

## **DPO Case File for DPO-2010-001 (Public)**

The following .pdf represents a collection of documents associated with the submittal and disposition of a differing professional opinion (DPO) from four employees from the Office of Nuclear Materials, Security and Safeguards (NMSS) about whether an environmental assessment is necessary to support an exemption request from a requirement in 10 CFR 74.59(d)(1) submitted by Nuclear Fuel Services. The employees do not agree with the interpretation presented by attorneys from the Office of the General Counsel (OGC) on the interpretation of the categorical exclusions in Part 51.

Management Directive (MD) 10.159, "The NRC Differing Professional Opinions Program," dated May 16, 2004, describes the DPO Program.

<http://pbadupws.nrc.gov/docs/ML0417/ML041770431.pdf>

The DPO Program is a formal process that allows employees and NRC contractors to have their differing views on established, mission-related issues considered by the highest level managers in their organizations, i.e., Office Directors and Regional Administrators. The process also provides managers with an independent, three-person review of the issue (one person chosen by the employee). After a decision is issued to an employee, he or she may appeal the decision to the Executive Director for Operations (EDO).

Because the disposition of a DPO represents a multi-step process, readers should view the records as a collection. In other words, reading a document in isolation will not provide the correct context for how this issue was considered by the NRC.

The records in this collection represent those records that are appropriate for release to the public.

Document 1: DPO Submittal

Document 2: Memo Forwarding DPO From DVPM to Office Manager

Document 3: Memo from Office Manager Establishing DPO Panel

Document 4: DPO Panel Report

Document 5: DPO Decision

Documents 1 – 5 have been redacted to protect personal privacy information, and Documents 1, 3 – 5 have also been redacted to protect information subject to the attorney-client privilege.

Differing Professional Opinion  
Public Case File  
DPO-2010-001

| Document No. | Date       | Title   | Redacted |
|--------------|------------|---|----------|
| 1            | 10/31/2011 | Differing Professional Opinion Submittal  | Y        |
| 2            | 11/10/2011 | Memorandum from Renée Pedersen, Differing Views Program Manager to Stephen G. Burns, General Counsel, Re: Differing Professional Opinion Involving Interpretation of Categorical Exclusions in Part 51 (DPO-2010-001)           | Y        |
| 3            | 11/18/2011 | Memorandum from Stephen G. Burns, General Counsel to Patricia Hirsch, Panel Chair, et al. Re: Ad Hoc Review Panel – Differing Professional Opinion Involving Interpretation of Categorical Exclusions in Part 51 (DPO-2010-001) | Y        |
| 4            | 04/21/2011 | Memorandum from Patricia K. Hirsch, Panel Chair, et al., to Stephen G. Burns, General Counsel Re: Differing Professional Opinion Panel Report on Interpretation of Categorical Exclusions in Part 51 (DPO-2010-001)             | Y        |
| 5            | 05/13/2011 | Memorandum from Stephen G. Burns, General Counsel to Kevin Ramsey, Senior Project Manager, et al., Re: Decision on Differing Professional Opinion Involving Interpretation of Categorical Exclusions in Part 51 (DPO-2010-001)  | Y        |

## **DPO Submittal**

DIFFERING PROFESSIONAL OPINION

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

1. OPO CASE NUMBER

2. DATE RECEIVED

DP0-2010-001

10/28/10

3. NAME OF SUBMITTER

4. POSITION TITLE

5. GRADE

Kevin M. Ramsey

Senior Project Manager

GG-15

6. OFFICE/DIVISION/BRANCH/SECTION

7. BUILDING

8. MAIL STOP

9. SUPERVISOR

NMSS/FCSS/FMB

EBB

E2C40M

Pete Habighorst

10. DESCRIBE THE PRESENT SITUATION, CONDITION, METHOD, ETC., WHICH YOU BELIEVE SHOULD BE CHANGED OR IMPROVED.

(Continue on Page 2 or 3 as necessary.)

On December 31, 2009, Nuclear Fuel Services (NFS) requested an exemption from a requirement in 10 CFR 74.59(d)(1) to measure the uranium element and isotopic content of strategic special nuclear material (SSNM). See ML100341335. This is a security requirement to detect any loss, theft or diversion of SSNM. A technical review by security specialists confirmed that the request was acceptable. As with any licensing action, the staff must address the environmental review requirements in Part 51. A rulemaking was recently published which added categorical exclusions to Part 51 for exemption requests. The provisions of 51.22(c) identify the categories of actions excluded from an environmental review. Specifically, 51.22(c)(25) states that the granting of an exemption from the requirements of any regulation of this chapter is excluded if certain conditions are met. I determined that the conditions were met and placed the final action into concurrence on August 16, 2010. (continued next page)

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.)

There is no reasonable basis for the OGC position that only 1 of the 9 criteria listed in 51.22(c)(25)(vi) is applicable to Part 74 requirements.

So what is stated in the SOC? In the final rule, the SOC provide the following guidance concerning how a categorical exclusion should be applied:

"Before applying a categorical exclusion to a proposed action, it should be determined whether there are any special circumstances that would potentially affect the human environment. If such special circumstances are, or are likely to (continued next page)

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

SIGNATURE OF CO-SUBMITTER (if any)

DATE

Kevin M. Ramsey

10/28/10

attached

13. PROPOSED PANEL MEMBERS (in priority order):

1. Thomas Grice, NMSS/FCSS/MCAB
2. James Park, FSME/DWMEP/EPPAD
- 3.

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

DATE OF ACKNOWLEDGMENT

☒ YES ☐ NO

11/4/2010

## 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.)

10 continued...

