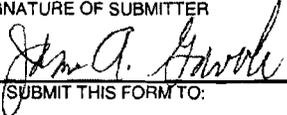
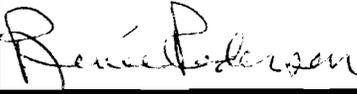


NRC FORM 690 (11-2002) NRCMD 10.159		U.S. NUCLEAR REGULATORY COMMISSION		FOR PROCESSING USE ONLY	
DIFFERING PROFESSIONAL OPINION -- APPEAL				1. DPO CASE NUMBER 2008-002	
INSTRUCTIONS: Prepare this form legibly and submit three copies to the address provided in Block 12 below.				2. DATE APPEAL RECEIVED	
3. NAME OF SUBMITTER James A. Gavula		4. POSITION TITLE Senior Reactor Inspector		5. GRADE 14	
6. OFFICE/DIVISION/BRANCH/SECTION RIII:OI		7. BUILDING OI	8. MAIL STOP OI	9. SUPERVISOR Scott Langan	
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 6/18/09	SIGNATURE OF CO-SUBMITTER (if any)		DATE
12. (SUBMIT THIS FORM TO: Differing Professional Opinions Program Manager Office of: Renee Pederson Mail Stop: OWFN 4A15A		13. ACKNOWLEDGMENT 13. SIGNATURE OF DIFFERING PROFESSIONAL OPINIONS PROGRAM MANAGER (DPOPM) 		DATE OF ACKNOWLEDGMENT 6/23/2009	
14. DECISION					
<input type="checkbox"/> Appeal sustained		<input type="checkbox"/> Appeal denied (see attached)		Differing Professional Opinion Closed	
				DATE	

June 18, 2009

MEMORANDUM TO: R. William Borchardt
Executive Director for Operations

FROM: 
James A. Gavula, Mechanical Engineer
Nuclear Reactor Regulation, Division of License Renewal

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

This is to document my appeal of the Region III, Regional Administrator's Decision, dated May 29, 2009, for DPO-2008-002.

First, let me apologize for causing additional resources to be expended on such a simple situation that should have been resolved at a much, much lower level. Although this simple situation appears to lack significant technical importance, it warrants your attention because of regulatory ramifications and potential public perception. If the agency cannot correctly resolve simple situations, then its ability to correctly resolve more complex situations is at question.

The Initial Concern

Simply put, this situation involves the agency's failure to enforce its regulations. In a letter dated April 2, 2007, Region III's Regional Administrator sent a request to FirstEnergy Nuclear Operating Company (FENOC) asking them, among other things, to "*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.*" [emphasis added] In their response dated May 2, 2007, FENOC failed to provide an assessment of the Exponent Report, which was specifically identified as such, and had been previously emailed on March 29, 2007, to various individuals at FENOC's corporate and site organizations.

I brought this concern to the attention of the Region III staff, and indicated that it was a potential violation of 10CFR50.9, "Completeness and Accuracy of Information." The Regional staff initially dismissed it by stating that the document in question was not an assessment of the Exponent Report, and FENOC's failure to provide the document was not material, because FENOC did not need to provide the document in response to the NRC's request. I then provided the report itself to the Region III staff, who again dismissed it, by now stating that no new details had been provided.

I filed a DPO, and the DPO panel's report stated that the NRC staff members involved in the request for information were seeking a technical assessment of the Exponent Report. Although the document in question was considered an assessment, it was not a technical assessment, and therefore, it was not material as required by 10CFR50.9. The Regional Administrator supported the DPO panel's conclusion.

Reasons for the Appeal

The fundamental basis for my appeal is the continuing mis-application of the term "material" in the context of a violation of 10CFR50.9.

As noted in the statements of consideration for 10CFR50.9, "*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.” In that regard, 10CFR50.9 states, “[i]nformation provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission’s regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.”

The statements of consideration also acknowledge the subjective nature of information, but then state “...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.” In this regard, FENOC apparently recognized the significance of the information when they artfully provided certain portions of the document in question in their subsequent response to the NRC’s Demand for Information. Instead of an assessment, FENOC characterized the document as an opinion. This was not accurate and forthright communication. The fact that FENOC eventually provide the information in response to the Demand for Information does not negate the violation in their initial response to the request for information; it establishes it.

According to NUREG-0386, “Practice & Procedure Digest,” Section 1.6.2, “Material False Statements,” “*Under Section 186a of the Atomic Energy Act, the test for materiality is whether the information is capable of influencing the decisionmaker, not whether the decisionmaker would, in fact, have relied on it.*” Since the NRC’s request specified “any assessments,” FENOC’s failure to provide the assessment of the Exponent Report was clearly capable of influencing the decisionmaker, and therefore was material. In this situation, the actual content of the assessment does not enter into the determination of being material.

