

Upon consideration of the joint intervenors' request and other relevant information, the staff agrees that PG&E should have reported the NSC audit. However, for the reasons set forth in this decision, the staff does not believe that the extreme remedy of either license suspension or revocation is warranted under these circumstances.

FACTUAL BACKGROUND

In July 1977, PG&E requested Pullman to obtain an independent audit of Pullman's work at Diablo Canyon. PG&E concurred in Pullman's selection of NSC to perform the audit. 1/ NSC conducted the audit between August 22 and September 20, 1977, and sent its report to Pullman on October 24, 1977. In its summary of its report, NSC found "little evidence available to verify the adequacy of the work performed" before early 1974; it concluded that, though documentation was available increasingly since early 1974, "the present program and controls still do not meet 10 CFR 50, Appendix B requirements" for the reasons identified in the report.2/ Upon its review of the NSC audit, Pullman disagreed with NSC's conclusion that necessary documentation did not exist for pre-1974 work. Pullman noted that NSC had failed to examine installed work and had misapplied the applicable codes and regulatory criteria. Pullman asserted that it met Appendix B

1/ See Affidavit of Russell P. Wischow, at 1-2, attached to PG&E's Answer to Joint Intervenors' Supplement to Motion to Reopen the Record on the Issue of Construction Quality Assurance (Sept. 21, 1983), which was filed with the Atomic Safety and Licensing Appeal Board.

2/ NSC Audit at 42. The NCS audit and the related Pullman and PG&E reports are attached to the PG&E filing referenced in footnote 1.

requirements, but indicated that the audit results were useful in identifying areas in which the quality assurance program could be upgraded.^{3/} Pullman submitted the final report of its review of the NSC audit to PG&E on April 11, 1978.

Apparently, PG&E did not receive a copy of the NSC audit until February 1978 when Pullman provided a draft of its review of the audit and the NSC audit report to PG&E.^{4/} PG&E reviewed the NSC audit and also performed an audit of Pullman's installation work. This audit by PG&E was conducted from April 2 through June 1, 1978, and resulted in a report to J.D. Worthington, PG&E Executive Vice President, on June 13, 1978, and a separate report to R.S. Bain, PG&E Manager of Station Construction, on June 16, 1978. While PG&E concluded that, contrary to the NSC audit's findings, Pullman essentially met applicable requirements, PG&E opened two non-conformance reports and four minor variation reports to initiate corrective actions as the result of its review. PG&E generally agreed with Pullman's assessment of the failings of the NSC audit.

At the time that the NSC audit was conducted and was being reviewed by Pullman and PG&E, the Atomic Safety and Licensing Board, on its own initiative, was considering the issue of quality assurance in the Diablo Canyon operating license proceeding. On May 25, 1977, the Board denied the joint intervenors' motion of April 29, 1977, to add a quality assurance contention to the proceeding. At the same time, the

^{3/} Pullman Report, section 4, "Observations," and section 5, "Summary."

^{4/} Affidavit of Russell P. Wischow, supra note 1, at 2-3.

Board directed PG&E and the staff to present evidence on the quality assurance program for Diablo Canyon. The hearing was conducted on October 18 and 19, 1977. Russell Wischow, the Director of the PG&E Quality Assurance Department, testified for PG&E. A panel of three witnesses from NRC's Region V office and the Office of Nuclear Reactor Regulation testified for the staff. Mr. Wischow described the quality assurance program and testified that the program had generally been effective in detecting defects and in ensuring their correction. The staff testified that implementation of the Diablo Canyon quality assurance program had been adequate. Counsel for the joint intervenors declined to cross-examine either Mr. Wischow or the staff's witnesses. PG&E filed its proposed findings of fact and conclusions of law on the quality assurance issue on November 11, 1977, in which PG&E asserted that its quality assurance program had uncovered and then had corrected defects in construction and that its quality assurance program for design and construction of the plant was acceptable. The joint intervenors opposed those findings on February 28, 1978. PG&E replied to the joint intervenors' opposition on March 14, 1978, and reiterated its view that the quality assurance program was acceptable. The staff filed its proposed findings on March 17, 1978. The Board issued its decision on quality assurance in a "Partial Initial Decision" in 1981. The Board found that the quality assurance program for the design and construction phase of Diablo Canyon complied with 10 CFR Part 50, Appendix B, and that implementation had been acceptable. LBP-81-21, 14 NRC 107, 116 (1981). 5/

