POLICY ISSUE
NOTATION VOTE

February 1, 2002 SECY-02-0023

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: PROPOSED REVISION TO THE ENFORCEMENT POLICY TO INCLUDE AN INTERIM POLICY REGARDING ENFORCEMENT DISCRETION FOR FITNESS-FOR-DUTY ISSUES AND STATUS OF RULEMAKING EFFORT

PURPOSE:

To (1) obtain Commission approval for a proposed revision to the NRC Enforcement Policy (as addressed in the attached *Federal Register* notice) to include an interim enforcement policy that would authorize enforcement discretion with respect to 10 CFR Part 26 practices regarding "suitable inquiry" and "pre-access testing," and (2) inform the Commission on the status of the fitness-for-duty (FFD) rulemaking effort.

BACKGROUND:

In SECY-01-0134, the staff informed the Commission of stakeholder issues associated with the affirmed final rule on 10 CFR Part 26, "Fitness-for-Duty Programs." The staff identified several options for addressing stakeholder concerns and recommended the option that included: (1) withdrawing the Office of Management and Budget (OMB) clearance request, (2) requesting additional public comment on all the rule's provisions, and (3) conducting several stakeholder meetings concerning a combined access authorization and FFD guidance document. The staff also informed the Commission that as a result of public meetings with stakeholders, it had learned of two common practices in the FFD area (suitable inquiry and pre-access testing) that did not meet the current Part 26 requirements. Given the staff's recommendation to withdraw the final rule, the staff developed an approach to address inconsistent implementation in these areas and recommended that an interim enforcement policy be created to authorize the exercise of enforcement discretion for licensees that follow the approach.

In a Staff Requirements Memorandum (SRM) dated October 3, 2001, the Commission approved the staff's recommended approach for the rule and also approved the development of an interim enforcement policy for exercising enforcement discretion with respect to the practices regarding suitable inquiry and pre-access testing. The Commission also directed the staff to provide periodic updates on the status of the rulemaking effort.

Contacts: Renée Pedersen, OE 415-2742
Garmon West, Jr., NRR 415-1044

DISCUSSION:

Suitable Inquiry

As previously addressed in SECY-01-0134, with regard to conducting a suitable inquiry in accordance with 10 CFR 26.27 prior to granting unescorted access, many licensees were failing to contact employers where an individual candidate was employed for less than 30 days. Instead, these licensees followed the practice for background investigations to support personnel access authorization requirements (10 CFR 73.56). That is, licensees only contacted employers where the individual candidate was employed for 30 days or more. Although the requirements are separate, licensees have maintained, and the NRC agrees, that it is reasonable to use the same practice for both rules.

As such, the staff does not intend to expend inspection resources to address past noncompliances in this area. Further, the staff has developed the following interim enforcement policy, until a final rule that would address this issue becomes effective. The NRC normally will not take enforcement action for a licensee's failure to contact all employers when an individual candidate was employed for less than 30 days, provided that a licensee verifies at least one period of employment status during that 30-day period. For example, during the month of April, if a transient worker was employed by Employer A for two weeks, by Employer B for one week, and unemployed for one week, under this interim policy, it would only be necessary to verify the worker's status for one of these periods.

Enforcement action may be taken where a licensee does not follow this practice.

Pre-Access Testing

Prior to granting unescorted access to a candidate for reinstatement or transfer, some licensees have not been conducting a pre-access test for alcohol and drugs if the candidate has recently been covered by a Part 26 FFD program (e.g., within the past 30 days). However, the fact that a candidate was recently covered does not necessarily mean the candidate was recently tested for drugs and alcohol. Thus, this practice does not satisfy §26.24(a)(1) and the applicable provisions of the NRC's guidance in NUREG-1385, "Fitness for Duty in the Nuclear Power Industry: Responses to Implementation Questions." The rule and guidance state that an applicant must be tested for drugs and alcohol "within 60 days prior to the initial granting of unescorted access." They do not provide an exception for a reinstatement or transfer where there is little or no break in coverage under a Part 26 FFD program.

