

## **DPO Case File for DPO-2011-001**

The following pdf represents a collection of documents associated with the submittal and disposition of a differing professional opinion (DPO) regarding the procedure the staff followed prior to issuing two immediately effective orders on September 2, 2010: the first to Mattingly Testing Services, Inc. (MTS), and the second to its president and owner. The DPO also challenged a provision in the Order to the president of MTS that effectively restricted his ownership of licensed material.

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 DPOPM to OE Office Director

Document 3: Memo from OE Office Director Establishing DPO Panel

Document 4: DPO Panel Report

Document 5: Memo Providing Supplemental Information to OE Office Director

Document 6: DPO Decision

## **DPO Submittal**

DIFFERING PROFESSIONAL OPINION

1. DPO CASE NUMBER

DPO-2011-001

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

2. DATE RECEIVED

1/25/2011

3. NAME OF SUBMITTER

Chuck Cain

4. POSITION TITLE

Deputy Director

5. GRADE

GG15

6. OFFICE/DIVISION/BRANCH/SECTION

RIV/DNMS

7. BUILDING

8. MAIL STOP

RIV

9. SUPERVISOR

Roy Caniano

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

1. Enforcement action was taken without meeting with the licensee (Mattingly Testing) or conducting an inspection exit briefing with NRC management to fully understand the facts of the case. Orders were issued revoking the license and banning the president from licensed operations for seven years. During the negotiation of a subsequent settlement agreement, the NRC learned that some of the facts expressed in the Orders were indeed inaccurate.
2. The Order to the president denied him the right to own licensed material granted by the general license in 10 CFR 31.9. The issues of concern, safety and security of material, were irrelevant to ownership. The action to deny ownership appeared to be only punitive. This action not only needlessly violated an individual's right to ownership, but also unnecessarily complicated the licensee's efforts to comply with the Orders and the regional office's efforts to confirm compliance. (Although the settlement agreement is not final, it appears that this right may be restored.)

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.)

1. It has always been the agency's policy to hold an inspection exit briefing and, in the case of escalated enforcement cases to hold, or to offer to hold, a predecisional enforcement conference with a licensee. These meetings provide the licensee the opportunity to respond to the findings and often result in the identification of additional information or the correction of information relevant to the case. The failure to do so on the Mattingly case did not serve well the agency's values of openness, cooperation, respect, and integrity and could have resulted in significant embarrassment to the agency if the case had been exposed to a public hearing. All escalated enforcement cases should grant the licensee the right to express their views on inspection and investigation findings before escalated action is taken.
2. The NRC does not ordinarily review ownership of licensed material during the process of reviewing an application for a specific materials license. The licensing process generally focuses only on possession and use. NRC escalated enforcement actions should refrain from revoking the general license granting ownership unless a nexus to safety and security can be established.

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

Charles E. Cain

DATE

01/24/2011

SIGNATURE OF CO-SUBMITTER (if any)

DATE

13. PROPOSED PANEL MEMBERS ARE (in priority order):

1. (none provided by submitter)

2.

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)

Rebecca Pedersen

PRE-CONDITIONS MET

☐ YES

☐ NO

DATE OF ACKNOWLEDGMENT

1/31/2011

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

February 10, 2011

MEMORANDUM TO: Roy P. Zimmerman, Director  
Office of Enforcement

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

SUBJECT: DIFFERING PROFESSIONAL OPINION INVOLVING  
INTERPRETATION OF CATEGORICAL EXCLUSIONS IN PART 51  
(DPO-2011-001)

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 January 25, 2011, and screened it in accordance with the guidance included in Management Directive (MD) 10.159, "The NRC Differing Professional Opinions Program." On January 31, 2011, I notified senior management and the submitter that the preconditions for acceptance were met and that the submittal was accepted for review within the DPO Program as DPO-2011-001.

The DPO (Enclosure 1) raises concerns with the agency's enforcement policy. The submitter believes that licensees should always have the right to express their views to the NRC before escalated enforcement action is issued. The submitter also believes that escalated enforcement actions should refrain from revoking the general license granting ownership unless a nexus to safety and security can be established.

Even though the submitter referenced the Mattingly Testing enforcement action in the DPO submittal, the concerns were addressed as enforcement policy issues. The submitter is not recommending any specific action related to the Mattingly Testing enforcement action.

Because the DPO takes issue with positions established in the enforcement policy, 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.

CONTACT: Renée M. Pedersen, OE  
[Renee.Pedersen@nrc.gov](mailto:Renee.Pedersen@nrc.gov)  
(301) 415-2742

- ☐ 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 EDO 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 follow-up 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 follow-up actions and establish completion dates within 2 weeks of issuing the DPO Decision. (The DVPM and submitter should be copied on any follow-up action memoranda or correspondence.)
- ☐ Notify the DVPM of follow-up 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 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 the on the day the DPO is accepted for review (January 31, 2011) until the day the DPO Decision is issued (August 9, 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

R. Zimmerman

- 3 -

Panel determines 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 EDO for approval.

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

- (1) DPO Decision (August 9, 2011);
- (2) Follow-up action memorandum (August 23, 2011); and
- (3) Weekly Information Report summary (August 23, 2011).

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 subsequently sending you 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. 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 employee as the DPO submitter. Managers and staff should be counseled against "hallway talk" on the issue.

As a final administrative note, please ensure that all correspondence associated with this case include the DPO number in the subject line, be profiled in accordance with ADAMS template OE-011, and be filed in the applicable DPO Case File folder in the ADAMS Main Library.