5/ In November 1981, shortly after issuance of a low power license for Unit 1, the Commission suspended the license in view of the discovery of deficiencies involving quality assurance for design activities. CLI-81-30, 14 NRC 950 (1981). The Appeal Board reopened the operating license record on design quality assurance by Memorandum and Order dated April 21, 1983.

REPORTABILITY OF THE NSC AUDIT

The basic issue raised by the joint intervenors' request is whether PG&E had an obligation to report the NSC audit. Reporting obligations to the Commission may arise from various sources: e.g., license conditions, regulations such as 10 CFR Part 21 and 10 CFR 50.55(e), and section 186 of the Atomic Energy Act. 6/ The joint intervenors contend that, by failing to report the NSC audit, PG&E violated 10 CFR 50.55(e) and committed a material false statement under section 186 of the Atomic Energy Act.

A. Reportability of the NSC Audit Under 10 CFR 50.55(e)

The joint intervenors believe that the NSC audit was reportable under 10 CFR 50.55(e) because the audit revealed a breakdown in Pullman's and PG&E's quality assurance programs. Under 10 CFR 50.55(e), the holder of a construction permit is required to:

notify the Commission of each deficiency found in design and construction, which, were it to have remained uncorrected, could have affected adversely the safety of operations of the nuclear power plant at any time throughout the expected lifetime of the plant, and which represents:

6/ The NSC audit may also have been reportable under PG&E's responsibility to make appropriate board notifications. Since the Appeal Board's decision in Duke Power Co. (McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-26 (1973), parties to NRC adjudicatory proceedings have been held to an absolute obligation to alert NRC adjudicatory tribunals to new information that is relevant and material to the matters being adjudicated. See also Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1-3), ALAB-677, 15 NRC 1387, 1394 (1982). The enforcement of the obligation to make board notifications is within the purview of the Commission's adjudicatory tribunals. The staff itself is responsible to ensure that new relevant and material information of which the staff becomes aware is provided to the boards and parties.

(i) A significant breakdown in any portion of the quality program conducted in accordance with the requirements of Appendix B to this part....

This regulation does not require the reporting of every deficiency in design or construction that could ultimately affect the safety of plant operations. Rather, the deficiency must be significant. The licensee must evaluate identified deficiencies in design and construction to determine whether a particular deficiency is significant. In determining whether the deficiency represents a significant breakdown in the quality assurance program or one of the three other types of significant deficiencies under § 50.55(e), the regulation permits the licensee reasonable latitude in determining a deficiency's significance.

PG&E evaluated the NSC audit and Pullman's response and concluded that Pullman's quality assurance program generally met applicable requirements. PG&E initiated its review after receiving the NSC audit with Pullman's own review of it. Pullman had reviewed the audit and determined that the findings did not substantiate major deficiencies in Pullman's quality assurance program. Pullman also noted that NSC had not reviewed or identified any hardware or installation deficiencies in Pullman's work, though such a review had been intended to be within the scope of the NSC audit. PG&E reviewed the NSC audit and Pullman's response and also audited the as-built condition of components and supports fabricated and installed by Pullman. PG&E concluded that Pullman's response to the NSC audit was generally correct. As a result of its findings, PG&E opened two nonconformance reports and four minor

variation reports to ensure corrective action for identified deficiencies in the programmatic description of the quality assurance program and in the implementation of procedures and for several minor installation deficiencies. PG&E did not conclude in its report that the identified deficiencies were "significant" or that Pullman's quality assurance program had suffered a "significant breakdown."

