
**OFFICE OF
THE INSPECTOR GENERAL
U.S. NUCLEAR
REGULATORY COMMISSION**

Audit of NRC's Drug Testing Program

OIG-05-A-05 December 20, 2004

AUDIT REPORT



All publicly available OIG reports (including this report) are accessible through
NRC's Web site at:

<http://www.nrc.gov/reading-rm/doc-collections/insp-gen/>

December 20, 2004

MEMORANDUM TO: Luis A. Reyes
Executive Director for Operations

FROM: Stephen D. Dingbaum/**RAI**
Assistant Inspector General for Audits

SUBJECT: AUDIT OF NRC'S DRUG TESTING PROGRAM
(OIG-05-A-05)

Attached is the Office of the Inspector General's (OIG) audit report titled, *Audit of NRC's Drug Testing Program*.

The objective of this audit was to assess the Nuclear Regulatory Commission's (NRC) implementation of its drug testing program. Based on our review and evaluation of NRC's drug testing program management controls, OIG determined that there are weaknesses with the program's random testing process and management oversight.

With regard to the random testing process, OIG determined that:

- The random testing pool does not include all employees who should be included.
- The agency is not applying its random selection methodology correctly when selecting employees for random testing.
- Some employees are not notified for testing in accordance with requirements.

With regard to program oversight, OIG determined that:

- The agency does not maintain sufficient program records.
- Program guidance is not readily available to employees.

This report makes 12 recommendations to strengthen the drug testing program's effectiveness as a deterrent to illegal drug use.

Agency comments provided at the exit conference on September 29, 2004, and during subsequent communications have been incorporated, as appropriate, into this report. Appendix C contains the agency's comments and our responses.

Please provide information on actions taken or planned on each of the recommendations directed to your office by February 11, 2005. Actions taken or planned are subject to OIG follow-up, as stated in the attached instructions.

If you have any questions or wish to discuss this report, please call me at 415-5915 or Beth Serepca at 415-5911.

Attachments: As stated

Distribution List

B. John Garrick, Chairman, Advisory Committee on Nuclear Waste
Mario V. Bonaca, Chairman, Advisory Committee on Reactor Safeguards
John T. Larkins, Executive Director, Advisory Committee on Reactor Safeguards/Advisory Committee on Nuclear Waste
G. Paul Bollwerk, III, Chief Administrative Judge, Atomic Safety and Licensing Board Panel
Karen D. Cyr, General Counsel
John F. Cordes, Jr., Director, Office of Commission Appellate Adjudication
Jesse L. Funches, Chief Financial Officer
Janice Dunn Lee, Director, Office of International Programs
William N. Outlaw, Director of Communications
Dennis K. Rathbun, Director, Office of Congressional Affairs
Eliot B. Brenner, Director, Office of Public Affairs
Annette Vietti-Cook, Secretary of the Commission
Patricia G. Norry, Deputy Executive Director for Management Services, OEDO
William F. Kane, Deputy Executive Director for Homeland Protection and Preparedness, OEDO
Martin J. Virgilio, Deputy Executive Director for Materials, Research and State Programs, OEDO
Ellis W. Merschoff, Deputy Executive Director for Reactor Programs, OEDO
William M. Dean, Assistant for Operations, OEDO
Jacqueline E. Silber, Chief Information Officer
Michael L. Springer, Director, Office of Administration
Frank J. Congel, Director, Office of Enforcement
Guy P. Caputo, Director, Office of Investigations
Paul E. Bird, Director, Office of Human Resources
Corenthis B. Kelley, Director, Office of Small Business and Civil Rights
Jack R. Strosnider, Director, Office of Nuclear Material Safety and Safeguards
James E. Dyer, Director, Office of Nuclear Reactor Regulation
Carl J. Paperiello, Director, Office of Nuclear Regulatory Research
Paul H. Lohaus, Director, Office of State and Tribal Programs
Roy P. Zimmerman, Director, Office of Nuclear Security and Incident Response
Samuel J. Collins, Regional Administrator, Region I
William D. Travers, Regional Administrator, Region II
James L. Caldwell, Regional Administrator, Region III
Bruce S. Mallett, Regional Administrator, Region IV
Office of Public Affairs, Region I
Office of Public Affairs, Region II
Office of Public Affairs, Region IV