Enclosures:

1. DPO submittal
2. Milestones and Timeliness Goals

cc: (w/o enclosures)

M. Weber, DEDMRS

M. Muessle, Acting AO

R. Zimmerman

- 3 -

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Enclosures:

1. DPO submittal
2. Milestones and Timeliness Goals

cc: (w/o enclosures)

M. Weber, DEDMRS

M. Muessle, Acting AO

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CCain, RIV

DPO-2011-001 file

OE R/F

**ADAMS Accession Number: ML110410198 (Package)**

**OE-011**

<b>OFFICE</b>	DVPM:OE	DD:OE
<b>NAME</b>	RPedersen:ndr	ACampbell
<b>DATE</b>	02/10/2011	02/10/2011

**OFFICIAL RECORD COPY**



DPO-2011-001

Subject: Enforcement Policy Issues

Assigned to: Roy Zimmerman, Director, OE  
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	1/24/2011
DVPM screens and accepts DPO	8 days	1/31/2011
DVPM assigns DPO to OD or RA	7 days	2/10/2011
OD or RA establishes DPO Panel	14 days	
DPO Panel conducts review <ul style="list-style-type: none"><li>- meets with submitter (<math>\approx 7</math> days)</li><li>- establishes Statement of Concerns (<math>\approx 7</math> days)</li><li>- confirms schedule with office manager (<math>\approx 7</math> days)</li><li>- collects, reviews, &amp; evaluates information (<math>\approx 90</math> days)</li><li>- writes report (<math>\approx 30</math> days)</li></ul>	140 days	
OD or RA issues DPO Decision	21 days	
<b>DPO TIMELINESS</b> (acceptance of DPO – DPO Decision)	<b>190 days</b>	

## **Memo Establishing DPO Panel**

February 24, 2011

MEMORANDUM TO: Jared K. Heck, Regional Attorney  
Region III

Michelle R. Beardsley, Health Physicist  
Agreement State Programs Branch  
Division of Materials Safety and State Agreements  
Office of Federal and State Materials  
and Environmental Management Programs

Maria E. Schwartz, Senior Program Manager  
Concerns Resolution Branch  
Office of Enforcement

FROM: Roy P. Zimmerman, Director */RA/*  
Office of Enforcement

SUBJECT: DIFFERING PROFESSIONAL OPINION INVOLVING  
ENFORCEMENT POLICY ISSUES (DPO-2011-001)

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 that was forwarded to me to disposition.

The DPO (Enclosure 1) raises concerns with the agency's enforcement policy. The submitter believes that licensees should always have the right to express their views to the NRC before escalated enforcement action is issued. The submitter also believes that escalated enforcement actions should refrain from revoking the general license granting ownership unless a nexus to safety and security can be established.

Even though the submitter referenced the Mattingly Testing enforcement action in the DPO submittal, the concerns were addressed as enforcement policy issues. The submitter is not recommending any specific action related to the Mattingly Testing enforcement action.

I have designated Jared Heck, Chairman of this DPO Panel and Michelle Beardsley and Maria Schwartz as DPO Panel members. 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.

CONTACT: Renée M. Pedersen, OE  
(301) 415-2742

- ☐ Meet with the submitter, as soon as practicable, to ensure that the DPO Panel understands the submitter's concerns and scope of the issues. (Normally within 7 days.)
- ☐ Promptly after the meeting, document the DPO Panel's understanding of the submitter's concerns, provide the Statement of Concerns (SOC) to the submitter, and request that the submitter review and provide comments, if necessary. (Normally within 7 days.)
- ☐ Meet with me to confirm the overall timeliness goal and to discuss schedule-related issues, the need for technical support (if necessary), or the need for administrative support for the DPO Panel's activities. (Normally within 7 days.)
- ☐ Maintain the scope of the review to not exceed those issues as defined in the original written DPO and confirmed in the SOC.
- ☐ 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 submitter to provide the submitter the opportunity to further clarify the submitter's views and to facilitate the exchange of information.
- ☐ Provide monthly status updates on your activities via email to Renée Pedersen, Differing Views Program Manager (DVPM) about 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 the submitter and 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 submitter should be recognized if the submitter's actions result in significant contributions to the mission of the agency.

Disposition of this DPO should be considered an important and time sensitive activity. Although the EDO approved a new timeliness goal of 190 calendar days on August 18, 2006, I want to strive to meet the 120 day timeliness goal included in the DPO MD. DPO timeliness is calculated beginning the day the DPO is accepted for review (January 31, 2011) until the day the DPO Decision is issued (target - May 31, 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 120 calendar days.

The timeliness goal identified for your DPO task is 70 calendar days. Please charge your DPO related activities to Activity Code ZG0007.

Although timeliness is an important DPO Program objective, the DPO Program also sets out to ensure that issues receive a thorough and independent review. The overall timeliness goal should be based on the significance and complexity of the issues and the priority of other agency work. Therefore, if you determine that your activity will result in the need for an extension beyond the overall 120 day timeliness goal, 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 DVPM who will forward it to the EDO for approval.

Because this process is not routine, 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 will also provide information intended to aid you in implementing the DPO process, e.g., DPO Panel report template.

An important aspect of our internal safety culture includes respect for differing views. As such, you should exercise discretion and treat this matter sensitively. 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.

As a final administrative note, please ensure that all correspondence associated with this case include the DPO number in the subject line, be profiled in accordance with ADAMS template OE-011, and be filed in the applicable DPO Case File folder in the ADAMS Main Library.

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 me 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-2011-001 Submittal
2. Milestones and Timeliness Goals

cc w/o Enclosures: C. Cain, RIV  
R. Pedersen, DVPM

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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 me 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-2011-001 Submittal
2. Milestones and Timeliness Goals

cc w/o Enclosures: C. Cain, RIV  
R. Pedersen, DVPM

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OFFICE	OE:OD
NAME	RZimmerman
DATE	02/24/2011

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DPO-2011-001

Subject: Enforcement Policy Issues

Assigned to: Roy Zimmerman, Director, OE  
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	1/24/2011
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OD or RA establishes DPO Panel	14 days	2/24/2011
DPO Panel conducts review <ul style="list-style-type: none"><li>- meets with submitter (<math>\approx 7</math> days)</li><li>- establishes Statement of Concerns (<math>\approx 7</math> days)</li><li>- confirms schedule with office manager (<math>\approx 7</math> days)</li><li>- collects, reviews, &amp; evaluates information (<math>\approx 28</math> days)</li><li>- writes report (<math>\approx 21</math> days)</li></ul>	70 days	
OD or RA issues DPO Decision	21 days	
<b>DPO TIMELINESS</b> (acceptance of DPO – DPO Decision)	<b>120 days</b> 5/31/2011	