In recent months the staff has reviewed the findings of the NSC audit and has examined extensively those findings that would affect the quality of installed hardware. 7/ The staff examined Pullman's records and procedures and the licensee's audits of Pullman's activities. The staff also interviewed various Pullman personnel, particularly those with experience at the site in the early 1970's. See Office of Nuclear Reactor Regulation, Safety Evaluation Report Related to the Operation of Diablo Canyon Nuclear Power Plant, Units 1 and 2, NUREG-0675, Supp. No. 21, at 2-157 (Dec. 1983); NRC Region V Inspection Reports Nos. 50-275/83-34 & 50-323/83-24; 50-275/83-37 & 50-323/83-25. The staff did not identify any significant breakdown in Pullman's quality assurance program or safety

7/ No one on the staff recalls specifically whether the NSC audit was reviewed by NRC inspectors in 1977 or 1978. However, an inspector may have seen the audit or at least PG&E's report of its review of the NSC audit during a July 1978 inspection. The inspection report only indicates that NRC examined a number of PG&E quality assurance audits performed between May 25 and July 6, 1978, the same time-frame within which the PG&E review of the NSC audit was issued. See NRC Region V Inspection Report Nos. 50-275/78-10 & 50-323/78-10, at 10 (July 25-26, 1978), attached to the PG&E filing referenced in footnote 1.

concerns with the installed hardware. 8/ Additionally, an NRC contractor reviewed some 100 radiographs, independently measured weld attributes and examined records of Pullman's work. The NRC contractor's review did not establish the existence of welding problems.

Although the timeliness of its evaluation could have been improved, PG&E's failure to make a report under § 50.55(e) does not appear unreasonable. Based on the staff's review of the NSC audit, Pullman's response, PG&E's review, and pertinent inspection reports during the period, the staff does not believe that the Pullman quality assurance program suffered a significant breakdown in 1977 such that PG&E was obliged to submit a report under § 50.55(e). 9/

8/ In response to the joint intervenor's supplemental motion to reopen the record on construction quality assurance before the Atomic Safety and Licensing Appeal Board, the staff has also taken the position that the NSC audit report did not reveal a major breakdown in the Pullman quality assurance program. See NRC Staff's Response to Joint Intervenors' Supplement to Motion to Reopen the Record on Construction Quality Assurance (Oct. 6, 1983) and attached Affidavit of Gonzalo H. Hernandez, Jr. (Oct. 4, 1983). The Appeal Board denied the joint intervenors' motion to reopen on October 24, 1983. In its Memorandum and Order issued on December 19, 1983, which details the rationale for its decision, the Appeal Board stated, "We have carefully reviewed the NSC audit report and the responses by Pullman and the applicant. These lead us to conclude that the deficiencies identified by NSC in 1977 did not evidence a significant or systematic failure of the quality assurance program." ALAB-756, Slip op. at 27 n.35, 18 NRC ____ (1983).

9/ In view of PG&E's findings regarding the NSC audit's results, reporting under 10 CFR Part 21 would not have been required since neither a defect nor noncompliance was present that could create a substantial safety hazard.

B. Reportability of the NSC Audit Under Section 186 of the Atomic Energy Act

Apart from 10 CFR 50.55(e), PG&E may have had an obligation to report the NSC audit under the "full disclosure" doctrine that has developed in NRC case law interpreting section 186 of the Atomic Energy Act. In holding that an omission of material information could constitute a material false statement under section 186 of the Atomic Energy Act, the Commission has imposed an obligation on licensees and applicants to ensure that relevant and material information is promptly furnished to the Commission. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric & Power Co. v. NRC, 571 F.2d 1289 (4th Cir. 1978).

Materiality of an omission or statement depends on "the context in which information appears and the stage of the licensing process involved" and "whether information has a natural tendency or capability to influence a reasonable agency expert." Id., 4 NRC at 491. Put another way, "materiality should be judged by whether a reasonable staff member should consider the information in question in doing his job." Id. at 486. The Commission has noted that "[a]t the hearing stage where agency decisionmaking is imminent, arguably relevant data must be promptly furnished if the agency is to perform its function." Id. at 488. Intent to mislead or to withhold information is not a prerequisite to the finding of a material false statement under section 186. 10/

10/ See VEPCO, supra, 4 NRC at 486-87. However, the degree of carelessness or intent in failing to provide material information is a pertinent consideration in determining whether and what enforcement action is appropriate for a given material false statement.