EXECUTIVE SUMMARY

BACKGROUND

President Reagan deemed it to be in the best interests of national security, public health, and safety to establish a national policy regarding drug use in the workplace. *Executive Order 12564, Drug-Free Workplace*, was signed into authority on September 15, 1986, to improve the efficiency of the Federal workforce and help prevent the use of illegal drugs in the workplace. This order requires that each agency head develop a plan for achieving a drug-free workplace while maintaining the rights of employees, the public, and the Government. The order also requires that each executive agency establish a program to test for evidence of illegal drug use by employees in sensitive positions.

PURPOSE

The objective of this audit was to assess the Nuclear Regulatory Commission's (NRC) implementation of its drug testing program.

RESULTS IN BRIEF

Improvements are needed in NRC's random drug testing process and oversight of its drug-free workplace program to improve the program's effectiveness and compliance with Federal and agency requirements. The Office of Inspector General (OIG) determined that the random testing pool does not include all employees who should be tested for drug use, the agency is not applying the random selection methodology correctly when selecting employees for random testing, and some employees are not notified for testing in accordance with Federal requirements. OIG also determined that the agency does not maintain sufficient program records and program guidance is not readily available to employees.

RECOMMENDATIONS

This report makes 12 recommendations to the Executive Director for Operations to strengthen the drug testing program's effectiveness as a deterrent to illegal drug use. A consolidated list of recommendations appears on page 17 of this report.

AGENCY COMMENTS

The agency provided comments during an exit conference that was held on September 29, 2004, and subsequently submitted written comments. Where appropriate, OIG modified the report in response to these comments. Appendix C contains a copy of the agency's written comments and OIG's response to each.

[Page intentionally left blank.]

ABBREVIATIONS AND ACRONYMS

EAP	Employee Assistance Program
HHS	Department of Health and Human Services
NRC	Nuclear Regulatory Commission
OIG	Office of the Inspector General
TDP	Testing Designated Position

[Page intentionally left blank.]

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
ABBREVIATIONS AND ACRONYMS.....	iii
I. BACKGROUND	1
II. PURPOSE.....	5
III. FINDINGS	5
A. DRUG TESTING PROCESS WEAKNESSES.....	5
B. PROGRAM OVERSIGHT WEAKNESSES.....	12
IV. CONSOLIDATED LIST OF RECOMMENDATIONS	17
V. AGENCY COMMENTS	19
APPENDICES	
A. SCOPE AND METHODOLOGY	21
B. FLOWCHART OF THE DRUG TESTING PROCESS.....	23
C. AGENCY COMMENTS AND OIG RESPONSE	25

[Page intentionally left blank.]

I. BACKGROUND

Federal Drug Testing Program Guidance

President Reagan signed *Executive Order 12564, Drug-Free Workplace*, into authority on September 15, 1986. The President deemed this to be in the best interests of national security, public health and safety, law enforcement, and the efficiency of the Federal service because the use of illegal drugs creates the possibility for coercion, influence, and irresponsible action under pressure. This order requires that each agency head develop a plan for achieving a drug-free workplace while maintaining the rights of employees, the public, and the Government. The order also requires that each executive agency establish a program to test for evidence of illegal drug use by employees in sensitive positions. The agency head is responsible for determining the extent to which such employees are tested and the criteria for such testing. The basis of the criteria should be the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to public health and safety or national security that could result from the failure of an employee to adequately perform his or her duties.

Executive Order 12564 authorizes the Secretary, Department of Health and Human Services (HHS), to promulgate scientific and technical guidelines for drug testing programs and requires agencies to conduct their drug testing programs in accordance with these guidelines. HHS has issued *Mandatory Guidelines for Federal Workplace Drug Testing Programs* and *Model Plan for a Comprehensive Drug-Free Workplace Program* to help Federal agencies consistently implement the requirements for facilitating a drug-free workplace.

