

generally no penalty assessment is even proposed. WCTI maintained that its situation was distinguishable from that of other testing companies that had been "fined" by the NRC for willful violations of the same regulations. In this regard, WCTI claimed that it should not be classified together with those testing firms in which the principals were deliberately ignoring compliance requirements.

Finally, the Licensee argued that, upon being notified that Form 241 had not been filed, WCTI took prompt corrective action to ensure compliance and effective comprehensive action to prevent recurrence of the violation.

#### *NRC Evaluation of Licensee's Request for Mitigation*

Section VI.A. of the Enforcement Policy provides that, in general, licensees are held responsible for the acts of their employees. The Commission formally considered the responsibility issue between a licensee and its employees in its decision concerning the Atlantic Research Corporation case, CLI-80-7, dated March 14, 1980. In that case, the Commission stated, in part, that "a division of responsibility between a licensee and its employees has no place in the NRC regulatory regime which is designed to implement our obligation to provide adequate protection to the health and safety of the public in the commercial nuclear field."

Not holding the licensee responsible for the actions of its employees, whether such actions result from negligence or willful misconduct, is tantamount to not holding the licensee responsible for the use or possession of licensed material. If the NRC adopted this position, there would be less incentive for licensees to monitor their own activities to assure compliance because licensees could attribute noncompliance to employee negligence or misconduct. Therefore, notwithstanding WCTI's argument that the blame for the violation rests with the former company RSO, under long-established Commission Policy and case law, the company is still responsible for the actions of its former RSO. Further, the NRC notes that the violation continued to exist in 1996, after the assignment of a newly trained RSO. This detracts from the Licensee's argument that the blame lay with one particular former RSO.

As WCTI noted, Section VI.B.2 of the NRC's Enforcement Policy provides for consideration of previous escalated enforcement in the civil penalty assessment process. However, the civil penalty assessment process considers several factors, including whether the violation is willful. If any one of these considerations applies, the policy states that the NRC should normally consider identification in addition to corrective action in the civil penalty assessment process (regardless of the licensee's previous escalated enforcement). In this case, the NRC considered both identification and corrective action in determining the civil penalty because the NRC concluded that the violation was willful.

The term "willfulness," as defined by Section IV.C. of the NRC Enforcement Policy

embraces a spectrum of violations ranging from deliberate intent to violate or falsify, to and *including careless disregard for requirements* (emphasis added). In this case, as described in the NRC's Notice, the NRC concluded that WCTI (not its president), through the action of one or more of its representatives, committed a violation with careless disregard for NRC regulations, a condition that clearly meets the NRC's definition of a willful violation. As described in the Notice, the NRC's conclusion was based on several grounds, including the fact that WCTI had knowledge of the requirement to file NRC Form 241 (which WCTI admits in its response).

As to Licensee's discussion of the NRC Enforcement Policy, civil penalties are not normally proposed in cases where the NRC concludes that no willful violation has occurred and no escalated enforcement action has been taken within the two prior years or two prior inspections, provided that prompt and comprehensive corrective action is taken. However, the policy provides for consideration of civil penalties in cases involving willfulness.

The NRC reviews each case being considered for enforcement action on its own merits to ensure that the severity of a violation and enforcement sanction are best suited to the significance of the particular violation. In this case, as noted above, the NRC concluded that the violation was willful. Therefore, in accordance with Section VI.B of the Enforcement Policy, the NRC concluded that: (1) No credit was warranted for identification because the NRC identified the violation; and (2) credit was warranted for WCTI's prompt and comprehensive corrective action (had the NRC concluded otherwise, a civil penalty of \$5,000 would have been proposed).