Here, PG&E had an obligation to submit the NSC audit to the Commission before it had reached the conclusion that the NSC audit had not revealed significant deficiencies in Pullman's quality assurance program because of the apparent conflict with PG&E's quality assurance testimony. 11/ By not reporting the NSC audit, PG&E committed a material false statement by omission. The obligation to report the NSC audit arose primarily because the Board had held a hearing to develop a record on quality assurance in the operating license proceeding. Although the Board had determined sua sponte to receive evidence on quality assurance, that fact did not absolve the licensee from any reporting obligation.

One can only speculate about the specific actions that would have been prompted if PG&E had reported the NSC audit; however, the NSC audit would likely have had some influence on the Board's and the staff's examination of the quality assurance issue. PG&E had testified on October 18, 1977 that its quality assurance program, including that of its contractors, was sufficient to ensure adequate design and construction of the Diablo Canyon plant. Within a few days of the hearing, Pullman, PG&E's prime piping contractor, received the NSC audit report which on its face suggested serious inadequacies in Pullman's quality assurance program. Thus, the audit's findings appeared to conflict with the testimony of PG&E which portrayed an adequate, effective quality assurance

11/ This may be an instance in which the failure to provide information would constitute both a failure to meet the obligation to keep the adjudicatory boards informed and a material false statement by omission. Although the obligations are derived from different sources, the obligations under the board notification policy and under section 186 are very similar. Moreover, two of the omissions for which the applicant was held liable in VEPCO were based upon the applicant's failure to adduce evidence before the Licensing Board. See LBP-75-54, 2 NRC 498, 532-33 (1975).

program. Given the interest of the Board in establishing a record on quality assurance, the board may well have kept open the record until evidence was received on the validity and significance of the NSC audit's findings. Furthermore, the staff would likely have followed PG&E's review and resolution of the audit's findings.

Although PG&E determined ultimately that the NSC audit had not in fact detected a significant quality assurance breakdown, PG&E did not make that determination until June 1978. Prior to June, the parties had filed proposed findings on quality assurance, and no decision had been rendered by the Board on the quality assurance issue. Given the pendency of the quality assurance issue, PG&E should have provided the NSC audit to the Commission. The audit was reportable not because it was an audit, but because the audit report appeared to contain more significant findings than might be expected of a typical audit. These findings appeared to contradict the record developed in the operating license proceeding and, most likely, would have resulted in follow-up review by the staff to ensure proper resolution of the audit's findings.

PG&E apparently did not have the NSC audit until February 1978, when PG&E received the audit with Pullman's draft review indicating that NSC's conclusions were generally invalid. This fact does not absolve PG&E from any reporting responsibility. Pullman obtained a copy of the audit in October 1977. In VEPCO, the Commission held that the applicant or licensee is chargeable with the knowledge of information in the possession of its contractors and consultants. See VEPCO, supra, CLI-76-22, 4 NRC at 486; LBP-75-54, 2 NRC 498, 504-06, 523 (1975); cf. 10 CFR Part 50, Appendix B, Criterion I; Atlantic Research Corp., CLI-80-7, 11 NRC 413, 421-22, 424 (1980). In any event, PG&E received the NSC audit in February 1978 with Pullman's draft response. Although PG&E would ultimately determine that the NSC audit

did not reveal significant quality assurance deficiencies, PG&E should have reported the NSC audit when PG&E received it, rather than waited to complete its review. At best, the status of the audit was indeterminate when PG&E received it, but, in light of the Commission's interest in the quality assurance issue and the potential conflict between PG&E's earlier testimony and the audit's findings, PG&E should have submitted the NSC audit to the Commission. Reportability under the facts here is a close call. In other cases, licensees and applicants have been expected to provide information during the hearing stage of the licensing process even where its materiality was uncertain. 12/ To decide otherwise here would weaken the incentives for licensees to ensure that the Commission is informed of potentially relevant and material information.

