

RULEMAKING ISSUE NOTATION VOTE

February 28, 2011

SECY-11-0028

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: OPTIONS FOR IMPLEMENTING AN ALTERNATIVE INTERIM
REGULATORY APPROACH TO THE MINIMUM DAYS OFF
PROVISIONS OF 10 CFR PART 26, SUBPART I, "MANAGING
FATIGUE"

PURPOSE:

The purpose of this paper is to request Commission direction on implementing the proposed alternative to the minimum days off (MDO) provisions in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26, "Fitness for Duty Programs," Subpart I, "Managing Fatigue."

SUMMARY:

In SECY-11-0003, "Status of Enforcement Discretion Request and Rulemaking Activities Related to 10 CFR Part 26, Subpart I, 'Managing Fatigue,'" dated January 4, 2011, the staff of the U.S. Nuclear Regulatory Commission (NRC) discussed its intent to bundle several petitions for rulemaking (PRMs) associated with 10 CFR Part 26. The staff also discussed its approach to addressing the Nuclear Energy Institute (NEI) request for enforcement discretion regarding the MDO provisions of Subpart I. The staff indicated that although it had planned rulemaking activities to address these same issues, it determined that an alternative interim regulatory approach was appropriate to address the stated industry concerns with the nonoutage MDO requirements in 10 CFR Part 26. This paper discusses the options for implementing an alternative approach to the MDO provisions for normal operations.

CONTACTS: Mary Ann Ashley, NRR/DIRS
(301) 415-1073

Gerry J. Gulla, OE/EB
(301) 415-2872

BACKGROUND:

On September 23, 2010, NEI submitted a letter requesting enforcement discretion from certain requirements in 10 CFR Part 26. The letter parallels NEI's rulemaking petition (PRM-26-5) in that both state that implementation of the MDO requirements has caused licensees to curtail beneficial practices, and both seek removal of the requirements. Both the PRM and the NEI letter proposed that the NRC replace the MDO requirements for normal operations with a performance objective for managing cumulative fatigue. The staff held public meetings on November 18, 2010, to gain information on the issues underlying the industry's request for enforcement discretion from the MDO requirements of 10 CFR 26.205(d)(3), (4), (5) and (6); on January 6, 2011, to discuss possible alternatives to the MDO requirements and to explore whether the alternatives were consistent with the technical basis for the current rule; and on January 25, 2011, to refine the alternative approach to the MDO provisions described in this paper.

DISCUSSION:

The staff agrees that an interim alternative to the requirements of 10 CFR 26.205(d)(3), related to MDO for normal, nonoutage operations, is appropriate while the staff is working on the rulemaking related to the fatigue management provisions of 10 CFR Part 26. The staff recommends implementation of an alternative approach that will provide timely flexibility to licensees. The primary benefit is that this approach would not impede the implementation of the beneficial safety practices that the industry has stated have been curtailed under the existing regulation. Neither PRM-26-5 nor participants in the public meetings offered any equivalent alternatives for outage periods in 10 CFR 26.205(d)(4), (5), or (6); therefore, the staff is not taking action in regard to those regulations.

The staff has determined that an alternative approach to MDO using a weekly average of 54 hours worked, calculated based on a rolling window of up to 6 weeks, will limit work hours to levels comparable to current MDO requirements while adding the simplicity and flexibility desired by the industry. Similar to the current MDO requirements, this alternative, when implemented with the other aspects of Subpart I that will remain unchanged, will help prevent most instances of cumulative fatigue by limiting the number of extended work weeks and work days. In those cases where extended schedules are unavoidable, the alternative will limit their duration and contribute to fatigue mitigation. Additionally, the staff will engage licensees in the coming months through regularly scheduled public meetings to identify problems and lessons learned from implementation of the alternative approach. The staff will consider these insights when conducting the rulemaking activities related to PRM-26-5, NEI's rulemaking petition on this same issue.

The staff evaluated several options for incorporating the alternative approach to MDO into the NRC's regulatory structure. In evaluating each option, the staff has assumed that, based on feedback from licensee representatives, up to three quarters of the sites (up to 50) could choose to adopt the alternative approach to the MDO requirements of 10 CFR 26.205(d)(3).