On August 26, 2010, OGC completed its review of the action and provided the following response:

[REDACTED]

I reviewed the Statements of Consideration for the proposed rule (73 FR 59540, October 9, 2008) and the final rule (75 FR 20248, April 19, 2010). I failed to find any statements that the applicability of the categorical exclusion to Part 74 was more limited than the applicability to other parts of 10 CFR. I met with my Branch Chief and the Deputy Director of my Directorate. They agreed with my use of the categorical exclusion.

On September 7, 2010, my Branch Chief and I met with OGC staff to discuss the matter further. We explained that the purpose of material control and accounting requirements in Part 74 is to detect the loss, theft, and diversion of SSNM. By nature, the purpose of these requirements is inspection and surveillance because they confirm that SSNM is where it is supposed to be. OGC requested that we provide examples of similar exemptions granted in the past. NMSS provided examples. Despite these discussions, OGC provided the following response on September 30, 2010:

[REDACTED]

[REDACTED]

After internal discussions, NMSS management directed me to schedule a meeting with OGC management during the week of October 18. However, OGC management declined the meeting request and informed NMSS management by telephone that it had reviewed the matter and supported the legal objection.

11. continued...

be present, the NRC would then prepare an EA and, if necessary, an EIS. If special circumstances are not present, then the categorical exclusion may be applied and the NRC will satisfy its NEPA obligation for that proposed action. The determination of whether special circumstances are present is a matter of NRC discretion."

The exemption request from NFS would result in an estimated number being recorded instead of a measured number. There is no reason to believe that this action would have any significant impact on the environment. Therefore, there are no special circumstances and the use of a categorical exclusion in this case is consistent with the guidance published with the final rule.

What else is stated in the SOC? During the public comment period, a representative of a State Department of Environmental Conservation requested, in part, that the provisions for inspection and surveillance requirements be removed from the categorical exclusion because the requirements are more safety-related than administrative. The request was denied for the following reason:

"The NRC makes a distinction between conducting a safety analysis and conducting an environmental analysis. The NRC has determined that granting exemption requests from the types of requirements described in subparagraphs (C), (D), and (F) will not have a significant effect on the human environment. The commenter asserts that these requirements are more safety-related than administrative. The NRC will conduct a safety review and must make findings similar to those required by 10 CFR 51.22(c)(9). The proposed rule listed four findings, namely, that granting (see next page)

## 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.)

11. continued...

the exemption request would not result in a: (i) Significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (ii) significant increase in individual or cumulative public or occupational radiation exposure; (iii) significant construction impact; or (iv) there is no significant increase the potential for or consequences from radiological accidents.

In response to this comment, the final rule adds a fifth required finding that there will be no significant hazards consideration, set forth in this final rule as 10 CFR 51.22(c)(25)(i). In addition, the term "procedural" will be deleted from 10 CFR 51.22(c)(25)(vi)(I) (formerly subparagraph (c)(25)(v)(J) in the proposed rule) as the term "procedural" could be misconstrued in this context to include the requirement for licensees to implement procedures for substantive requirements. Thus, with these changes, the NRC concludes that the requirement to make these findings as part of its safety analysis provides adequate protection of public health and safety and as such, the revised categorical exclusion is appropriate."

Consistent with this guidance, our safety evaluation of the NFS exemption request made the following findings:

"There is no significant hazards consideration;

"There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

"There is no significant increase in individual or cumulative public or occupational radiation exposure;

"There is no significant construction impact;

"There is no significant increase in the potential for or consequences from radiological accidents; and

"The requirements from which an exemption is sought involve inspection and surveillance requirements.

[REDACTED] Webster's dictionary defines "inspection" as a critical examination, and "surveillance" as the close observation of a place or process. NMSS believes a measurement to verify and account for highly-enriched uranium meets the plain English definition of inspection and surveillance.

[REDACTED] NMSS staff contend that the purpose of most Part 74 requirements is inspection and surveillance.

[REDACTED] NMSS staff disagree. All modifications to systems used for materials accountability are excluded from environmental review under the existing provisions in 51.22(c)(12). Exemptions from the same requirements should be viewed the same way if they meet all other criteria. It is unclear why the authors of the rulemaking believed that the 51.22(c)(25)(vi)(F) provision for inventory scheduling was needed in addition to the 51.22(c)(25)(vi)(G) provision for all scheduling requirements.

The result of the legal objection is the waste of Federal and State resources to prepare and publish an environmental assessment for an action which has no potential to impact the environment. This waste of resources will continue in the future as additional requests for exemptions from Part 74 requirements are submitted. This legal objection is not in the public interest, and it hinders the protection of public health and safety and the environment by wasting resources which could be used to address more significant issues.

DPV Co-Submitters:

Mary Adams, Senior Project Manager

*M. Adams*

**Memo Forwarding DPO from DPOPM to Office  
Manager**

November 10, 2010

MEMORANDUM TO: Stephen G. Burns, General Counsel  
Office of the General Counsel

FROM: Renée Pedersen, Differing Views Program Manager /RA/  
Office of Enforcement

SUBJECT: DIFFERING PROFESSIONAL OPINION INVOLVING  
INTERPRETATION OF CATEGORICAL EXCLUSIONS IN PART 51  
(DPO-2010-001)

The purpose of this memorandum is to advise you of a Differing Professional Opinion (DPO) that was submitted to me as the Differing Views Program Manager (DVPM). I received the DPO on October 28, 2010, and screened it in accordance with the guidance included in Management Directive (MD) 10.159, "The NRC Differing Professional Opinions Program." I have concluded that the preconditions for acceptance have been met and have accepted this issue as DPO-2010-001 for review within the DPO Program.

The DPO (Enclosure 1) raises concerns from four employees from the Office of Nuclear Materials, Security and Safeguards (NMSS) about whether an environmental assessment is necessary to support an exemption request from a requirement in 10 CFR 74.59(d)(1) submitted by Nuclear Fuel Services. The employees do not agree with the interpretation presented by attorneys from the Office of the General Counsel (OGC) on the interpretation of the categorical exclusions in Part 51.