One could argue that, for purposes of reporting construction deficiencies, the Commission has established a specific reporting threshold in 10 CFR 50.55(e) which requires only the reporting of certain deficiencies. Nonetheless, the Commission has imposed a distinct reporting obligation through the "full disclosure" doctrine developed under section 186 of the Atomic Energy Act. While 10 CFR 50.55(e) establishes a reporting standard for most instances in which construction deficiencies are identified, licensees have an obligation under section 186 to report information not otherwise reportable under 10 CFR 50.55(e), particularly where a particular matter is being adjudicated before an NRC tribunal.

Although the Commission and its licensees are more sensitive to reporting issues today, the standards applied in the foregoing analysis

12/ See VEPCO, supra, LBP-75-54, 2 NRC at 523 and CLI-76-22, 4 NRC at 488. Compare Duke Power Co., supra, 6 AEC at 625 n. 15, in the context of the obligation to make board notifications. See also supra note 11.

were in place in 1977 when the NSC audit was performed. Accordingly, the staff believes that the NSC audit should have been reported and that the failure to report constitutes a material false statement under section 186 of the Atomic Energy Act.

ENFORCEMENT ACTION FOR THE REPORTING FAILURE

Having determined that PG&E made a material false statement, the question remains whether any enforcement action should be taken. The joint intervenors would have the Commission revoke the low power license for Diablo Canyon Unit 1 or continue its suspension.

Not all violations of NRC requirements, including material false statements, warrant the extreme remedy of license revocation or suspension. See Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405-06 (1978); Washington Public Power Supply System (WNP Nos. 4 & 5), DD-82-6, 15 NRC 1761, 1766 n.9 (1982). The choice of enforcement sanctions for violations of NRC requirements rests within the sound discretion of the Commission, based on consideration of such factors as the significance of the underlying violations and the effectiveness of the sanction in securing lasting corrective action. The Commission's current policy on the application of enforcement sanctions is set forth in 10 CFR Part 2, Appendix C. 13/ The enforcement policy classifies

13/ At the time PG&E failed to report to NSC audit, the effective enforcement policy was the one issued on December 31, 1974. That policy did not classify material false statements under the categories of "violations", "infractions", and "deficiencies" used to rank the relative severity of violations of NRC requirements. In those instances in which civil penalties were imposed for a material false statement, the amounts of civil penalties were equivalent to the range of penalties imposed for items of noncompliance in the "violation" category. The categories of violations and the schedule of civil penalties for violations are reproduced in Atlantic Research Corp., ALAB-594, 11 NRC 841, 856-59 (1980).

different types of violations by their relative severity and describes circumstances in which formal sanctions, including orders, civil penalties, and notices of violation, are appropriate.

The severity categories for violations involving material false statements are addressed in Supplement VII of the current enforcement policy. Applying this guidance to the material false statement at issue here, the staff would classify PG&E's failure to report the NSC audit as a Severity Level IV violation. Classification at this level is appropriate for two basic reasons. First, the staff is not aware of any evidence which suggests that the failure to report resulted from a deliberate, calculated effort to conceal or withhold the NSC audit. Thus, the material false statement here does not carry the degree of intent or recklessness which would warrant classification at severity levels I or II. Second, the failure to report - though material - is not significant enough to warrant classification at Severity Level III. Although the staff would probably have ensured that PG&E or its contractor had evaluated the audit report and had initiated appropriate corrective actions as might be required, the NSC audit would not have changed the staff's position at the time on quality assurance because ultimately PG&E concluded and the staff agreed that the NSC audit did not identify a significant quality assurance breakdown. In any event, PG&E took appropriate corrective actions without staff action. In sum, while the NSC audit would have influenced the staff in the sense that the staff would have probably sought more information, the NSC audit would not have resulted in a different staff position on the quality assurance issue.