While the DPO panel found that the NRC staff involved in the Request for Information *believed* a **technical** assessment of the Exponent Report was being sought, this curiosity has no bearing on the existence of a 50.9 violation. Unless that belief had been communicated to FENOC, the information being sought in the request was “any assessment” of the Exponent Report. The word “technical” appears **nowhere** in the NRC’s Request for Information, and there were no other modifiers associated with “any assessment.” For the DPO panel to use this rationale as the basis for not constituting a violation completely lacks merit. For the Regional Administrator to subsequently support the DPO panel’s findings is disturbing.

Closing

After working for more than six years with the Office of Investigations and the Department of Justice to investigate and prosecute individuals from Davis-Besse that lied to the NRC, I find it very discouraging that such a simple matter requires such extraordinary efforts to get it right. In January 2007, the NRC issued the “Inspector Newsletter” including “the red photo” of the Davis-Besse head with the admonition “that it takes focused and concerted effort...to ensure that safety issues are appropriately addressed.” In September 2008, NRC Commissioner Lyons dedicated a model of the Davis-Besse reactor vessel head gradation as a memorial to remind both the NRC staff and licensees “not only of the vulnerability of technology to degradation, but also to the vulnerability of people to complacency.” Not only has the NRC apparently become complacent, it now appears to consciously blind itself to a fundamental tenet that took the industry to the brink of a potential disaster in 2002.

The NRC has been variously criticized by the General Accounting Office and Union of Concerned Scientists for failing to enforce its regulations. This is another example. The public can readily conclude that instead of requiring licensees to defend their actions to the NRC, the NRC will defend licensees’ mistakes or misdeeds in an effort to maintain the status quo.

As I stated in my initial documentation for this issue, and reiterated in my DPO, and re-emphasized to the Regional Administrator, my concern is with the adequacy of FENOC’s corrective actions to ensure they provide complete and accurate information in submittals to the NRC. This corrective action

resulted from the NRC's Level 1 violation of 10CFR50.9. Either FENOC's process for ensuring completeness and accuracy is insufficient or FENOC is not following their process. Since the discovery of the head degradation:

- FENOC provided incomplete and inaccurate information in its root cause report
- FENOC provided incomplete and inaccurate information in its initial response to the Notice of Violation for incomplete and inaccurate information in their responses to Bulletin 2001-01.
- FENOC provided incomplete and inaccurate information in its revised response to the Notice of Violation for incomplete and inaccurate information in their responses to Bulletin 2001-01.
- FENOC provided incomplete and inaccurate information in its portrayal of their insurance claim by withholding the Mattson portion of the effort.
- FENOC provided incomplete information in responding to Region III's request for additional information concerning the Exponent Report.

In every instance, when the situation was brought to NRC management's attention, the agency chose to hide behind the definition of materiality with respect to continuing violations of 50.9, instead of asking the licensee to demonstrate that their corrective actions were adequate.

The Regional Administrator's decision noted that the NRC's Confirmatory Order required FENOC to address many of the questions regarding the adequacy of its processes for communicating with the NRC. However, FENOC's root cause for this issue did not identify this concern, and FENOC's corrective actions were focused on "commercial" reports that needed to be considered from a safety perspective. The Regional Administrator acknowledged that FENOC's root cause report did not identify this concern, yet he "believes" that "the Confirmatory Order was very effective in that regard, and achieved corrective actions that would have been expected had a violation of 10CFR50.9 occurred." If the problem has not been identified, how can it be fixed?

If this decision is not overturned it will have a continued chilling effect on the staff's willingness to point out materially incomplete or inaccurate information. Other regional inspectors have told me, they would no longer waste their time with 50.9 violations, because management chooses to ignore egregious examples under the guise of not being material to the NRC. This is yet another example.

The staff's willingness to use the DPO process depends on whether their effort makes a difference. Having a process that allows this approach is only effective if it is perceived to not be a waste of time. As robust as the program may appear, it is a complete facade if it makes no difference. Hearing what is being said is not listening to what is being said. Management appears to be extremely reluctant to admit that a past decision was wrong. In doing so, their credibility continues to erode.

During my involvement with the Davis-Besse case, there were two types of individuals: those that did something wrong, and those that didn't do something right. Both types of individuals received enforcement action from the NRC as well as prosecutorial letters from the DOJ. If I fail to use every available means to do the right thing, then I would join the same league as those with whom I am taking issue. I have witnessed a senior manager admonish an inspector for not bringing an issue to his attention. When the inspector replied that the manager had attended the presentation that he, the inspector, had given at the annual inspector seminar, the manager replied, "Why didn't you make me understand how important the issue was?" I don't know what else to do to make the agency understand the importance of this issue.