Because the DPO takes issue with a position established by your organization, in accordance with section (D)(3)(c) of the MD Handbook, I am forwarding this DPO to you for appropriate action.

MD 10.159-036 specifically addresses your responsibilities as an Office Director. In brief, you are required to:

- ☐ Establish an independent ad hoc panel (DPO Panel) to review the issue, draw conclusions, and make recommendations to you regarding the disposition of the issues presented in the DPO.
- ☐ Provide appropriate oversight of and support to the DPO Panel to ensure a thorough and timely review of the DPO (while maintaining process independence).
- ☐ Review the DPO Panel's report to ensure that it clearly, accurately, and completely addresses the tasks outlined in your memorandum establishing the panel.
- ☐ Issue a DPO Decision to the submitter within the current EDO-approved 190-day timeliness goal (May 13, 2011).



- ☐ Request Commission approval for DPO extensions beyond the 190-day timeliness goal. (Requests should be forwarded thru the DVPM with the reason for the delay and a new completion date.)
- ☐ Forward status updates during the disposition of the DPO and until the time that all followup actions are complete. (Updates should be emailed to the DVPM by the last day of the month and will be communicated to the submitter and distributed to all DPO participants and the cognizant DEDO and the Commission in the DPO Monthly Status Report.)
- ☐ Identify and assign appropriate followup actions and establish completion dates within 2 weeks of issuing the DPO Decision. (The DVPM and submitter should be copied on any followup action memoranda or correspondence.)
- ☐ Notify the DVPM of followup action schedule delays, including the reason for the delay and a revised completion schedule. (The DVPM will subsequently notify the submitter, reflect it in the DPO Monthly Status Report, and report it to the applicable DEDO.)
- ☐ Forward a summary of the DPO to the DVPM for inclusion in the Weekly Information Report. (In the event the DPO is appealed, the summary will be postponed until the DPO Appeal Decision is issued.)
- ☐ Take action to positively recognize the DPO submitter if the submitter's actions result in significant contributions to the mission of the agency.
- ☐ Review documents in the DPO case file for public release when the case is closed if the submitter requests public release.

Disposition of this DPO should be considered an important and time sensitive activity. Although the timeliness goal included in the DPO MD is 120 days, on August 18, 2006, the EDO approved a new timeliness goal of 190 calendar days. DPO timeliness is calculated beginning on the day the DPO is accepted for review (November 4, 2010) until the day the DPO Decision is issued (May 13, 2011).

Process Milestones and Timeliness Goals for this DPO are included as Enclosure 2. The timeframes for completing process milestones are identified strictly as goals—a way of working towards reaching the DPO timeliness goal of 190 calendar days.

Although timeliness is an important DPO Program objective, the DPO Program also sets out to ensure that issues receive a thorough and independent review. Therefore, if you or the DPO Panel determine that an extension beyond 190 calendar days is necessary at any time during the process, please send me an email with the reason for the extension request and a new completion date. I will subsequently forward this request to the Commission for approval.

In an effort to provide necessary oversight and tracking, you should open an action item within your office to address the three key deliverables:

- (1) DPO Decision (May 13, 2011);
- (2) Followup action memorandum (May 27, 2011); and
- (3) Weekly Information Report summary (May 27, 2011).

Tracking numbers will be included in the DPO Monthly Status Report.

Because this process is not routine, I will be meeting and communicating with all parties during the process to ensure that everyone understands the process, goals, and responsibilities. I will be sending you a DPO Equipment Bag that includes information intended to aid you, the DPO Panel, and support staff in implementing the DPO process.

An important aspect of our internal safety culture includes respect for differing views. As such, all employees involved in the process should be instructed to exercise discretion and treat this matter sensitively. Documents should be distributed on an as-need basis. In an effort to preserve privacy, minimize the effect on the work unit, and keep the focus on the issues, employees should be instructed to simply refer to the employees as the DPO submitters. Managers and staff should be counseled against "hallway talk" on the issue.

As a final administrative note, because DPO records have special handling requirements (e.g., records are not declared official agency records until the DPO process is complete), please ensure that all correspondence associated with this case be processed in accordance with the special instructions that I will email to your Program Assistant, Debbie Pulley.

If you or your staff have any questions, please feel free to contact me directly at (301) 415-2742 or email [Renee.Pedersen@nrc.gov](mailto:Renee.Pedersen@nrc.gov).

Enclosures:

- 1. DPO submittal
- 2. Milestones and Timeliness Goals

cc: (w/o enclosures)

M. Weber, DEDMRS  
N. Mamish, AO

- (1) DPO Decision (May 13, 2011);
- (2) Followup action memorandum (May 27, 2011); and
- (3) Weekly Information Report summary (May 27, 2011).

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As a final administrative note, because DPO records have special handling requirements (e.g., records are not declared official agency records until the DPO process is complete), please ensure that all correspondence associated with this case be processed in accordance with the special instructions that I will email to your Program Assistant, Debbie Pulley.

If you or your staff have any questions, please feel free to contact me directly at (301) 415-2742 or email [Renee.Pedersen@nrc.gov](mailto:Renee.Pedersen@nrc.gov).