Third, in comparison with some Severity Level III material false statements in other cases, this violation is less significant. For example, in the Pilgrim case, the licensee represented that it was in compliance with an NRC regulation when it had not, in fact, met the applicable requirement. ^{14/} In Brunswick, the material false statement involved the licensee's inaccurate representation of its corrective actions in response to an NRC Notice of Violation. ^{15/} These two instances are more severe than the material false statement at issue here, particularly in view of the fact that the affirmative representations in those cases were false and were made in response to express staff requests for information. The staff has, in another case, applied the Severity Level IV classification to a material false statement which the staff did not consider significant. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), DD-83-17, 18 NRC ____ (Nov. 15, 1983). In view of these precedents, the staff has concluded that Severity Level IV is the appropriate classification for the violation in this case.

In view of the minimal significance of this particular material false statement, license revocation or continued suspension is inappropriate. As noted above, the failure to report the NSC audit does not appear to

^{14/} See NUREG-0940, Vol. 1, Nos. 1 & 2, at I-8 (Sept. 1982) (EA 81-63).

^{15/} See Letter to E.E. Utley, Carolina Power & Light Co., from J.P. O'Reilly, NRC Region II Administrator (EA-83-88; Jan. 10, 1984).

have been deliberate or willful. 16/ Even if this particular instance were considered in conjunction with the material false statement for which PG&E was cited in early 1982, escalation of enforcement sanctions to the level of license revocation or suspension would not be warranted. Moreover, continued suspension or revocation would not appear to be an appropriate remedy here. The material false statement for which PG&E received a Notice of Violation on February 11, 1982 involved an inaccurate characterization of its receipt of draft reports of the seismic reverification program. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-82-1, 15 NRC 225 (1982). The false statement was compounded by the failure of other PG&E officials to correct the false statement although they knew it to be false at the time. This violation, although more significant than the current violation, did not result in suspension or revocation of the license or even in the imposition of a civil penalty.

Furthermore, the material false statement currently under consideration predated by several years the enforcement action taken in 1982. In connection with that enforcement action, PG&E was required to take appropriate corrective actions. In letters dated March 23, April 15 and 28, 1982, PG&E described its corrective action to ensure good communication between PG&E and the NRC to prevent the recurrence of material false statements or similar reporting failures. The staff would expect such corrective actions to preclude in the future the type of reporting failure involved in the failure to report the NSC audit.

16/ For an instance in which the making of deliberately false statements regarding the status of licensed activities led to license revocation, see American Testing Laboratories, Inc., Order to Show Cause and Order Temporarily Suspending License, 48 Fed. Reg. 28371 (June 21, 1983); Order Revoking License, 48 Fed. Reg. 57182 (Dec. 28, 1983).



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A Notice of Violation pursuant to 10 CFR 2.201 is an appropriate sanction for a material false statement of the type made here. Civil penalties are not usually imposed for Severity Level IV violations. In view of the circumstances surrounding this violation including its age and minimal safety significance, a civil penalty for the failure to report the NSC audit would serve no remedial purpose and, accordingly, a Notice of Violation at most is the appropriate sanction here. 17/

CONCLUSION

For the reasons stated in this decision, PG&E committed a material false statement by failing to report the 1977 NSC audit. Because license revocation or the continuation of the suspension of the low power license is inappropriate for this material false statement, the intervenors' request for such relief is denied.

A copy of this decision will be provided to the Commission for possible review in accordance with 10 CFR 2.206(c). Unless the Commission otherwise directs, the staff will issue a Notice of Violation regarding this matter after the conclusion of the period within which the Commission may review this decision.



Richard C. DeYoung, Director
Office of Inspection and Enforcement

Dated at Bethesda, Maryland,
this 26 day of March 1984.

17/ Having concluded that a civil penalty is not appropriate in these circumstances, I do not need to reach the question whether imposition of a civil penalty would be barred by the statute of limitations in 28 U.S.C. 2462.



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