## **DPO Panel Report**





**UNITED STATES  
NUCLEAR REGULATORY COMMISSION**  
REGION III  
2443 WARRENVILLE ROAD, SUITE 210  
LISLE, IL 60532-4352

May 11, 2011

MEMORANDUM TO: Roy P. Zimmerman, Director  
Office of Enforcement

FROM: Jared Heck, Differing Professional Opinion (DPO) Panel Chair  
Michelle Beardsley, DPO Panel Member  
Maria E. Schwartz, DPO Panel Member

SUBJECT: DIFFERING PROFESSIONAL OPINION PANEL REPORT INVOLVING  
THE NRC'S ENFORCEMENT POLICY (DPO 2011-001)

In a memorandum dated February 24, 2011, you appointed us as members of a DPO Ad Hoc Review Panel (DPO Panel) to review DPO 2011-001. The DPO Panel has completed its review in accordance with the guidance in Management Directive 10.159, "The NRC Differing Professional Opinions Program."

The DPO Panel Report is enclosed for your consideration. The DPO Panel's conclusions are summarized as follows:

- The agency's decision to issue orders to Mattingly Testing Services, Inc., and its president/owner without first offering a predecisional enforcement conference or issuing a Demand for Information satisfied the guidelines of the Enforcement Policy.
- Although the Enforcement Policy does not explicitly address the use of orders to ban "ownership," the decision to ban the president of MTS from owning licensed material was reviewed, deliberated, and agreed upon in accordance with normal enforcement processes. The decision was tied to staff concerns about the potential safety consequences of allowing the president's continued control over licensed material.

The DPO Panel also offers two recommendations:

- Guidance to staff (and possibly licensees) regarding the scope and meaning of the phrase "licensed activities" is needed.

CONTACT: Jared Heck, ORA  
63-/829-9653

- Guidance to staff on how to draft orders in a manner that avoids unintended consequences may be warranted.

Enclosure:  
DPO Panel Report

cc: DPO Submitter  
R. Pederson

May 11, 2011

MEMORANDUM TO: Roy P. Zimmerman, Director  
Office of Enforcement

FROM: Jared Heck, Differing Professional Opinion (DPO) Panel Chair  
Michelle Beardsley, DPO Panel Member  
Maria E. Schwartz, DPO Panel Member

SUBJECT: DIFFERING PROFESSIONAL OPINION PANEL REPORT INVOLVING  
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The DPO Panel Report is enclosed for your consideration. The DPO Panel's conclusions are summarized as follows:

- The agency's decision to issue orders to Mattingly Testing Services, Inc., and its president/owner without first offering a predecisional enforcement conference or issuing a Demand for Information satisfied the guidelines of the Enforcement Policy.
- Although the Enforcement Policy does not explicitly address the use of orders to ban "ownership," the decision to ban the president of MTS from owning licensed material was reviewed, deliberated, and agreed upon in accordance with normal enforcement processes. The decision was tied to staff concerns about the potential safety consequences of allowing the president's continued control over licensed material.

The DPO Panel also offers two recommendations:

- Guidance to staff (and possibly licensees) regarding the scope and meaning of the phrase "licensed activities" is needed.

CONTACT: Jared Heck, ORA  
63-/829-9653

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OFFICE	RIII								
NAME	Heck/pb	MBeardsley	MSchwartz						
DATE	05/11/11 / RA /	05/11/11 / RA /	05/ 11/11 / RA /						

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- Guidance to staff on how to draft orders in a manner that avoids unintended consequences may be warranted.

Enclosure:  
DPO Panel Report

cc: DPO Submitter  
R. Pederson

**Differing Professional Opinion (DPO)  
Involving the NRC's Enforcement Policy (DPO 2011-001)**

**DPO Panel Report**

**/ RA /**

**Jared K. Heck, Panel Chair**

**/ Jared K. Heck for/**

**Michelle R. Beardsley, Panel Member**

**/ Jared K. Heck for/**

**Maria E. Schwartz, Panel Member**

## **Introduction**

On January 24, 2011, a Differing Professional Opinion (DPO) was filed regarding the procedure the staff followed prior to issuing two immediately effective orders on September 2, 2010: the first to Mattingly Testing Services, Inc. (MTS), and the second to its president and owner. The DPO also challenged a provision in the Order to the president of MTS that effectively restricted his ownership of licensed material.

On February 24, 2011, the Director, Office of Enforcement, established the DPO Ad Hoc Review Panel (DPO Panel) to independently review the matter. Subsequently, on March 8, the DPO Panel interviewed the submitter regarding his DPO, and then developed a concise Statement of Concerns that would guide the DPO Panel's review. On March 15, the submitter approved the Statement of Concerns.

Using the Statement of Concerns as a guide, the DPO Panel next interviewed several individuals who participated in the enforcement process that gave rise to the DPO. Separate interviews were conducted with the Branch Chief and Division Director in Region IV who participated in the case, the FSME enforcement specialist, the OE enforcement specialist, and the OGC attorney involved in the case. The DPO Panel also reviewed relevant enforcement program documents, including the Enforcement Policy and Enforcement Manual, the enforcement panel worksheets and strategy forms from the MTS case, and drafts of orders and a Demand for Information prepared during the agency's deliberation of the MTS enforcement action.

After completing its initial interviews and document review, the DPO Panel re-interviewed the submitter. During that interview, the DPO Panel shared its preliminary observations with the submitter and provided him an opportunity to suggest further sources of information for review. The submitter indicated that he was satisfied with the scope of the DPO Panel's review. The DPO Panel determined that no additional interviews were necessary.

## **Statement of Concerns**

The submitter does not question or challenge the NRC's Enforcement Policy, nor has the submitter requested that the final enforcement outcome in the Mattingly Testing Services (MTS) case be reconsidered. Accordingly, we did not evaluate whether the language of the Enforcement Policy or Enforcement Manual should be revised, nor did we evaluate whether the enforcement action in the MTS case should be reopened.