Executive Order 10450, Security Requirements for Government Employment (April 27, 1953), requires agency heads to designate sensitive positions within the agency. This Executive Order describes sensitive positions as those that could have a material adverse effect on national security. This Executive Order also stipulates that agency heads are to suspend or terminate persons filling sensitive positions that use intoxicants to excess or are addicted to drugs.

The Supplemental Appropriations Act of 1987 authorizes random drug testing of employees in sensitive positions.

NRC Drug Testing Program Guidance

NRC must ensure that the civilian use of nuclear materials occurs in a manner consistent with public health and safety, environmental quality, and national security. Impaired judgment or reliability, inappropriate behavior, or similar aberrant actions could have disastrous, immediate, and long-term effects. In carrying out its mission and to implement Executive Order 12564, NRC issued two guidance documents. The *NRC Drug-Free Workplace Plan* (Plan) sets forth NRC's objectives, policies, procedures, and implementation guidelines to achieve a drug-free workplace. The Plan describes NRC's drug testing program, including awareness and education opportunities for all employees, drug testing, counseling, and provisions for rehabilitation for employees who use illegal drugs. The *NRC Drug Testing Manual* (Manual) contains procedures to assure that NRC's drug testing program is uniformly implemented for the employees and applicants subject to testing.

NRC's drug testing program includes provisions for the conduct of random, applicant, reasonable suspicion, post-accident, voluntary, and follow up testing. This audit report focuses primarily on the random drug testing component of the program. In accordance with the Atomic Energy Act of 1954, all NRC positions are sensitive and potentially subject to drug testing. However, pursuant to the criteria established in Executive Order 12564 and the Plan, the NRC Commission in 1997 determined that NRC employees in positions containing one or more of the following attributes are subject to random testing:

1. Employees with unescorted access to vital or protected areas of certain NRC licensed facilities.
2. Employees who have assigned incident response duties or are on call for regional or headquarters incident response centers.
3. Employees with access to Sensitive Compartmented Information, Foreign Intelligence Information, or who require access more than once or twice a year to classified information.
4. Employees who are motor vehicle operators whose principal or backup duties include driving Government vehicles to transport passengers.

NRC estimates that approximately 1,720 of its 3,260 employees occupy positions that are subject to random drug testing. NRC's policy is to annually test 50 percent of employees in the testing pool. All external candidates being seriously considered for employment in testing designated positions also require drug testing. Appendix B contains a flow chart that depicts NRC's drug testing process.

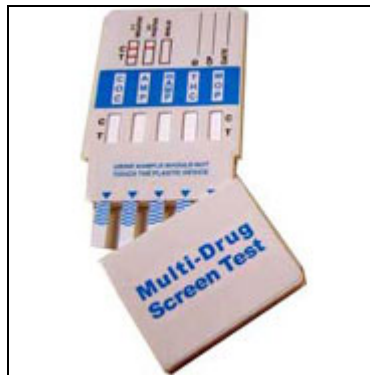


Figure 1. Drug test kit.

In accordance with the *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, employees subject to random testing must provide a urine specimen that an HHS approved laboratory analyzes for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine.

Program Roles and Responsibilities

Drug program staff in the Security Branch, Division of Facilities and Security, Office of Administration manage the testing component of NRC's drug-free workplace program. Staff in the Office of Human Resources maintain the database of testing designated positions. Staff in other offices throughout the agency also have responsibilities for program implementation. Table 1, on page 4, describes the roles and responsibilities of various staff and contractors involved in the program.