As previously stated in SECY-01-0134, the staff believes that it is reasonable that short breaks in coverage for a reinstatement or a transfer should be treated similar to the case of continuous coverage. For example, a worker who is continuously covered, but unavailable for behavioral observation and possible random testing while on vacation for two or three weeks, is generally not given a pre-access test upon return. Also, the practice of omitting the pre-access test when the break in coverage is less than 30 days is similar to NRC's practice in related areas. For example, using the guidance endorsed by Regulatory Guide 5.66, licensees generally do not conduct a background check under §73.56(b)(27)(i) for a candidate for reinstatement or a transfer when the gap in coverage is less than 30 days. In another example, using the guidance in NUREG-1385, an individual covered by a contractor's FFD

program may take a (reasonably short) period of time to transfer from one site to another without invoking the need for a pre-access test.

As such, the staff does not intend to expend inspection resources to address past noncompliances in this area. Further, until a final rule that would address this issue is published and becomes effective, under this interim enforcement policy, the NRC normally will not take enforcement action for a licensee's failure to conduct a pre-access test for alcohol and drugs in those cases where an individual has had a short break in FFD coverage, provided certain conditions are met. That is, the candidate for reinstatement or transfer has been covered by a Part 26 FFD program for at least 30 of the previous 60 days and has not, in the past: tested positive for illegal drugs; been subject to a plan for treating substance abuse; been removed from or made ineligible for activities within the scope of Part 26; or been denied unescorted access at any other nuclear power plant or other employment in accordance with a FFD policy.

Enforcement action may be taken where a licensee does not follow this practice.

Status of Rulemaking Effort

As directed by the Commission, the staff met with stakeholders on November 15, 2001, December 6, 2001, and January 17, 2002, concerning both the proposed FFD rule and access authorization guidance. The staff has scheduled meetings with stakeholders for February 19-20, 2002. The staff will continue to provide periodic updates to the Commission on the rulemaking effort.

RECOMMENDATION:

The staff recommends that the Commission approve publication of the attached *Federal Register* notice announcing an immediately effective revision to the Enforcement Policy.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper.

Notes:

1. The interim enforcement policy will be published in the *Federal Register* and will become effective upon publication. Comments on this revision will be accepted for 30 days after publication and will be considered prior to the next revision to the Enforcement Policy.

2. The appropriate Congressional Committees will be notified.

3. The change to the Policy Statement does not impact information collections that are subject to the requirements of the Paperwork Reduction Act.

4. The staff has determined that this is not a "major" rule as defined in the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804(2).

5. The Office of Enforcement's web site will be updated. Necessary changes to the Enforcement Manual will also be made.

/RA/

William D. Travers
Executive Director
for Operations

Attachment:
Draft *Federal Register* notice with revision to Enforcement Policy

ADAMS ACCESSION NUMBER: ML020100435

FILE NAME: G:\RENEE\SECY for Fitness for Duty Discretion Policy.wpd
☐ Publicly Available ☐ Non-Publicly Available ☐ Sensitive ☐ Non-Sensitive

OFFICE	OE:ES	OE:DD	OE:D	NRR
NAME	RPedersen	JGLuehman	FJCongel	BBoger
DATE	1/11/2002	12/17/2001	1/11/2002	1/18/2002

OFFICE	OGC	EDO	ADM
NAME	LChandler	WTravers	By email
DATE	12/17/2001	02/01/02	12.07/01

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NUCLEAR REGULATORY COMMISSION

[NUREG - 1600]

Revision of the NRC Enforcement Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: revision.

SUMMARY: The Nuclear Regulatory Commission (NRC) is publishing a revision to its General Statement of Policy and Procedure for NRC Enforcement Actions (NUREG-1600) (Enforcement Policy or Policy) to include an interim enforcement policy regarding enforcement discretion for certain fitness-for-duty issues.

DATES: This revision is effective on (insert date of publication in the *Federal Register*), while comments are being received. Submit comments on or before (30 days after publication in the *Federal Register*).

ADDRESSES: Submit written comments to: Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop: T6D59, U. S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, Room O1F23, 11555 Rockville Pike, Rockville, MD.

FOR FURTHER INFORMATION CONTACT: Renée Pedersen, Senior Enforcement Specialist, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-2741, e-mail (RMP@nrc.gov) or Garmon West, Jr., Office of Nuclear Reactor Regulation, Program Manager, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-1044, (fitnessforduty@nrc.gov).