Implementation Option 1: Direct Final Rulemaking

Option 1 is a method for quickly revising an existing regulation and allows for public participation through the comment process. However, the staff determined that replacing the MDO requirements and having all licensees adopt the alternative has the potential to introduce a new set of adverse consequences if those licensees satisfied with the current requirement were forced to change. As a result, if the Commission chooses rulemaking as the method for implementing the alternative approach, the most appropriate path would be to revise 10 CFR 26.205(d)(3) to add the alternative approach as a voluntary alternative that licensees could implement in lieu of the current nonoutage MDO requirements.

Using the direct final rulemaking process to add a voluntary, alternative regulatory requirement is uncommon. Such an approach does not meet the approved criteria for direct final rulemaking procedures contained in NUREG/BR-0053, Revision 6, "United States Nuclear Regulatory Commission Regulations Handbook," because the staff anticipates receiving at least one significant adverse comment. The Commission would need to take the following actions to implement this option:

- Delegate rulemaking authority to the Executive Director for Operations (EDO) (for the direct final rule and for the potential proposed and final rules).
- Direct the staff to forego any review by the Advisory Committee on Reactor Safeguards.
- Direct the staff to promulgate rule language consistent with the staff's interim approach discussed during the Commission meeting on February 8, 2011.
- Redirect and reprioritize staff resources in numerous areas to give the highest priority to this activity (except for other work involving immediate public health and safety and security concerns).

Direct final rulemaking can require at least 8 months. This estimate does not include the time needed for the staff to prepare regulatory guidance. The preparation of regulatory guidance, if needed, would begin after publication of the rule in the *Federal Register* and would take at least 6 months (2 months to prepare draft guidance and 4 more months to publish a draft regulatory guide). This option could ultimately fail to provide the requested timely relief from the unintended consequences. This option would expend approximately 2 full-time equivalent staff (FTEs) in fiscal year (FY) 2011 and FY 2012.

As stated in the Chairman's February 16, 2011, vote sheet on SECY-11-0003, the direct rulemaking process could be reduced to 4 months by:

- Assigning OGC as the lead office for rulemaking.
- Limiting the public comment period to 30 days with no extensions.
- Preparing updated regulatory guidance on an expedited basis.

Implementation Option 2: Plant-Specific Exemptions

Option 2 is the normal method by which the NRC can allow a licensee to meet the intent of a rule using an alternative means. This option could involve significant resources since it would require individual licensees to submit their requests and the staff to review them and grant exemptions from the MDO requirements. These exemptions would remain in place until the agency has revised 10 CFR 26.205(d)(3).

Although the staff would be able to complete individual exemption requests more quickly than it could finish a direct final rulemaking, the normal schedule for reviewing an exemption request is from 3 to 6 months per exemption. However, a large number of requests could result in delays in granting relief to individual licensees. On the other hand, accelerating the schedule for responding to licensees would require the diversion of staff resources from other licensing activities that are in process or planned. This process would be straightforward as long as each licensee submits a high-quality exemption request that parallels the requirements in the staff's proposed alternative regulatory approach. This option would expend approximately 0.1 FTE for each exemption request, resulting in an overall resource expenditure of up to 5 FTEs through the remainder of FY 2011 and into FY 2012.

Implementation Option 3: Orders

This option would require each licensee that wants to adopt the alternative approach to inform the NRC that it intends to do so. The NRC staff would then issue an order to each licensee allowing adoption of the alternative approach and would document the licensee's planned schedule for implementation. The order would be "confirmatory" in the sense that the licensee would consent to being bound by the alternative approach in lieu of the existing regulatory requirements. Orders have the advantage of being relatively quick to issue. Additionally, issuing orders may involve lower levels of staff resources as long as all licensees commit to the same interim alternative approach; however, this approach requires both action by multiple licensees and also staff resources to issue the plant-specific orders. Moreover, the NRC typically uses orders in circumstances where a net safety enhancement is associated with the action being ordered. In this case, the orders would merely provide an alternative to meet the existing requirements, which is usually handled by exemption or license amendment. Notwithstanding the licensees' consent to such orders, the orders are likely subject to a prior opportunity for hearing by other interested persons in individual cases. Thus, implementation of the alternative approach under an order may have to await the conclusion of the hearing process. The issuance of each order would take approximately 1 month and involve a level of effort of less than 0.1 FTE, resulting in a resource expenditure of approximately 3 FTEs through the remainder of in FY 2011 and into FY 2012. However, this does not reflect the resources that the NRC would expend on hearings if they were requested. The resource requirements would increase exponentially if a substantial number of hearings are requested.