Table 1. Drug-Free Workplace Program Roles and Responsibilities

Role Stipulated in Plan	NRC Job Title	Office/ Division	Description of Responsibility
Drug Program Coordinator	Deputy Executive Director for Management Services	Office of the Executive Director for Operations	Implements and manages the drug program within NRC, including receiving verified positive test results.
Headquarters Assistant Drug Program Coordinator	Personnel Security Specialist	Division of Facilities and Security, Office of Administration	Directs and administers the collecting and testing portions of the drug program for NRC, including generating random test lists for headquarters, regions, and remote sites; maintaining/retaining all NRC drug program collection and test records for NRC employees and applicants; and coordinating with regional staff to conserve resources and accomplish reliable and accurate testing objectives.
Regional Assistant Drug Program Coordinators	Directors for Resource Management Administration	One in each Regional Office	Notify the appropriate management official located at the specific site on the actual test date and forward all drug testing-related records to headquarters for storage and retention.
Employee Assistance Program (EAP) Manager	Manager, Employee Assistance & Wellness Services	Office of Human Resources	Advises NRC staff on the submission of annual statistical reports and prepares consolidated reports on NRC EAP activity.
Drug Rehabilitation Assessment Coordinator	Contractor	Office of Human Resources	Serves as initial point of contact for employees who ask for or are referred to drug counseling.
Medical Review Officer	Contractor	Division of Facilities and Security	Reviews all laboratory test results, confirming whether an individual has obtained a verified positive test result and reports to headquarters on all activities and findings on a regular basis.
Supervisors	Various	All NRC supervisors	Identify, report, and refer for counseling individuals who use illegal drugs in the workplace; initiate appropriate disciplinary action upon a finding of illegal drug use; and assist higher-level supervisors in evaluating employee performance and/or behavior problems that may be related to illegal drug use.

II. PURPOSE

The objective of this OIG audit was to assess NRC's implementation of its drug testing program. Appendix A contains more information on audit scope and methodology.

III. FINDINGS

Improvements are needed in NRC's random drug testing process and oversight of its drug-free workplace program to better ensure program effectiveness and compliance with Federal and agency requirements. With regard to the random testing process, OIG determined that:

- The random testing pool does not include all employees who should be included.
- The agency is not applying its random selection methodology correctly when selecting employees for random testing.
- Some employees are not notified for testing in accordance with Federal requirements.

With regard to program oversight, OIG determined that:

- The agency does not maintain sufficient program records.
- Program guidance is not readily available to employees.

Program enhancements in the random testing process and management oversight will strengthen the drug testing program's effectiveness as a deterrent to illegal drug use.

A. Drug Testing Process Weaknesses

NRC's random drug testing process contains several weaknesses:

- The agency's pool of employees subject to random drug testing does not include all employees who should be included.
- The agency is not implementing an effective random process to select employees from the existing pool.
- The agency is not consistently following HHS random testing notification requirements.

NRC's Pool of Testable Employees Is Not Complete

NRC's employee testing pool is incomplete in two ways. First, some employees who should be included in the pool because they occupy testing designated positions are not. Second, there are two categories of employees whose jobs contain attributes that HHS recommended as testing designated positions, but these employees have not been subject to random drug testing at NRC. The pool is incomplete because (1) NRC has no formal process for adding individuals to the random drug testing pool when newly assigned responsibilities qualify them for random testing and (2) NRC has not re-evaluated the criteria for determining testing designated positions after recent threats to national security.

Some Employees Are Not Included in the Pool

According to the *NRC Drug-Free Workplace Plan*, employees with one or more of the following attributes in their positions are subject to random drug testing:

- Unescorted plant/facility access.
- Incident response responsibilities.
- Classified access.
- Motor vehicle operators.

These are the job attributes that the Commission determined would require employee participation in the agency's random drug testing program. Jobs with these attributes are referred to as testing designated positions.

Despite this Commission requirement, some employees who should be subject to testing due to their job attributes are never tested because they have not been added to the testing pool. Auditors reviewed records for 65 of 425 headquarters employees with incident response duties and found that 23 – or 35 percent – were not included in the pool. Auditors also determined that only 3 of 45 Office of Investigations staff were included in the pool. This staff is composed primarily of criminal investigators whose duties require the review of classified information.