The submitter has two primary concerns:

1. After reviewing a draft inspection report, several Region IV managers had additional questions regarding the findings and reached consensus that additional information should be obtained from the licensee prior to taking enforcement action. The submitter noted that Region IV drafted a Demand for Information. Additionally, the submitter believed an inspection exit conference or a predecisional enforcement conference would have added additional clarity to the information that a Region IV inspector and Office of Investigations investigator had amassed. Despite the submitter's understanding that regional consensus was that additional information from the licensee was necessary before issuing immediately effective orders revoking the license of MTS and banning the president of MTS from licensed activities, the submitter believes that

approach was overruled by representatives from headquarters (HQ) offices at an enforcement panel.

2. The enforcement action approved by the enforcement panel included an Order to the president of MTS, which prohibited the president from owning regulated material. The effect of the prohibition on ownership was to cause the individual to be in immediate and further noncompliance because even though the president had transferred MTS's radiography cameras to another qualified licensee for safe and secure storage, the legal title to the cameras was still held by the president. Under the circumstances, the submitter believes that the agency could have met its safety and security goals with fewer unintended consequences if the Order had been drafted more carefully.

## **Factual Background**

On September 2, 2010, the staff issued an Order Revoking License (Effective Immediately) to MTS. As detailed in the MTS Order, the staff found that MTS violated several NRC regulations, the terms of a Confirmatory Order issued to MTS on March 6, 2009, and other requirements. On the same day, the staff also issued an Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) for a period of seven years from the date of the order to the president and owner of MTS.

The orders were based in part on the results of an Office of Investigation (OI) investigation that concluded certain violations were willful and deliberate. The OI investigation was initiated in 2009 following a report made to Region IV of a lost radiography camera belonging to MTS. The investigation found, among other things, that the president of MTS had lied during the investigation, and remained engaged in licensed activities following the issuance of NRC's 2009 Confirmatory Order prohibiting him from such activities.

Following completion of the OI investigation but prior to any enforcement panel involving NRC headquarters, Region IV management and staff held several internal meetings and discussions to develop a proposed enforcement strategy. Eventually, Region IV agreed to propose a strategy that would first have the agency issue a Demand for Information (DFI) to MTS, essentially to ask the licensee to "show cause" why the NRC should not suspend or revoke its license.

The Region IV proposal was deliberated at two enforcement panels with representatives from FSME, OE, and OGC. At the first panel, OE and FSME asked several questions about the Region IV proposal to issue a DFI. According to representatives from those offices, they believed the investigation provided the agency with enough information upon which to act. Gathering additional information from MTS, they opined, might not prove valuable given that the president previously lied to NRC under oath. According to the OGC attorney who participated, OGC supported OI's finding that the president had lied, and advised that the agency could, if it chose, take enforcement action without first issuing a DFI.

The first enforcement panel did not reach consensus on what enforcement action to take because of the somewhat unusual circumstances of the MTS case, and because of the questions raised by FSME and OE regarding the Region IV proposal. The enforcement panel did agree that Region IV should draft a DFI so that if the decision was made to issue a DFI, one would be ready to send, and directed OE and OGC to draft immediately-effective orders for further consideration. The panel members agreed to reconvene later to make a final decision. The submitter could not recall if he was present at the first enforcement panel.

Following the first enforcement panel, several discussions ensued among the various offices and individuals involved. The DPO Panel was not able to determine the precise number of conversations that occurred, however, among the several conversations it does appear that the Region IV Division Director consulted with the Regional Administrator regarding the views expressed by OE, OGC, and FSME at the first enforcement panel.

According to the Division Director, he supported Region IV's "going-in" position and understood the submitter's interest in pursuing that position, but after the first enforcement panel he came to a different view. The Director was persuaded by comments from OE and FSME that the trustworthiness of the president of MTS was questionable. Therefore, the Director believed that requesting further information or explanation from the company regarding the NRC's inspection and investigation findings was not necessary. The Director understood that the submitter continued to support either issuing a DFI or holding a PEC, and the Director told the DPO Panel that he didn't disagree entirely with the submitter's point of view.

The Director met with the Regional Administrator to share his views following the first enforcement panel. According to the Director and the Branch Chief we interviewed, such a meeting is typical in Region IV following an enforcement panel where there is a difference of opinion between the Region and HQ offices regarding the proposed action. The Regional Administrator understood the questions posed by FSME and OE, and according to the Director, agreed that issuing a DFI may not be valuable under the circumstances. The submitter and the Director told the DPO Panel that the submitter was not present during that meeting.

At the next enforcement panel, at which the submitter appears to have been present according to the enforcement panel strategy form, the decision was made to issue orders to MTS and to its president without first holding a PEC or issuing a DFI. The order to the president would ban him from engaging in "licensed activity" for a period of 7 years.

The president's previous ban on engaging in "licensed activity" followed an investigation and ADR session in early 2009. Despite the ban, the president and owner of MTS still exercised control over operations, and, according to representatives from FSME and OGC, he used that power in a manner that caused further violations by MTS. Although the violations did not have actual safety consequences—they involved the failure to report a lost camera and the failure to meet certain compliance deadlines set by a previous Confirmatory Order—they suggested to some on the enforcement panel that the president's continued control over the operations of MTS posed potential safety risks that needed to be addressed.

The DPO Panel asked each enforcement panel participant that was interviewed to characterize the nature and tone of discussions during the enforcement panel. All those interviewed stated that they believed that the discussions and deliberations were thorough and respectful during the panels. Each of those interviewed also noted that, as often happens, discussions also occurred outside of the enforcement panels.

Following the second enforcement panel, at which the decision was made to issue orders rather than a DFI, the normal concurrence process was followed. According to the OE representative that the DPO Panel interviewed, there were "many opportunities for individuals to express concerns" during concurrence because a number of "significant changes" were proposed to the orders, which required OE to "circle back several times to each office to ensure that their concurrence was still valid."