Enclosures:

- 1. DPO submittal
- 2. Milestones and Timeliness Goals

cc: (w/o enclosures)  
M. Weber, DEDMRS  
N. Mamish, AO

Distribution: w/o enclosures C. Haney, NMSS A. Campbell, OE K. Ramsey, NMSS  
[REDACTED], NMSS [REDACTED], NMSS M. Adams, NMSS DPO-2010-001 file

X Non-Public  
X Sensitive

**ADAMS ML103140536**

**OE-011**

|        |             |            |            |
|--------|-------------|------------|------------|
| OFFICE | DVPM:OE     | DD:OE      | D:OE       |
| NAME   | R. Pedersen | ACampbell  | RZimmerman |
| DATE   | 11/10/2010  | 11/10/2010 | 11/10/2010 |

**OFFICIAL RECORD COPY**

DPO-2010-001

Subject: Interpretation of Categorical Exclusions in part 51

Assigned to: Steve Burns, OGC

DPO Submitters: Kevin Ramsey, [REDACTED], [REDACTED], Mary Adams

DPO Panel:

**DPO Milestones and Timeliness Goals**

| <b>DPO Milestone</b>   | <b>Timeliness Goals</b>         | <b>Actual Date</b> |
|--|---------------------------------|--------------------|
| Individual submits DPO (NRC Form 680)  | None                            | 10/28/10           |
| DVPM screens and accepts DPO   | 8 days                          | 11/4/10            |
| DVPM assigns DPO to OD or RA   | 5 days                          | 11/10/10           |
| OD or RA establishes DPO Panel   | 14 days                         |                    |
| DPO Panel conducts review <ul style="list-style-type: none"><li>- meets with submitter (≈ 8 days)</li><li>- establishes Statement of Concerns</li><li>- collects, reviews, and evaluates information</li><li>- writes report (≈ 30 days)</li></ul> | 150 days                        |                    |
| OD or RA issues DPO Decision   | 21 days                         |                    |
| <b>TIMELINESS</b><br><div style="text-align: right;"><b>DPO</b></div> <div style="text-align: right;">(acceptance of DPO – DPO Decision)</div>   | <b>190 days</b><br>May 13, 2010 |                    |

## **Memo from Office Manager Establishing DPO Panel**



OFFICE OF THE  
GENERAL COUNSEL

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

November 18, 2010

MEMORANDUM TO: Patricia Hirsch, Panel Chair  
Tracey Stokes, Panel Member  
Thomas Grice, Panel Member

FROM:  Stephen G. Burns  
General Counsel

SUBJECT: AD HOC REVIEW PANEL - DIFFERING PROFESSIONAL OPINION ON  
INTERPRETATION OF CATEGORIAL EXCLUSIONS IN PART 51 (DPO-  
2010-001)

In accordance with Management Directive (MD) 10.159, "The NRC Differing Professional Opinions Program," I am appointing you as members of a Differing Professional Opinion (DPO) Ad Hoc Review Panel (DPO Panel) to review a DPO regarding the Office of the General Counsel's (OGC) interpretation of a categorical exclusion in 10 C.F.R. Part 51. A copy of the DPO is included as Enclosure 1.

I have designated Patricia Hirsch as chair of this DPO Panel and Tracey Stokes as a DPO Panel member. Thomas Grice was proposed by the DPO submitters and serves as the third member of the DPO Panel. In accordance with the guidance included in MD 10.159 and consistent with the DPO Program objectives, I task the DPO Panel to do the following:

- ☐ Review the DPO submittal to determine if sufficient information has been provided to undertake a detailed review of the issue.
- ☐ Meet with the submitters, as soon as practicable, to ensure that the DPO Panel understands the submitters' concerns and scope of the issues.
- ☐ Promptly after the meeting, document the DPO Panel's understanding of the submitters' concerns, provide the Statement of Concerns (SOC) to the submitters, and request that the submitters review and provide comments, if necessary.
- ☐ Maintain the scope of the review to not exceed those issues as defined in the original written DPO and confirmed in the SOC.
- ☐ Consult with me, as necessary to discuss schedule-related issues, the need for technical support (if necessary), or the need for administrative support for the DPO Panel's activities.

- ☐ Perform a detailed review of the issues and conduct any record reviews, interviews, and discussions you deem necessary for a complete, objective, independent, and impartial review. The DPO Panel should re-interview individuals as necessary to clarify information during the review. In particular, the DPO Panel should have periodic discussions with the submitters to provide the submitters the opportunity to further clarify the submitters' views and to facilitate the exchange of information.
- ☐ Provide monthly status updates on your activities via email to Sara McAndrew, OGC's Differing Views Office Liaison (DVOL) no later than noon the last day of the month. The DVOL will forward this information to the Differing Views Program Manager (DVPM) the last day of the month. This information will be reflected in the Milestones and Timeliness Goals for this DPO and included in the Monthly Status Report on the DPO Program that is forwarded to the Commission. Please provide a copy of email status updates to me.
- ☐ Issue a DPO Panel report, including conclusions and recommendations to me regarding the disposition of the issues presented in the DPO. The report should be a collaborative product and include all DPO Panel member's concurrence. Follow the specific processing instructions for DPO documents.
- ☐ Consult me as soon as you believe that a schedule extension is necessary to disposition the DPO.
- ☐ Recommend whether the DPO submitters should be recognized if the submitters' actions result in significant contributions to the mission of the agency.

Disposition of this DPO should be considered an important and time sensitive activity. The EDO-approved timeliness goal to disposition a DPO is 190 calendar days (in this case by May 19, 2011). DPO timeliness is calculated beginning on the day the DPO is accepted for review (in this case November 10, 2010) until the day the DPO Decision is issued. Process Milestones and Timeliness Goals for this DPO are included as Enclosure 2. The timeframes for completing process milestones are identified strictly as goals—a way of working towards reaching the DPO timeliness goal of 190 calendar days. The timeliness goal identified for your DPO task is 150 calendar days, meaning that you should have provided your report to me by April 8, 2011. I am hoping that you can complete your effort well before those dates. I request that within a month from the date of this memorandum you provide me with your best estimate of when you might complete your report. (Please charge your DPO-related activities to Activity Code ZG0007.)