Implementation Option 4: Enforcement Discretion

Option 4 would allow a licensee to receive enforcement discretion for failing to meet the requirements of 10 CFR 26.205(d)(3), provided that the licensee properly implements the interim alternative approach. The NRC would make such enforcement discretion available to licensees through the issuance of an interim enforcement policy. The interim policy would describe the alternative to the MDO requirements that could be adopted by a licensee, if it

chooses to do so, and would be published in the *Federal Register*. The enforcement discretion process is well established and has been used in the past to provide this type of relief. In addition, approving interim changes to the Enforcement Policy is completely within the Commission's control. This option also has the advantage of being relatively quick to implement and requires fewer resources than the other options. The disadvantage is that the NRC would be granting enforcement discretion for ongoing violations of the nonoutage MDO requirements. The discretion could cover a large number of licensees for the period of time until rulemaking on Subpart I is complete (approximately 28 months).

This interim change to the Commission's Enforcement Policy could be finalized and published in the *Federal Register* with an immediately effective implementation date. This approach has been used in the past. Issuing the policy as immediately effective would acknowledge the significant public discussion of this option that has taken place in three Category 3 meetings held by the staff between November 18, 2010, and January 25, 2011, and at the February 8, 2011, Commission briefing on 10 CFR Part 26. Further, the staff understood and considered the range of views on this issue during the development of the alternative and will provide additional opportunities for public comment as part of the related rulemaking activities. Any needed guidance to support implementation of the interim policy would be developed and issued using less formal processes than required for rulemaking. The staff anticipates that issuing this guidance will require additional staff resources of approximately 0.1 FTE.

Therefore, if the agency were to issue the interim Enforcement Policy as final without soliciting additional public comment, the staff expects that the alternative to the MDO requirements would be available for licensee adoption less than 1 month after publication in the *Federal Register*. The Office of Nuclear Reactor Regulation and the Office of Enforcement believe the necessary resources to implement this option could be absorbed without impacting the FY 2011 budgeted workload.

RECOMMENDATION:

The staff recommends Option 4. The staff requests that the Commission approve the enclosed draft *Federal Register* notice, "Interim Enforcement Policy for Minimum Days Off Requirements," for publication in the *Federal Register* as immediately effective.

RESOURCES:

The resources are not included in the FY 2011 President's Budget or in the FY 2012 budget request.

Option	Business Line	Product Line	Product	FTE
1	Operating Reactors	Rulemaking	Rulemaking	2
2	Operating Reactors	Licensing	Licensing Actions	5
3	Operating Reactors	Licensing	Licensing Actions	3-5
4	Operating Reactors	Licensing	Licensing Actions	0.1

The Commissioners

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COORDINATION:

The Office of the General Counsel has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections.

/RA by Martin J. Virgilio for/

R. W. Borchardt
Executive Director
for Operations

Enclosure:
Draft *Federal Register* Notice

COORDINATION:

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R. W. Borchardt
Executive Director
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Enclosure:
Draft *Federal Register* Notice

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OFFICE	OE:PM	NRR/DIRS:TA	TechEditor *	RIV*
NAME	GGulla	MAshley	KAzariah-Kribbs	KKennedy
DATE	02/07/11	02/07/11	02/16/1	02/14/11
OFFICE	NRR/DPR:D*	NRR/DIRS:D*	ADM/DAS/RAD:BC *	PMDA:D
NAME	TMcGinty	FBrown	CBladey	MGivvines (HLe for)
DATE	02/14/11	02/10/11	02/17/11	02/22/11
OFFICE	OE:D	NSIR:D*	NRO:D*	RES:D*
NAME	RZimmerman	JWiggins (RCorreia for)	MJohnson (JTappert for)	BSheron (CLui for)
DATE	02/16/11	02/14/11	02/14/11	02/15/11
OFFICE	OCFO:D *	OGC/GCHEA/ML*	OGC/GCLR/RMR *	
NAME	JDyer (JGolder for)	CScott (MLemoncelli for)	BJones (HBenowitz for)	
DATE	02/18/11	02/23/11	02/23/11	
OFFICE	NRR:D	EDO		
NAME	ELeeds (BBoger for)	RBorchardt		
DATE	2/24/11			

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