In its response, WCTI claimed that its case was "readily distinguishable" from other similar enforcement actions such as EA 95-270, "Foley Construction Services," EA 95-101, "Testco, Inc.," and EA 93-241, "S.K. McBryde, Inc." The NRC agrees that WCTI's case is distinguishable from the cases cited by WCTI in that the cases cited involved deliberate violations, not violations involving careless disregard. However, WCTI's comparison of the civil penalty in this case to that in the cases cited is flawed in that: (1) The civil penalty in the Foley Construction Services case was based on the civil penalty assessment process described in an earlier Enforcement Policy;<sup>1</sup> (2) the enforcement action taken against Testco, Inc., involved an Order Prohibiting Involvement in NRC-Licensed Activities to President of the company, as well as a civil penalty to the licensee, which was initially based on enforcement discretion and subsequently reduced from \$5,000 to \$1,000; and (3) the S. K. McBryde case did not involve an NRC Form-241 violation, it involved a Severity Level IV violation for failure to maintain

<sup>1</sup> In this earlier Enforcement Policy, the base amount for a Severity Level III was \$500 and the civil penalty assessment process involved consideration of 6 factors. Under the current Enforcement Policy, the base amount for a Severity Level III is \$2,500 and the civil penalty assessment process involves consideration of 2 factors.

complete and accurate records and a civil penalty that was based on the civil penalty assessment process described in the earlier Enforcement Policy.<sup>1</sup> Furthermore, the enforcement action against WCTI is consistent with other recent cases involving careless disregard by testing companies to submit Form-241 where corrective action credit was warranted. For example, penalties of \$2,500 were assessed in enforcement actions involving EA 96-382, "Energy Technologies, Inc.," EA 96-382, "Grandin Testing Lab, Inc.," and EA 96-447, "Testing Laboratories, Inc."<sup>2</sup>

#### *NRC Conclusion*

The NRC concludes that the violation occurred as stated and that the Licensee has not provided adequate justification for reconsideration of the characterization of the violation as "willful" or for mitigation of the civil penalty. Consequently, the proposed civil penalty in the amount of \$2,500 should be imposed.

[FR Doc. 97-29242 Filed 11-4-97; 8:45 am]

BILLING CODE 7590-01-P

## **NUCLEAR REGULATORY COMMISSION**

[Docket Nos. 50-275 AND 50-323]

### **Pacific Gas and Electric Company; Diablo Canyon Power Plant Units 1 and 2, Environmental Assessment and Finding of No Significant Impact**

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from certain requirements of its regulations for Facility Operating License Nos. DPR-80 and DPR-82, issued to Pacific Gas and Electric Company (the licensee), for operation of the Diablo Canyon Power Plant (DCPP), Units 1 and 2, located in San Luis Obispo County, California.

#### **Environmental Assessment**

##### *Identification of Proposed Action*

The proposed action would exempt Pacific Gas and Electric Company from the requirements of 10 CFR 70.24, which requires in each area in which special nuclear material is handled, used, or stored, a monitoring system that will energize clear audible alarms if accidental criticality occurs. The proposed action would also exempt the licensee from the requirements to maintain emergency procedures for each area in which this licensed special nuclear material is handled, used, or stored to ensure that all personnel withdraw to an area of safety upon the

<sup>2</sup> These cases are available on the NRC web site at "http://www.nrc.gov/oe/", which is maintained by the Office of Enforcement.

sounding of the alarm, to familiarize personnel with the evacuation plan, and to designate responsible individuals for determining the cause of the alarm, and to place radiation survey instruments in accessible locations for use in such an emergency.

The proposed action is in accordance with the licensee's application for exemption dated April 3, 1997, as supplemented by letter dated August 4, 1997.

#### *The Need for the Proposed Action*

The purpose of 10 CFR 70.24 is to ensure that if a criticality were to occur during the handling of special nuclear material, personnel would be alerted to that fact and would take appropriate action. At a commercial nuclear power plant the inadvertent criticality with which 10 CFR 70.24 is concerned could occur during fuel handling operations. The special nuclear material that could be assembled into a critical mass at a commercial nuclear power plant is in the form of nuclear fuel; the quantity of other forms of special nuclear material that is stored on site in any given location is small enough to preclude achieving a critical mass. Because the fuel is not enriched beyond 5.0 weight percent uranium-235 and because commercial nuclear plant licensees have procedures and design features that prevent inadvertent criticality, the staff has determined that it is unlikely that an inadvertent criticality could occur due to the handling of special nuclear material at a commercial power reactor. The requirements of 10 CFR 70.24, therefore, are not necessary to ensure the safety of personnel during the handling of special nuclear materials at commercial power reactors.