## EVALUATION

### *Concern 1: Issuing Orders without a Prior PEC or DFI*

The NRC Enforcement Policy (Policy) in effect at the time MTS was decided provided NRC decision makers substantial discretion in determining whether to hold a PEC. Section V of that Policy states that “whether an individual will be provided an opportunity for a [PEC] will depend on the circumstances of the case.” Under Section V, an important factor to be considered when deciding whether to hold a PEC is whether or not the NRC has “sufficient information to make an informed enforcement decision.” In cases like MTS, where the agency was considering an action against an individual, another important factor was whether the individual had “already had an opportunity to address the issue,” for example, through an NRC investigation.

The Policy provides less information about the use of DFIs, but it does suggest that the purpose of a DFI is to gather information that may be needed to make an informed enforcement decision: “Demands for Information are. . . for the purpose of enabling the NRC to determine whether an order or other enforcement action should be issued.” Conversely, no DFI would be issued if the NRC concludes it has sufficient information upon which to act.

In the MTS case, the second enforcement panel concluded that there was sufficient information to justify issuing orders without first offering a PEC or issuing a DFI. The conclusion was reached after deliberating the results of a 2009 inspection and investigation. The inspection and investigation showed that MTS and its president were in violation of the terms of previous Confirmatory Orders, and that the president had lied to the NRC under oath. Representatives from FSME, OE, and OGC explained to the DPO Panel that they believed the agency had enough information upon which to act, and that attempting to gather more through a DFI would not be valuable. At the second enforcement panel, Region IV management agreed with that assessment. Thus, the stated basis for the enforcement panel’s decision satisfies the guidelines set forth by the Policy.

The proposal to issue a DFI was not unreasonable *per se*. The Region IV Division Director acknowledged that he supported the proposal initially and, ultimately, did not entirely disagree with the submitter’s position. Also, according to the OE representative we interviewed, the NRC would typically offer a PEC or some other opportunity (perhaps a DFI) for a licensee to present information directly to NRC management prior to the agency taking escalated enforcement action. But from the interviews the DPO Panel conducted and the enforcement records the DPO Panel reviewed, the enforcement panel concluded that the MTS case was not typical. In the enforcement panel’s analysis, action more immediate than a DFI was warranted because the NRC had substantial evidence regarding the licensee’s poor history of performance and the president’s deliberate misconduct.

In interviews with the DPO Panel, the submitter did not appear to disagree with the enforcement panel’s conclusion that orders were warranted, rather, he disagreed with the decision to issue orders without first offering MTS and its president some prior opportunity to be heard by NRC management. The Region IV Branch Chief interviewed by the Panel agreed with the submitter’s point of view, and speculated that a PEC or DFI might have yielded additional information that the NRC could have factored in to its final enforcement decision.

The submitter acknowledged that offering MTS and its president some prior opportunity to be heard may not have changed the agency’s decision to revoke the MTS license and ban the president from licensed activities for a period of seven years. But the submitter saw no actual or

potential safety consequences in the case that would require immediate NRC action. He noted that some of the violations upon which the enforcement panel based its decision occurred roughly a year prior, which cut against the notion that immediately-effective orders were necessary to protect the public. The submitter viewed the question of whether to issue the DFI as one of "fairness," or "due process," given that the NRC had decided to revoke the license altogether, and restrict the president's ownership of licensed material.

Questions of "fairness" and "due process" were considered at the enforcement panels and addressed by the OGC representative, who explained that the hearing rights afforded by the orders themselves satisfy "due process" requirements. It is not entirely clear at which panel "due process" was discussed, or whether the submitter was present during those discussions. Records show the submitter to have been present at the second panel, and the Region IV Division Director recalled the submitter being present at both. However, the submitter himself could not recollect precisely which panels he attended.

#### *Concern 2: Provision Banning Ownership was Unjustified, Lacked Adequate Safety Nexus*

The NRC Enforcement Policy (Policy) and other legal authorities under which NRC operates permit the agency to take whatever action it deems necessary to protect the public health and safety, as well as the common defense and security. Typically, such actions include Notices of Violation, civil penalties, and orders. From time to time, orders are issued to modify, suspend, or revoke licenses, or to ban individuals from engaging in "licensed activity." The Policy in effect at the time did not explicitly address the use of orders to prohibit "ownership," or define the phrase "licensed activity."

The order that was issued to the president of MTS banned him from engaging in "those activities conducted pursuant to a specific or general license issued by NRC." The same language was used in the prior Confirmatory Order to the president, issued in 2009. According to the OGC and OE representatives interviewed, that language is boilerplate for orders banning individuals from NRC-licensed activity.

According to several people the DPO Panel interviewed, there was a good deal of confusion and disagreement as to the meaning of the phrase "licensed activities." All parties interviewed agreed that the phrase "licensed activities" does not have a commonly-understood definition, and is subject to various interpretations. In the opinion of the OE enforcement specialist who drafted the orders in MTS, neither licensees nor NRC staff necessarily understand that a ban on "licensed activities" effectively includes a ban on "ownership."

The DPO Panel found that regulations in 10 CFR 31.9 and 10 CFR 40.21 confer the right of ownership of byproduct and source material via a general license. So, the order issued to the president of MTS, which banned him from "activities conducted pursuant to a . . . general license," was reasonably construed as a ban on "ownership" of NRC-regulated material.

The submitter did not consider there to be a sufficient safety reason for prohibiting the president from owning regulated material because the violations caused by the president had not had actual safety consequences. The submitter also noted that, when the agency reviews applications for specific licenses, the NRC does not typically concern itself with who owns radioactive material, but instead focuses its review on how the material will be possessed and used. The submitter did not believe the decision to prohibit the president of MTS from owning material was well explained.

The OGC, FSME and OE participants interviewed explained that the order to the president of MTS was intended to prevent him from continuing to exercise control over the NRC-regulated aspects of MTS operations. The enforcement panel concluded that the potential safety consequences of continuing to allow the president to control MTS were significant, given that the president had, over the years, committed multiple examples of deliberate misconduct, lied to the NRC and failed to comply with the terms of the previous order banning him from “licensed activities.” According to the OE enforcement specialist who drafted the order, “the focus of both orders was an immediate cessation of work and prompt storage of the materials in such a way as to limit the physical control that [the president] could exercise.”