SUPPLEMENTARY INFORMATION:

A proposed amendment to the Fitness-for-Duty (FFD) rule was published on May 9, 1996 (61 FR 21105). After consideration of public comment, a final rule was affirmed by the Commission on December 4, 2000. When the NRC sought clearance from the Office of Management and Budget (OMB) to publish the affirmed final rule, stakeholders objected and expressed a number of concerns regarding the affirmed final rule. Because of stakeholder concerns and questions about implementation of the final rule, the NRC met with stakeholders several times to discuss implementation questions and to more fully understand their concerns about the rule. Given the significance of stakeholder concerns, the NRC considered several options and concluded on October 3, 2001, that it should: (1) withdraw the OMB clearance request, (2) request additional public comment on all the rule's provisions, and (3) conduct several stakeholder meetings concerning a combined access authorization and FFD guidance document.

As a result of the public meetings with stakeholders, the NRC learned of two common practices in FFD areas (suitable inquiry and pre-access testing) that did not meet the current Part 26 requirements.

With regard to conducting a suitable inquiry prior to granting unescorted access, many licensees were failing to contact employers when an individual candidate was employed for

less than 30 days in accordance with 10 CFR 26.27. Instead, many licensees followed the practice for background investigations to support personnel access authorization requirements set forth in 10 CFR Part 73. That is, licensees only contacted employers when the individual candidate was employed for 30 days or more. Although the requirements are separate, licensees have maintained, and the NRC agrees, that it is reasonable to use the same practice for both rules. A suitable inquiry is very similar to a background check. It involves asking questions about drug and alcohol use, whereas a background check involves asking questions about reliability. In fact, a licensee typically contacts a previous employer only once and asks both sets of questions at that time.

Based on stakeholder input, the NRC has developed an approach to address inconsistent implementation in this area. Therefore, until a final rule that would address this issue becomes effective, under this interim enforcement policy, the following approach will be taken. The NRC normally will not take enforcement action for a licensee's failure to contact all employers when an individual candidate was employed for less than 30 days, provided that a licensee verifies at least one period of employment status during that 30-day period. For example, during the month of April, if a transient worker was employed by Employer A for two weeks, Employer B for one week, and unemployed for one week, under this interim policy, it would only be necessary to verify the worker's status for one of these periods.

Because this practice requires at least one contact for each 30-day period, the NRC believes it provides adequate safety. Neither the current rule nor the affirmed final rule provides an exception for short-term employers. Nevertheless, by requiring at least one contact for each 30-day period, this practice provides for a reasonable amount of inquiry in a cost-effective manner.

With regard to pre-access testing, many licensees were failing to conduct a pre-access test for alcohol and drugs in those cases where an individual was being reinstated or had been transferred and had been covered by a Part 26 FFD program within the past 30 days. Licensees failed to conduct the pre-access testing in these cases because they viewed the initial FFD pre-access screening as being the same as access authorization initial screening. Access authorization initial screening is completed once and, as long as continuous behavioral observation is maintained, the initial screening is not repeated. Again, although the requirements are separate, it is understandable how a licensee might mistakenly follow the same practice for both rules.

The NRC believes that it is reasonable that short breaks in coverage for a reinstatement or a transfer be treated similar to the case of continuous coverage. For example, a worker who is continuously covered, but unavailable for behavioral observation and possible random testing while on vacation for two or three weeks is generally not given a pre-access test upon return. Also, the practice of omitting the pre-access test when the break in coverage is less than 30 days is similar to NRC's practice in related areas. For example, using the guidance endorsed by Regulatory Guide 5.66, "Access Authorization Program for Nuclear Power Plants, " June 1991, licensees generally do not conduct a background check under 10 CFR 73.56(b)(27)(i) for a candidate for reinstatement or a transfer when the gap in coverage is less than 30 days. In another example, using the guidance in NUREG-1385, "Fitness For Duty in the Nuclear Power Industry: Responses to Implementation Questions," October 1989, an individual covered by a contractor's FFD program may take a (reasonably short) period of time to transfer from one site to another without invoking the need for a pre-access test.