OIG identified two reasons why some incident response and Office of Investigations employees are not characterized as being in testing designated positions and are not included in the NRC's random drug testing pool. First, some agency staff have used outdated 1988 criteria – which predates the Commission's 1997 determination on testing designated positions – to identify only incident response decision makers for inclusion in the pool. Second, the agency has no formal process for

adding to the testing pool those employees whose positions were not initially considered testable positions, but whose responsibilities changed over time. An example of this scenario would be an administrative staff person who, since September 11, 2001, has been assigned incident response duties as part of his or her job.¹ All incident response staff, including administrative personnel, have key roles during emergencies and their use of illegal drugs could impact NRC's ability to respond. Another example would be an Office of Investigations criminal investigator who, in the past, rarely reviewed classified information but whose cases now require frequent review of such information.

These failures to correctly identify employees for inclusion in the random drug testing pool can remain undetected because the agency does not conduct any type of quality assurance review to make sure that the correct individuals are included. Ensuring that employees are appropriately included in the random drug testing pool raises the assurance of a drug free workplace among NRC employees with public health and safety responsibilities.

Recommendations

OIG recommends that the Executive Director for Operations:

1. Fully implement existing NRC policy by including all individuals with incident response duties and with annual access to classified information into the random drug testing pool.
2. Implement a procedure for updating testing designated positions in the random drug testing pool. This procedure should capture individuals whose job responsibilities shift over time to include or exclude employees meeting the criteria for inclusion in the drug testing pool.
3. Periodically conduct a quality assurance review to ensure that all jobs with testable attributes are included in the random drug testing pool.

Computer System Administrators and Law Enforcement Staff Are Not Categories of Testing Designated Positions

OIG identified two categories of employees whose jobs contain attributes that HHS suggests as testing designated positions, but these employees have not been subject to random drug testing at NRC. These categories are computer system administrators and law enforcement employees who are authorized to carry weapons.

¹ OIG report, *Audit of the NRC's Incident Response Program* (OIG-04-A-20), dated September 16, 2004, determined that improvements are needed to assure that essential incident response functions are completed efficiently and effectively. This report also determined that NRC does not have a formal process to certify personnel for incident response duties.

These agency employees are not subjected to random drug testing because agency policy does not require it. However, OIG contends that each of these groups should be subjected to random testing because of their job responsibilities. Computer system administrators are referred to as "trusted information system employees" because they have levels of system rights allowing them to access files, retrieve passwords, and perform essential network functions. These individuals have the capability of bringing down or causing significant damage to the agency's computer network. All NRC criminal investigators who engage in law enforcement may be authorized to carry weapons, detain individuals, and execute arrests as part of their duties. These responsibilities necessitate clear thinking and unclouded judgment. While NRC requires its contract security guard force to undergo random drug testing, the agency does not require such testing of agency employees with law enforcement duties.

NRC last revised its testing categories in 1997 and has not since re-evaluated the criteria for determining the testing designated positions. Yet, current threats to national security have caused the agency to re-evaluate and increase security measures in other areas, as evidenced in the creation of the position of Deputy Executive Director for Homeland Protection and Preparedness, the Office of Nuclear Security and Incident Response, and the implementation of strengthened physical and computer security measures. The exclusion of those employees who could cause damage to public health and safety indicates that managers have neither reviewed who should be included in the testing pool nor updated the criteria for testing designated positions.

Recommendations

OIG recommends that the Executive Director for Operations:

4. Revise the categories of testing designated positions to include computer system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons.
5. Re-evaluate categories of testing designated positions and continue to do so biennially.

Selection for Drug Testing Is Not Completely Random

NRC does not employ a completely random testing methodology as part of its drug testing program. While staff begin each test period with a randomly generated list of names, they do not use the list in a manner that assures employees an equal chance of being selected. This is because

the agency lacks formal written procedures for staff to follow in implementing the agency's random selection process. By developing such procedures, NRC can improve the reliability of its random selection process.