Because the DVPM has developed additional implementing procedures, not all guidance may be in MD 10.159. Therefore, the DVPM will be meeting and communicating with all parties during the process to ensure that everyone understands the process, goals, and responsibilities. The DVPM has prepared information intended to aid you and support staff in implementing the DPO process. In particular, because DPO records have special handling requirements, please ensure that all correspondence associated with this case be processed in accordance with the special instructions that the DVPM will provide you.

An important aspect of our internal safety culture includes respect for differing views. As such, you should exercise discretion and treat this matter sensitively. Documents should be distributed on an as-need basis. In an effort to preserve privacy, minimize the effect on the work unit, and keep the focus on the issues, you should simply refer to the employee as the DPO submitter. Avoid conversations that could be perceived as "hallway talk" on the issue. We need to do everything that we can in order to create an organizational climate that does not chill employees from raising dissenting views.

I appreciate your willingness to serve and your dedication to completing an independent and objective review of this DPO. Successful resolution of the issues is important for NRC and its stakeholders. If you have any questions, you may contact Sara McAndrew, DVOL, at (301) 415-1562 or Renée Pedersen, DVPM, at (301) 415-2742 or email [Renee.Pedersen@nrc.gov](mailto:Renee.Pedersen@nrc.gov).

I look forward to receiving your independent review results and recommendations.

Enclosures:

1. DPO-2010-001
2. Milestones and Timeliness Goals

cc w/o Enclosures:

Kevin Ramsey

[REDACTED]  
[REDACTED]

Mary Adams  
Renée Pedersen  
Sara McAndrew



DPO-2011-001

Subject: Interpretation of Categorical Exclusions in Part 51

Assigned to: Steve Burns, OGC

DPO Submitters: Kevin Ramsey, [REDACTED], [REDACTED] Mary Adams

DPO Panel: Patricia Hirsch, Panel Chair; Tracy Stokes, Panel Member; Thomas Grice, Panel member

**DPO Milestones and Timeliness Goals**

| <b>DPO Milestone</b>   | <b>Timeliness Goals</b>         | <b>Actual Date</b> |
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| OD issues DPO Decision   | 21 days                         |                    |
| <b>DPO TIMELINESS</b><br>(acceptance of DPO – DPO Decision)  | <b>190 days</b><br>May 13, 2010 |                    |

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I look forward to receiving your independent review results and recommendations.

Enclosures:

1. DPO-2010-001
2. Milestones and Timeliness Goals

cc w/o Enclosures: Kevin Ramsey  
 [REDACTED]  
 [REDACTED]  
 Mary Adams  
 Renée Pedersen  
 Sara McAndrew

Document Name: G:\GC\Rothschild\DPO Panel Establishment.doc

|         |          |     |     |     |
|---------|----------|-----|-----|-----|
| Office: | OGC      | OGC | OGC | OGC |
| Name:   | SBurns   |     |     |     |
| Date:   | 11/14/10 |     |     |     |

OFFICIAL RECORD COPY

## **DPO Panel Report**

April 21, 2011

MEMORANDUM TO: Stephen G. Burns  
General Counsel

FROM: Patricia K. Hirsch, Panel Chair */RA/*  
Differing Professional Opinion Ad Hoc Review Panel

Thomas A. Grice, Panel Member */RA/*  
Differing Professional Opinion Ad Hoc Review Panel

Tracey L. Stokes, Panel Member */RA/*  
Differing Professional Opinion Ad Hoc Review Panel

SUBJECT: DIFFERING PROFESSIONAL OPINION PANEL REPORT ON  
INTERPRETATION OF CATEGORICAL EXCLUSIONS IN  
10 CFR PART 51 (DPO-2010-001)

In a memorandum dated November 18, 2010, you appointed us as members of a Differing Professional Opinion (DPO) Ad Hoc Review Panel (DPO Panel) to review a DPO regarding the interpretation of a categorical exclusion under 10 CFR Part 51. The DPO concerns a request from Nuclear Fuel Services (NFS) for an exemption from the requirements of 10 CFR 74.59(d)(1), and the staff of the U.S. Nuclear Regulatory Commission's (NRC's) Office of Nuclear Material Safety and Safeguards (NMSS) determination that the proposed action qualified for the categorical exclusion contained in 10 CFR 51.22. During the concurrence process, staff submitted its safeguards evaluation report (SER) to OGC for review. OGC disagreed with NMSS' determination that a specific subsection of 10 CFR 51.22 was applicable to the licensing action. The disagreement between NMSS and OGC resulted in the instant DPO. The DPO Panel has reviewed the DPO 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 concerns raised in the DPO are detailed in the enclosed DPO Panel Report. Based on our review, the DPO Panel concludes that the staff's determination that a categorical exclusion under 10 CFR 51.22(c)(25) was applicable to the proposed action was reasonable. 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 Submitters  
R. Pederson, DVPM  
S. McAndrew, OGC/DVOL

April 21, 2011

MEMORANDUM TO: Stephen G. Burns  
General Counsel

FROM: Patricia K. Hirsch, Panel Chair  
Differing Professional Opinion Ad Hoc Review Panel

Thomas A. Grice, Panel Member  
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ADAMS Accession Number: ML11110A239

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|----------------|----------------------|-----------------------|--------------------|
| <b>OFFICE:</b> | OGC/DPO Panel Member | NMSS/DPO Panel Member | OGC/DPO Chairman   |
| <b>NAME:</b>   | Tracey L. Stokes     | Thomas A. Grice       | Patricia K. Hirsch |
| <b>DATE:</b>   | 04/20/11             | 04/20/11              | 04/21/11           |

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**Differing Professional Opinion (DPO)  
On Interpretation of  
Categorical Exclusions in 10 CFR Part 51  
(DPO-2010-001)**