Therefore, until a final rule that would address this issue is published and becomes effective, under this interim enforcement policy, the NRC normally will not take enforcement

action for a licensee's failure to conduct a pre-access test for alcohol and drugs in those cases where an individual has had a short break in FFD coverage, provided certain conditions are met. Specifically, the candidate for reinstatement or transfer has been covered by a Part 26 FFD program for at least 30 of the previous 60 days and has not, in the past: tested positive for illegal drugs; been subject to a plan for treating substance abuse; been removed from or made ineligible for activities within the scope of Part 26; or been denied unescorted access at any other nuclear power plant or other employment in accordance with a FFD policy.

It should be noted that this interim policy provides the same guidance that would have been allowed under the affirmed final rule. The NRC believes that it provides adequate safety. It is important to recognize that this interim policy only applies to candidates for reinstatement or transfer. These individuals have already demonstrated a negative drug test as part of their being previously granted unescorted access. They have been subject to random drug testing (some may have actually had a drug test as part of a program), and they have been subject to a behavioral observation program within a recent time frame.

In conclusion, based on these factors, and its judgment that both practices provide adequate safety, the NRC considers the risk associated with issuing an interim enforcement policy to authorize the use in suitable cases of enforcement discretion pending rulemaking to be insignificant.

Accordingly, the proposed revision to the NRC Enforcement Policy reads as follows:

GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS

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INTERIM ENFORCEMENT POLICIES

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Interim Enforcement Policy for Generally Licensed Devices Containing Byproduct Material (10 CFR 31.5)

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Interim Enforcement Policy Regarding Enforcement Discretion for Certain Fitness-for-Duty Issues (10 CFR Part 26)

This section sets forth the interim enforcement policy that the NRC will follow to exercise enforcement discretion for certain violations of requirements in 10 CFR Part 26, Fitness-for-Duty Programs that occur after (insert date of publication in the *Federal Register*). The policy is in effect until a final revision of 10 CFR Part 26 is issued and becomes effective.

Suitable Inquiry

The regulations in 10 CFR 26.3 and 10 CFR 26.27(a)(2) require that before granting an individual unescorted access, a licensee must conduct a suitable inquiry consisting of a "best-effort verification of employment history for the past five years, but in no case less than three years, obtained through contacts with previous employers to determine if a person was, in the past, tested positive for illegal drugs, subject to a plan for treating substance abuse, removed from, or made ineligible for activities within the scope of 10 CFR Part 26, or denied

unescorted access at any other nuclear power plant or other employment in accordance with a fitness-for-duty policy."

The requirements do not provide an exception regarding short-term employers. However, enforcement action will not normally be taken for failure to contact employers when an individual was employed for less than 30 days, if the following practice is adopted:

If the individual applicant has periods of less than 30 days of contiguous employment or unemployment, at least one of the periods of employment or unemployment must be verified for each 30-day period. For example, assume that during the month of April a transient worker was employed by Employer A for two weeks, employed by Employer B for one week, and unemployed for one week. Under this interim policy, it would only be necessary to verify one of the following periods for the month of April: employment with Employer A, employment with Employer B or unemployment.

The NRC may take enforcement action when a licensee does not follow this practice.

Pre-Access Testing

The regulations in 10 CFR 26.24(a)(1) requires that a person be tested for drugs and alcohol “within 60 days prior to the initial granting of unescorted access to protected areas...”

The requirement does not provide an exception when an individual is reinstated at a facility or transferred to another facility where there is little or no break in coverage under a Part 26 Fitness for Duty (FFD) program. However, enforcement action will not normally be taken for failure to conduct a pre-access test for alcohol and drugs in those cases where an

individual has recently been covered by a Part 26 FFD program (e.g., within the past 30 days), if the following practice is adopted:

Pre-access testing for drugs and alcohol must be conducted within 60 days before the granting of unescorted access to protected areas or assignment to activities within the scope of this part, unless the individual:

(a) Has been covered by a program meeting the requirements of this part for at least 30 days during the 60 days immediately previous to the granting of unescorted access; and

(b) Has not tested positive for illegal drugs, been subject to a plan for treating substance abuse, been removed from or made ineligible for activities within the scope of Part 26, or been denied unescorted access at any other nuclear power plant or other employment in accordance with a fitness-for-duty policy.

The NRC may take enforcement action when a licensee does not follow this practice.

Dated at Rockville, MD, this day of , 2002.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission