054)  
NRC Demand for Information (DFI), dated May 14, 2007 (ML071340325 and ML071340333)  
FENOC Response to DFI, dated June 13, 2007 (ML071640480)  
FENOC Supplemental Response to DFI, dated July 16, 2007 (ML073380233)  
Public Meeting Summary, dated August 7, 2007 (ML072070145)  
Confirmatory Order, dated August 15, 2007 (ML072260535)  
FENOC Verification and Validation Package for RFI Response  
Consultant's Report (various versions)  
CR07-224115, Root Cause Analysis Report, Evaluation of Response to May 2, 2007 DFI, dated August 20, 2007  
Nuclear Operating Administrative Procedure, NRC Correspondence Review and Approval Process, Dated June 2, 2004  
Procedure NG-RA-00804, NRC Communications, dated March 15, 2004

**Listing of Individuals Interviewed**

Mark Satorius, Regional Administrator

K. Steven West, Director, Division of Reactor Safety (DRS), Allegation Review Board (ARB) Chair

Cynthia Pederson, Director, Division of Reactor Projects (DRP), ARB Chair

Jared Heck, Regional Council

Eric Duncan, Chief, Plant Support Branch, DRS

David Hills, Chief, Engineering Branch 1, DRS

Kenneth O'Brien, Team Leader, Enforcement and Investigations Coordination Staff (EICS)

Bruce Burgess, Senior Construction Inspector, Region II

Geoffrey Wright, Senior Project Engineer, DRP

John Rukowski, Senior Resident Inspector, Davis Besse, DRP

James Heller, Senior Allegations Coordinator, EICS

DPO Submitter