**DPO Panel Report**

/RA/

Patricia K. Hirsch, Panel Chair

/RA/

Thomas A. Grice, Panel Member

/RA/

Tracey L. Stokes, Panel Member

Dated: April 21, 2011

Enclosure

## INTRODUCTION

On October 28, 2010, the Nuclear Regulatory Commission (NRC) received a Differing Professional Opinion (DPO) concerning the applicability of 10 CFR 51.22(c)(25)(vi) to an exemption request submitted by a licensee. On November 18, 2010, the Office of General Counsel established a DPO Ad Hoc Review Panel (Panel) consisting of Chairman, Patricia Hirsch, and members Thomas Grice and Tracey Stokes. The Panel was convened in accordance with Management Directive (MD) 10.159, "The NRC Differing Professional Opinions Program."

The Panel met with: Peter Habighorst, Kevin Ramsey, [REDACTED], [REDACTED], Mary Adams, John Hull, and Andrew Pessin. Additionally, the Panel reviewed a variety of relevant documentation, including copies of communications between various NRC staff, the NRC's regulations, the statements of considerations for the proposed and final rules resulting in the promulgation of 10 CFR 51.22(c)(25), and licensing documents related to the underlying proposed action.

## STATEMENT OF CONCERNS

After meeting with the submitters and other NRC personnel, the Panel has identified the following concerns:

- Resource allocation – Whether staff and agency resources are being unnecessarily expended to prepare and publish an environmental assessment for an action which staff determines has no potential to significantly impact the environment.
- Interpretation of NRC's regulations – Whether the staff's reading of 10 CFR 51.22(c)(25) and the Statements of Consideration is an overly broad application of the NRC's regulation, or whether OGC's reading of the same regulation is an overly strict interpretation of the same regulation.
- Procedure – How can the process be improved such that staff has some degree of certainty or predictability in an OGC interpretation? What procedure or process should OGC and staff use to resolve disagreements or disputes prior submitting a DPO?

The DPO submitters and other NRC personnel reviewed and commented on this summary of the Statement of Concerns.

## BACKGROUND

The DPO arose during staff's consideration of a December 31, 2009, submittal from Nuclear Fuel Services (NFS), which holds a special nuclear materials license from the NRC. NFS, under contract with the Department of Energy National Nuclear Security Agency (NNSA), opens and processes 2S type UF6 cylinders to remove the heel of material in each cylinder. NNSA recently requested NFS to retain a small number of unprocessed cylinders. These cylinders containing heels will be shipped to the Y-12 National Security Complex for forensic analysis. However, this requires that NFS retain the cylinder for periods of one year or longer before shipping them to Y-12 and, during this time the retained cylinders will be subject to the measurement requirements identified in the NFS Physical Inventory (PI) program. However, NFS is unable to definitively measure the amount of heel contained in each cylinder, so it is unable to comply with the terms of its PI program. According to staff, NFS is required by

10 CFR 74.59(d)(1) to measure the uranium element and isotopic content of strategic special nuclear material (SSNM) received, produced, transferred, on inventory, or shipped, discarded, or otherwise removed from inventory. NFS requests that it be permitted to determine the amount of SSNM or heel to be reported as remaining in each cylinder by using a combination of the net weight of the heel, a concentration factor and an enrichment factor versus performing an independent measurement of the material remaining in the heel.

The staff in the Office of Nuclear Material Safety and Safeguards, Division of Fuel Cycle Safety and Safeguards, Fuel Facility Licensing Directorate (staff) determined that NFS' submittal was a request for an exemption from the requirements of 10 CFR 74.59(d)(1). Accordingly, the staff began a technical review to confirm whether the request was acceptable. The grant of an exemption from NRC regulation is a licensing action subject to the environmental review requirements of the National Environmental Policy Act of 1969, as amended (NEPA), unless the licensing action falls within a category of actions that the NRC has already determined to be excluded from further environmental review under NEPA (known as a "categorical exclusion"). The NRC's list of categorical exclusions is contained in 10 CFR 51.22(c). This list was modified, effective April 19, 2010, to include additional categories of actions which the NRC has determined do not individually or cumulatively have a significant effect on the human environment. One of the newly listed categorical exclusions pertains to those actions in which the NRC grants an exemption from its regulations provided that certain conditions are met. As part of its review, the staff determined that NFS' request for an exemption from 10 CFR 74.59(d)(1) was categorically excluded by 10 CFR 51.22(c)(25), which provides:

Granting of an exemption from the requirements of any regulation of this chapter, provided that (i) there is no significant hazards consideration; (ii) there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (iii) there is no significant increase in individual or cumulative public or occupational radiation exposure; (iv) there is no significant construction impact; (v) there is no significant increase in the potential for or consequences from radiological accidents; and (vi) the requirements from which an exemption is sought involve: (A) recordkeeping requirements; (B) reporting requirements; (C) inspection or surveillance requirements; (D) equipment servicing or maintenance scheduling requirements; (E) education, training, experience, qualification, requalification or other employment suitability requirements; (F) safeguard plans, and materials control and accounting inventory scheduling requirements; (G) scheduling requirements; (H) surety, insurance or indemnity requirements; or (I) other requirements of an administrative, managerial, or organizational nature.

Staff finalized its review of the licensing action, including the preparation of a safeguards evaluation report; however, because staff determined that 10 CFR 51.22(c)(25) was applicable, staff concluded an environmental assessment (EA) was not required. On August 16, 2010, staff submitted its proposed response to NFS' request for an exemption to OGC for review and concurrence.