On the second point of this concern—*i.e.*, the licensee’s effort to comply with the orders was unnecessarily complicated by NRC—all parties agreed that making the orders to the president and licensee immediately effective caused immediate non-compliance, because the orders did not allow a time period in which the president could transfer his ownership of the licensed material. The orders did contain a provision permitting them to be relaxed for good cause, which was exercised to provide time for the license and the material to be transferred. However, as the OE specialist explained, the orders could have been drafted to include such a “time gate” at the outset: “If I had fully understood the restriction on ownership, I would have place[d] a time in which [the president of MTS] had to comply with selling the materials.” The OGC attorney involved in the MTS case told the DPO Panel that she is currently tasked to prepare an internal memo to provide guidance as to what constitutes “licensed activities.” The HQ enforcement specialist also indicated that he hopes to address, in some form of guidance document, the importance of including compliance deadlines when drafting orders.

## **Conclusions**

The agency issued orders without first offering MTS or its president a predecisional enforcement conference or issuing a demand for information because the agency determined it already had sufficient information upon which to act. The information upon which the orders were based included the poor enforcement history of the licensee, and the findings of an investigation that showed deliberate misconduct by the licensee’s president.

The investigation results and enforcement history also caused many to think that pursuit of additional information prior to issuing the orders would not be helpful, because the information gathered would be of questionable reliability. So, rather than delay issuance of Orders to gather additional information, the decision was made to proceed based on the information available, with the understanding that the licensee and its president would have an opportunity to request a hearing to challenge the orders. The enforcement panel determined that the hearing opportunity afforded by the orders would satisfy all “due process” requirements.

The agency’s decision was made in accordance with the Enforcement Policy and Enforcement Manual, which permit the agency to forgo a PEC or DFI if the agency has sufficient information upon which to act. The decision was reached after deliberation at two enforcement panels, which were preceded and followed by several less formal interactions between and among staff and management in Region IV, OE, OGC, and FSME.

The DPO Panel further found that the agency’s decision to prohibit the president of MTS from engaging in licensed activities was tied to safety concerns. In particular, it was believed that the president was unreliable and untrustworthy, and would not refrain from engaging in licensed activities in the future if he were permitted to continue owning regulated materials. The

president had demonstrated in the past that he would, by virtue of his ownership interest, exercise control over the material.

Some confusion emerged in the case regarding the meaning of the phrase “licensed activities.” As used in the order to the president of MTS, which was drafted according to boilerplate, the phrase was interpreted as a ban on ownership of NRC-regulated material. That interpretation appears to accord with the language of the order and NRC regulations, however, it may not have been understood by all of the enforcement panel participants. Ultimately, through settlement negotiations, the president was permitted to retain partial ownership (but not a controlling share) rights over the material in question.

## **Recommendations**

Guidance to staff (and possibly licensees) regarding the scope and meaning of the phrase “licensed activities” is needed. In the MTS case, there was disagreement and confusion regarding whether a ban on engaging in “licensed activities” meant a ban on possession, use, ownership, or some combination of the three. The Office of Enforcement should work with the Office of the General Counsel to determine whether the phrase is capable of more than one permissible interpretation, and if so, seek the views of the Regions and other staff offices to develop an agreed-upon and workable interpretation to guide future inspection and enforcement efforts.

Guidance to staff on how to draft orders should also be reviewed. In particular, the Office of Enforcement should determine whether existing guidance adequately describes the importance of setting actionable deadlines for compliance with the various provisions of an order. Guidance to staff that describes the potential consequences of failing to include compliance deadlines may be valuable.

**Supplemental Information  
to OE Office Director**

June 6, 2011

MEMORANDUM TO: Roy P. Zimmerman, Director, OE  
FROM: Chuck Cain, Region IV /RA/  
SUBJECT: DPO-2011-001

This is provided as a supplement to the panel's report to you dated May 11, 2011.

I appreciate the panel's efforts in reviewing the DPO I submitted on January 24, 2011. On March 14, I had reviewed the Statement of Concerns prepared by the panel and believed that the panel understood the central themes of the DPO; however, their report did not fully address my primary concern, and the results of the panel's interviews prompt some response.

First, the cover letter for the report summarizes one of the report's two conclusions by stating, "The agency's decision to issue orders to Mattingly Testing Services, Inc., and its president/owner without first offering a predecisional enforcement conference or issuing a Demand for Information satisfied the guidelines of the Enforcement Policy."

While this statement may be so, it does not fully answer the primary issue raised by the DPO. The point intended in the DPO was that some form of communication between agency management and the licensee was important before a major enforcement action to ensure that the facts of the case were fully understood. But Region IV management and staff were ordered not to discuss any findings with Mattingly prior to or after the issuance of the orders. This communication could have taken various forms, such as a PEC or DFI, but certainly could have (and should have) included an "inspection exit briefing." In fact, I used this phrase twice in this short seven-sentence portion of the DPO, but the panel report mentions the phrase only once in its 6 ½ pages and does not address this option or address the primary concern.

During my 33 years with the NRC in Region IV, I have participated in hundreds of enforcement cases. I cannot recall a single case before Mattingly when agency management failed to hold a telephonic management exit briefing or obtain other confirmatory information from a licensee prior to taking escalated enforcement action, especially an action as serious as license revocation. We have never made important decisions based solely on the reported findings of a junior inspector and an OI investigator (who has no materials regulatory training). In fact, additional communication is routinely employed in the form of regulatory instruments such as 1) an inspection report which solicits a response if the facts are incorrectly stated or 2) a proposed imposition of civil penalty before taking a final action. As I spelled out in the DPO, such communications "provide the licensee the opportunity to respond to the findings and often result in the identification of additional information or the correction of information relevant to the case." Also, failure to do so "could have resulted in significant embarrassment to the agency," and "all escalated enforcement cases should grant the licensee the right to express their views on inspection and investigation findings before escalated action is taken."