#### *Environmental Impacts of the Proposed Action*

The Commission has completed its evaluation of the proposed action and concludes that inadvertent or accidental criticality will be precluded through compliance with the Diablo Canyon Power Plant, Units 1 and 2 Technical Specifications, the design of the fuel storage racks providing geometric spacing of fuel assemblies in their storage locations, and administrative controls imposed on fuel handling procedures.

The proposed exemption would not result in an increase in the probability or consequences of accidents, affect radiological plant effluents, or cause any significant occupational exposures. Therefore, there are no radiological impacts associated with the proposed exemption.

The proposed exemption does not result in a change in non-radiological effluents and will have no other non-radiological environmental impact.

Accordingly, the Commission concludes that there are no significant environmental impacts associated with the proposed action.

#### *Alternatives to the Proposed Action*

Since the Commission has concluded that there is no measurable environmental impact associated with the proposed action, any alternatives with equal or greater environmental impact need not be evaluated. As an alternative to the proposed exemption, the staff considered denial of the requested exemption. Denial of the request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

#### *Alternative Use of Resources*

This action does not involve the use of any resources not previously considered in the Final Environmental Statements for the Diablo Canyon Power Plant dated May 1973.

#### *Agencies and Persons Consulted*

In accordance with its stated policy, on October 6, 1997, the staff consulted with the California State official, Mr. Steve Hsu of the Radiologic Health Branch of the State Department of Health Services, regarding the environmental impact of the proposed action. The State official had no comments.

#### *Finding of No Significant Impact*

Based upon the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated April 3, 1997, and supplemental letter dated August 3, 1997, which are available for public inspection at the Commission's Public Document Room, which is located at The Gelman Building, 2120 L Street, NW., Washington, DC., and at the local public document room located at the California Polytechnic State University, Robert E. Kennedy Library, Government Documents and Maps Department, San Luis Obispo, California 93407.

Dated at Rockville, Maryland, this 30th day of October 1997.

For the Nuclear Regulatory Commission.

**Steven D. Bloom,**

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[FR Doc. 97-29245 Filed 11-4-97; 8:45 am]

BILLING CODE 7590-01-P

## **NUCLEAR REGULATORY COMMISSION**

[Docket No. 50-346]

### **Toledo Edison Company; Centerior Service Company and The Cleveland Electric Illuminating Company; Davis-Besse Nuclear Power Station, Unit 1; Environmental Assessment and Finding of No Significant Impact**

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from certain requirements of its regulations to Facility Operating License No. NPF-3, issued to Toledo Edison Company, Centerior Service Company, and The Cleveland Electric Illuminating Company (the licensees), for operation of the Davis-Besse Nuclear Power Station, Unit 1, located in Ottawa County, Ohio.

#### **Environmental Assessment**

##### *Identification of the Proposed Action*

The proposed action would exempt the licensees from the requirements of 10 CFR 70.24, which requires in each area in which special nuclear material is handled, used, or stored a monitoring system that will energize clear audible alarms if accidental criticality occurs. The proposed action would also exempt the licensees from the requirements to maintain emergency procedures for each area in which this licensed special nuclear material is handled, used, or stored to ensure that all personnel withdraw to an area of safety upon the sounding of the alarm, to familiarize personnel with the evacuation plan, to designate responsible individuals for determining the cause of the alarm, and to place radiation survey instruments in accessible locations for use in such an emergency.

The proposed action is in accordance with the licensees' application for exemption dated January 30, 1997, as supplemented May 28 and October 3, 1997.

##### *The Need for the Proposed Action*

The purpose of 10 CFR 70.24 is to ensure that if a criticality were to occur during the handling of special nuclear material, personnel would be alerted to that fact and would take appropriate