[REDACTED] In an August 26, 2010, e-mail to the staff, OGC [REDACTED]

The August 26, 2010, e-mail concluded that [REDACTED]

On September 7, 2010, staff and OGC met to discuss the matter further. During the meeting, staff indicated that it had determined that NFS' requested exemption fell within categorical exclusion 10 CFR 51.22(c)(25)(vi)(C) – inspection or surveillance, not categorical exclusion 10 CFR 51.22(c)(25)(vi)(F). Upon the staff's identification of subparagraph (vi)(C) as the applicable categorical exclusion, the discussion shifted to whether 10 CFR 74.59(d)(1) was an inspection or surveillance requirement. [REDACTED]

On September 8, 2010, staff provided OGC with examples of two past exemption requests for similar actions. In a September 30, 2010 e-mail to the staff, OGC stated [REDACTED]

The September 30, 2010 e-mail also included an excerpt from a September 10, 2010, internal OGC e-mail concerning categorical exclusion 10 CFR 51.22(c)(25)(vi)(G) (scheduling requirements), that stated:

[A]lthough that was not necessarily the intent when we drafted the rule (that the (vi)(G) categorical exclusion (CATEX) applies only to non-MC&A items), under the rules of construction, it is the correct interpretation--that different provisions should be construed harmoniously with each other, that each word or phrase has a particular purpose or meaning, etc. Thus, (vi)(G) CATEX covers only non-MC&A items.

The September 30, 2010, OGC e-mail concluded [REDACTED]

Staff and OGC continued to engage in dialogue on the issue, and on October 18, 2010, staff requested a meeting with OGC management. On the morning of October 19, 2010, staff and OGC participated in a joint telephone call. [REDACTED]

[REDACTED] The licensee was informed that its request would be delayed by several months. On October 28, 2010, staff submitted this DPO. There have been no further communications on this matter between the staff and OGC.

## EVALUATION

In accordance with NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs," which provides guidance to the NRC staff on the procedures necessary to ensure that NEPA and the NRC's regulations in 10 CFR Part 51 are complied with, upon receipt of a licensing action request, the staff is required to:

[F]irst determine[] whether a [categorical exclusion (CATX)] is applicable for the proposed action. . . . If a CATX exists, the finding should be documented as described in Chapter 2. The proposed action is subject to no further NEPA review, but is still evaluated for compliance with NRC radiation protection regulations and other applicable environmental regulations. . . . If no CATX applies, NMSS staff responsible for the proposed action must prepare an EA (10 CFR 51.21).

NUREG-1748 at pg. 1-2.

The staff followed this procedure to the letter. It reviewed the proposed action and made a determination that a categorical exclusion was applicable. Staff then completed the SER documenting its NEPA finding and performing a safeguards review on the proposed action. Once this process was completed, the staff submitted the SER for OGC review.

OGC likewise conducted a review. Based upon the Panel's interviews and the documentation reviewed, OGC reviewed the document and the staff's categorical exclusion determination. Based on language in the SER, OGC concluded [REDACTED]

Staff and OGC met to discuss the issue. During that meeting, the staff reiterated that the subparagraph of 10 CFR 51.22(c)(2) that was applicable was (vi)(C) and not (vi)(F). Following the initial meeting with staff, OGC continued internal discussions regarding [REDACTED]

[REDACTED] The staff provided OGC with examples of two past exemption requests for similar actions in which it had performed an EA, and for which the EA resulted in a Finding of No Significant Impact. [REDACTED]

[REDACTED] OGC communicated this position to staff. Thereafter, staff requested a meeting with OGC management on the issue,

and included some written notes and discussions on the disagreement. Based upon this request, OGC again began internal discussion on the issue, and a telephone call between staff and OGC was held in which OGC indicated [REDACTED]

[REDACTED] Following this communication, OGC continued its internal dialogue on the issue, and [REDACTED]

As an initial matter, the Panel concludes that a lack of clear communication between staff and OGC resulted in the filing of the DPO at a premature stage. OGC was still actively considering the issue and was in the process of escalating the issue for management review. However, the staff was unaware of this fact, and once the DPO was filed both staff and OGC ceased all discussions.

The first concern identified in this DPO involves the issue of resource allocations. Specifically, the question arose as to whether the staff should be required to prepare and publish an environmental assessment for an action which the staff found has no potential to significantly impact the environment. NEPA and the NRC's regulations in 10 CFR Part 51, clearly answer that question in the affirmative, unless the NRC, through rulemaking, has determined that the action is categorically excluded. If the staff finds that an action does not have any potential to significantly impact the environment and a categorical exclusion does not exist, the option open to staff is to engage in a rulemaking to modify the list of actions that have been determined to be categorically excluded.

The second concern identified relates to the interpretation of the NRC's regulations. Specifically, the question arose as to whether the staff's interpretation of 10 CFR 51.22(c)(25) was overly broad, or whether OGC's interpretation of the same provision was overly narrow. The Panel is of the opinion that the regulations in § 51.22(c)(25) are not so clear or specific as to dictate only one possible interpretation. The Panel looked to both the *Federal Register* notices for the proposed rule and the final rule that promulgated the section, and found nothing to help clarify the provisions. The Panel did note that the proposed language in § 51.22(c)(25)(G) did not originally include the specific mention of the MC&A, and the final rule was silent as to why the revision was made to the language. Notwithstanding this fact, the Panel agrees with OGC that the plain meaning of the words in the regulation should rule; however, the Panel also recognizes that limitations on the plain meaning of the words in the regulation cannot be inferred, but rather must be explicit. [REDACTED]

[REDACTED] Additionally, the Panel recognizes that an overly-broad categorical exclusion could be invalidated if the matter becomes the subject of a petition for judicial review. However, as the regulation is currently

drafted, if the staff is able to articulate a rationale and reasonable link between the measurement requirement that is the subject of the exemption request and the inspection and surveillance requirement categorical exclusion, the categorical exclusion should apply. OGC's recourse is to request that the rule language be amended to add the specific prohibition that is now absent. Nevertheless, staff should be prudent in its use and application of the categorical exclusion.