The panel report also lists insights provided it by OE and FSME staff. I noted the report's statement that the staff believed that "the investigation provided the agency with enough information upon which to act" and "opined" in so many words that having a meeting with the president of Mattingly Testing would be a waste of time anyway since he was a liar. No doubt we did receive enough information upon which to act, but it will never be known whether that

information was accurate and whether our actions were appropriate. Nor did we learn what the president's state of mind was when he provided us false information, especially under oath. Maybe he did lie. But maybe he was simply mistaken. A management discussion with him would perhaps have proven beneficial, have provided some insights, and have better served to seal our case.

The report appears to advance the view that immediate action was needed to protect the health and safety of the public. At one point the report mentions that "action more immediate than a DFI was warranted." Later in the conclusions the statement occurs, "So, rather than delay issuance of Orders to gather additional information, the decision was made to proceed...." The facts of the case indicate there was no identified need for immediate action. The inspection findings were first presented about a year before the orders were issued. At that time, nor at any point later, was there anyone holding an opinion that immediate action was necessary. It is truly disingenuous to imply that there was a compelling need for immediate action which would forestall the opportunity to conduct an inspection exit briefing with the licensee. An inspection exit briefing could have been held telephonically without the need for complicated scheduling and could have been accomplished within the span of an hour. It is not uncommon in a regional office for such a call to be arranged and executed within a few hours. It is hard to imagine what the down side of such a call could have possibly been.

The second issue in the DPO related to the denial of the licensee president's right to ownership of licensed material. Late in the process of formulating the order banning the president, the phrase occurred in a draft that he would be banned from "those activities conducted pursuant to a specific or general license issued by the NRC." The intended consequence of the phrase was interpreted locally in Region IV to apply to the use in NRC jurisdiction of the general license for reciprocal recognition of a possible Mattingly Agreement State license as outlined in 10 CFR 150, Section 150.20. That is, this phrase was included to ensure that Mattingly did not use the back door approach of continuing to perform radiography in NRC jurisdiction at temporary jobsites using a license issued by an Agreement State.

I surprised regional management when I informed them that inclusion of this phrase would have the unwitting effect of banning the president from ownership under the General License of 10 CFR 31, Section 31.9. This was not a subject that had been discussed before that moment. It was agreed locally that this was not the intended effect of the phrase, but there was no challenge, that I am aware of, in clarifying its intention and the phrase was included in the final order.

10 CFR Part 31, Section 31.9, is short and simple. The entire section has been pasted in below from the NRC's own website.

**§ 31.9 General license to own byproduct material.**

A general license is hereby issued to own byproduct material without regard to quantity. Notwithstanding any other provision of this chapter, a general licensee under this paragraph is not authorized to manufacture, produce, transfer, receive, possess, use, import or export byproduct material, except as authorized in a specific license.

[30 FR 8189, June 26, 1965]

This General License has long been interpreted to state that anyone can own material. Any citizen of the United States can own material without notification to the NRC. Anyone who owns stock in a U.S. corporation that is licensed to possess byproduct material is effectively an owner of licensed material. Any Federal employee that owns shares of the Thrift Saving Plan's C Fund

is an owner of byproduct material. In fact any person in a foreign country can own byproduct material that is specifically licensed in the U.S. As far as I know there are 7 billion persons on the planet and any one of them can own a U.S.-licensed radiography source except the president of Mattingly Testing. But as the General License makes clear, no one can control licensed material unless they have a specific license issued by the NRC or an Agreement State. The broad provisions of the General License have been interpreted to mean that no one who is an owner has control of the material. The NRC's process of reviewing an application for a specific license does not specifically include a review of ownership but focuses on control.

The panel reports that OGC, FSME, and OE participants were interviewed and that they stated that the intention of this requirement in the order was to limit the president's "control" of licensed material. The panel report repeatedly uses the word "control" in regard to this issue. As the DPO stated, "The issues of concern, safety and security of material, were irrelevant to ownership. The action to deny ownership appeared to be only punitive. This action not only needlessly violated an individual's right to ownership, but also unnecessarily complicated the licensee's efforts to comply with the Orders and the regional office's efforts to confirm compliance."

The president immediately transferred (returned) byproduct material to the manufacturer/distributor upon receipt of the NRC orders. Therefore, he had no control over the material even though he continued to be the owner and there was no immediate buyer of the material. The material not only included the residual iridium-192 sources in the radiographic exposure devices, but also included the depleted uranium shielding built into the devices. There was considerable frustration by the president and regional NRC staff in fulfilling the rote requirement of the order in finding a new owner for the material and ensuring that all provisions of the order had been satisfied. All this effort was needless to ensure health and safety of the public.

Toward the end of the Mattingly case processing, OGC told us they would be issuing a white paper later that would train us on the true meaning of "licensed activities." The implication was that we need to begin regulating ownership. In the many decades that the agency has been licensing and inspecting use of materials we have never "regulated" ownership beyond the scope of the provisions of § 31.9. We regulate those who control the material through a specific license. Regulating ownership will bring unimaginable resource implications to all agency licensing and inspection functions. We will await OGC's later direction on this matter.

Finally, nowhere does the report address the agency's values reflected in the acronym ISOCER that was mentioned in one of those seven sentences in the DPO. As I stated, I do not believe the handling of this case well served our stated values of openness, cooperation, respect, and integrity.

cc:

Jared Heck  
Michelle Beardsley  
Maria Schwartz  
Renée Pedersen



## **DPO Decision**

June 28, 2011

MEMORANDUM TO: Charles L. Cain, Senior Materials Analyst  
Region IV

FROM: Roy P. Zimmerman, Director /RA/  
Office of Enforcement

SUBJECT: DIFFERING PROFESSIONAL OPINION DECISION REGARDING  
IMPLEMENTATION OF NRC'S ENFORCEMENT POLICY (DPO 2011-  
001)

The purpose of this memorandum is to provide my decision for the Differing Professional Opinion (DPO) regarding implementation of the NRC's Enforcement Policy that you submitted on January 24, 2011. Thank you for submitting your differing view. The Agency benefits when professional judgments such as yours are shared and evaluated, so that we can determine where improvements to our decision-making processes may be appropriate.

In accordance with Management Directive 10.159, "The NRC's Differing Professional Opinions Program," I appointed an Ad Hoc Review Panel on February 24 to conduct an independent review of your concerns. The panel interviewed you on March 8 and developed a concise Statement of Concerns that guided the Panel's review. It is my understanding that on March 15, you approved the Statement of Concerns, which follows:

You do not question or challenge the NRC's Enforcement Policy, nor request that the final enforcement outcome in the Mattingly Testing Services (MTS) case be reconsidered. However, you have two primary concerns:

1. After reviewing a draft inspection report, several Region IV managers had additional questions regarding the findings and reached consensus that additional information should be obtained from MTS (the licensee) prior to taking enforcement action. Region IV had drafted a Demand for Information, and you believed an inspection exit conference or a pre-decisional enforcement conference would have added clarity to the information that a Region IV inspector and Office of Investigations investigator had amassed. Despite your understanding that regional consensus was that additional information from the licensee was necessary before issuing immediately effective orders revoking the license of MTS and banning the president of MTS from licensed activities, you believe that approach was overruled by representatives from headquarters (HQ) offices at an enforcement panel.

2. The enforcement action approved by the enforcement panel included an Order to the President of MTS, which prohibited the President from owning regulated material. The effect of the prohibition on ownership was to cause the individual to be in immediate and further noncompliance because even though the President had transferred MTS's radiography cameras to another qualified licensee for safe and secure storage, the Agency could have met its safety and security goals with fewer unintended consequences if the Order had been drafted more carefully.

The Panel provided the results of their review on May 11 and concluded that:

- The Agency's decision to issue orders to MTS and its President/Owner without first offering a pre-decisional enforcement conference or issuing a Demand for Information satisfied the guidelines of the Enforcement Policy.
- Although the Enforcement Policy does not explicitly address the use of orders to ban "ownership," the decision to ban the President of MTS from owning licensed material was reviewed, deliberated, and agreed upon in accordance with normal enforcement processes. The decision was tied to staff concerns about the potential safety consequences of allowing the President continued control over licensed material.

The Panel also offered two recommendations:

- Guidance to staff (and possibly licensees) regarding the scope and meaning of the phrase "licensed activities" is needed.
- Guidance to staff on how to draft orders in a manner that avoids unintended consequences may be warranted.

After you reviewed the Panel report, you provided me your views in a memorandum, dated June 6<sup>th</sup>. A few days later we had a productive phone call, in my opinion, as we discussed your views and I shared a number of thoughts as well. In reaching my decision on your DPO, I took your original DPO, the Panel report, your above memorandum and our phone call into account. While I agree with the conclusions of the Panel, I also agree with a number of points you conveyed in your June 6<sup>th</sup> memo, and our discussion.

As you indicated, and I agree, it is highly unusual<sup>1</sup> for the NRC to take an action as serious as a license revocation without having additional communication with the licensee via some

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<sup>1</sup> For example, the Agency issued an immediately effective order (without prior opportunity for a PEC) suspending the KTL Roubidoux's license in 2004 after OI concluded that the licensee had engaged in deliberate misconduct, including providing inaccurate and incomplete information to the NRC. However, a Demand for Information was issued, and responded to, prior to the license being revoked and the company President being banned from regulated activities for 5 years. In MTS, the President was already under an order banning him for 2 years from regulated activities, when a second order was

combination of an exit briefing, pre-decisional enforcement conference and/or Demand for Information. As you indicated, such communications “provide the licensee the opportunity to respond to the findings and often result in the identification of additional information or the correction of information relevant to the case”.

As the Panel indicated, the decision to not seek additional information from MTS before issuing the orders was reached after deliberation at two enforcement panels, which were preceded and followed by several less formal interactions between and among staff and management in Region IV, and the Offices of Enforcement, the General Counsel, and Federal and State Materials and Environmental Management Programs. The Panel report explains that the staff determined it already had sufficient information upon which to act based on the investigation results, poor enforcement history, and that additional information gathered would be of questionable value due to staff concerns regarding the reliability and trustworthiness of the MTS President.

Although not emphasized in the Panel report, I also recall from participating in the discussions that a principal driver for our actions resulted after considerable discussion among the above office representatives (and the Office of Investigations) regarding staff’s concern about the need to ensure the radiography cameras were promptly accounted for, and safely secured without providing too much lead time to the licensee on our intention to issue a revocation order. The reasoning behind this approach was to minimize the potential for the sources to be improperly controlled by a licensee with whom we had lost confidence and trust. With an abundance of caution being the agreed upon approach; taking steps to maintain public health and safety through swift, safe storage and control of the cameras by keeping them out of the public domain was a paramount consideration, during what we anticipated would be an upsetting period for the licensee.

With regard to your view, that “the Agency could have met its safety and security goals with fewer unintended consequences if the Order had been drafted more carefully”, I agree that we can learn from the manner this Order was drafted, and support the recommendations made by the Panel, as appropriate actions to address your concern.

In closing, I want to again express my appreciation to you for using the Differing Professional Opinions Program to address your concerns. Your willingness to bring your concerns forward, resulted in recommendations from the Panel which should enhance our drafting of similar orders in the future. With regard to your concerns on how we chose a rarely used approach with less communication with the licensee, I agree that this approach does less to emphasize our Values. However, in this instance, the approach was taken with forethought, and an abundance of caution, to above all else, maintain public health and safety.

C. Cain

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In accordance with Management Directive 10.159, The Differing Professional Opinions Program, a summary of the issue and its disposition will be included in the Weekly Information Report to advise interested employees of the outcome.

cc: M. Weber, DEDMRT  
E. Collins, RIV  
R. Pedersen, DPOPM  
K. Fuller, RIV OWCE Champion

C. Cain

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In accordance with Management Directive 10.159, The Differing Professional Opinions Program, a summary of the issue and its disposition will be included in the Weekly Information Report to advise interested employees of the outcome.

cc: M. Weber, DEDMRT  
E. Collins, RIV  
R. Pedersen, DPOPM  
K. Fuller, RIV OWCE Champion

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