The final concern identified pertains to office procedure, and to what extent the staff is required to seek OGC concurrence on an interpretation of NRC regulations and how it can ensure that it has a degree of certainty or predictability in an OGC interpretation. OGC is the NRC's interpretive office, and the right to interpret the NRC's regulations in a binding manner is reserved to OGC. Staff's internal office procedures as set forth in the Fuel Cycle Project Manager's Handbook dated May 2010, state that OGC review is required for Environmental Impact Statements, letters to Congress, replies to the public involving an ongoing policy or legal issue or as part of a formalized process, § 2.206 petitions, rulemakings, and exemptions. In this instance, the Panel finds that because the categorical exclusion was just recently codified and its use had been limited up to this point, consultation with OGC was appropriate.

The question was also raised as to how staff can ensure that it has a degree of certainty or predictability in an OGC interpretation. As with any new regulation there will be an adjustment period where both the staff and OGC will need to work together to determine the proper application of the rule. With experience, the issues will be worked out in time, as new issues arise and are addressed. The best way that both OGC and staff may ensure consistency in interpretation and application is for both offices to maintain open lines of communications.

## CONCLUSION

Based on the information gathered during this review, the Panel concludes that the measurement requirement in 10 CFR 74.59(d)(1) can be reasonably considered part of the inspection and surveillance program the licensee has established to account for the special nuclear material under its control. Accordingly, as currently drafted, the categorical exclusion in 10 CFR 51.22(c)(25)(vi)(C) would be applicable.

Additionally, the Panel would like to stress that had the offices communicated more clearly with one another it is very probable that this DPO would not have been submitted and the resources used to develop an EA for the proposed action would have been spared, not to mention the resources needed for a DPO.

## RECOMMENDATIONS

The following recommendations are offered for consideration:

1. The DPO process should clarify that the submittal of a DPO does not necessarily require that the parties cease discussing the issue. In this instance, if the lines of communication had remained open while this DPO was pending the issue may have been resolved earlier. The NRC personnel involved with this DPO felt that they were obligated to stop discussing this matter during the review process.
2. The staff and OGC should regroup to decide whether policy goals and legal requirements are sufficiently met by the categorical exclusion rule language as currently drafted, or whether further refinement of the rule language is warranted.

## **DPO Decision**

[REDACTED]

May 13, 2011

MEMORANDUM TO: Kevin Ramsey, Senior Project Manager  
NMSS/FCSS

Mary Adams, Senior Project Manager  
NMSS/FCSS

[REDACTED]

[REDACTED]

FROM: Stephen G. Burns /RA/  
General Counsel

SUBJECT: DECISION ON DIFFERING PROFESSIONAL OPINION INVOLVING  
INTERPRETATION OF CATEGORICAL EXCLUSIONS IN 10 CFR  
PART 51 (DPO-2010-001)

In accordance with Management Directive 10.159, I am sending this memorandum to reflect my decision on the Differing Professional Opinion (DPO) that you submitted on the question of the applicability of the categorical exclusion provisions in 10 CFR Part 51 to an exemption request from a measurement requirement in 10 CFR 74.59(d)(1). In considering this matter, I have reviewed your submittal, background documentation related to the discussions between Office of the General Counsel and NMSS staff on the particular case that gave rise to the DPO, and the report of the Ad Hoc Review Panel chaired by Assistant General Counsel Patricia K. Hirsch dated April 21, 2011.

This is a close case, and I appreciate the sincere arguments on both sides of the question presented. A plausible rationale can be made for a narrower approach offered by OGC staff to interpreting the regulation of 10 CFR 51.22(c)(25) as well as the broader approach you offer in the DPO. Considering both viewpoints, I concur with the DPO Ad Hoc Panel's conclusion that the staff could reasonably determine that a categorical exclusion under 10 CFR 51.22(c)(25) could be applied to the exemption request at issue. Although we should be cautious in being overly expansive in applying categorical exclusions in manner that would thwart the environmental stewardship goals of the National Environmental Policy Act (NEPA), I believe that a categorical exclusion can be reasonably applied to the exemptions to allow the measurement alternative here, based on an overall consideration of the language, terms, and regulatory history of 10 CFR 51.22 as well as the nature and treatment of material control and accounting requirements in NRC regulations.

[REDACTED]

[REDACTED]

[REDACTED] In addition, careful consideration and analysis in consultation with OGC is important in deciding how to treat future exemptions or actions that surface latent ambiguities in the application of the rule.

I have also given consideration to the other recommendations of the Ad Hoc Review Panel and generally agree with them. Continued dialogue before the DPO was filed may have led to an earlier resolution of this issue. It would also appear that staff and OGC should evaluate whether the language of the categorical exclusion rule is adequately meeting the staff's needs and satisfying OGC's legitimate concerns for conformity to legal and procedural requirements. I plan to issue a follow-up memorandum to this decision that suggests further actions that may be appropriate to address both these issues.

Again, I appreciate the dialogue on this matter that you have raised through the DPO process. The expression of your views here reflects the importance of continued dialogue among technical and legal staff to achieve the agency's safety and security mission in an efficient manner within the bounds of the law.

cc: R. Pederson, DVPM  
C. Haney, NMSS  
S. McAndrew, OGC/DVOL  
Patricia Hirsch, Panel Chair  
Thomas Grice, Panel Member  
Tracey Stokes, Panel Member  
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|---------|---------------|-----|-----|-----|
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| Name:   | S. Burns /RA/ |     |     |     |
| Date:   | 5/13/11       |     |     |     |

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[REDACTED]