HHS requires that employees be randomly selected for testing, with all employees in the testing pool having an equal chance of being selected. In accordance with this requirement, NRC may choose any random selection process that has been certified by a statistician. HHS also requires that supervisors notify individuals that they have been selected for random drug testing.

NRC starts each testing period with a randomly generated list of names, based on a computer-generated algorithm that was certified by a statistician. The headquarters list contains roughly three times the number of names needed for testing. For example, in one test period, the computer randomly generated a list of 135 names when the first 45 would be needed for testing. If some of the first 45 individuals were excused, the next on the list were to be contacted. According to a statistician, in order to identify 45 individuals for testing on a given day, it was reasonable to assume that program staff would not have to contact individuals beyond the first 50 on the list. Furthermore, if alternates were needed, it is important that they be contacted in the order they appear on the list.

Drug program staff do not use the headquarters list in a manner that assures an equal chance of selection. Employees are sometimes selected for testing if drug program staff recognizes the name of someone on the list that was previously determined to be available. Or, employees will be called for testing because they have the same supervisor or work in the same office with another employee whose name appeared earlier on the list. OIG identified the following examples from a sample of 18 employees from one office who were selected for testing:

- In one test period, an individual who was 116th on the list was selected for drug testing.
- In four test periods, individuals who were 70th, 71st, 72nd, and 75th on the lists were selected for drug testing.
- In 10 consecutive test periods, some individuals were selected from beyond the first 50 individuals named in the list.

Drug program staff explained that once one supervisor in an office has been notified, the supervisor might be asked about the availability of others in the office who appear later on the list. They further explained that they used this method for calling individuals for testing because they do not have an accurate supervisors list and because they assumed that

contacting anyone on the list was within the parameters of the random process. However, according to a statistician, selecting someone for drug testing based on name, supervisor, or office recognition does not constitute a sound random methodology.

In addition, drug program staff give some agency managers preferential treatment that interferes with the random testing process. When drug program staff recognize the names of certain agency managers (referred to by drug program staff as "VIPs"), they place these names on a different contact list, which is pursued separately than the larger list.

Finally, NRC's random selection process does not provide a means to test employees who are frequently absent. Instead of rescheduling absent employees for a different day of drug testing – or weighting the likelihood of selection for employees who are frequently on travel – these employees are excused from testing. This further increases the chance of some employees being called for drug testing more often and lessens the agency's ability to detect drug use among those who are often absent.²

Drug program staff are not employing an effective random selection process because the agency lacks written procedures for conducting a sound random drug testing process in accordance with HHS requirements. By establishing a formal procedure for carrying out an effective random selection process, NRC will better equalize employees' chances of being selected, thereby improving program reliability.

Recommendations

OIG recommends that the Executive Director for Operations:

6. Develop formal written procedures for staff to follow in implementing the agency's random drug testing selection process.
7. Include in the process a means to drug test the randomly selected employees who are frequently absent.
8. Develop and implement a quality assurance process to periodically verify that employees are randomly selected for drug testing without regard to their name, office, or position.

² OIG Memorandum Report, *Review of NRC's Drug-Free Workplace Plan* (OIG-04-A-15), dated May 24, 2004, recommended that the Executive Director for Operations revise the Plan to include a deferral of testing clause contained in the Department of Health and Human Services *Model Plan for a Comprehensive Drug-Free Workplace Program*. The agency agreed to complete this recommendation, which allows drug testing of employees who were absent on the day of the drug test for up to 60 days after the test date.

Agency Notification Procedures Are Noncompliant

Drug program staff do not follow HHS guidance concerning drug testing notification requirements because the agency lacks a quality assurance process to verify that notification procedures are implemented according to that guidance. Proper employee notification is necessary to protect employees from unwarranted disciplinary action and the agency from legal challenge.

According to HHS notification requirements, supervisors must inform employees who have been selected for random drug testing that they are under no suspicion of taking drugs and that the employee's name was selected randomly. Both the employee and supervisor must sign a form verifying that these steps were taken prior to the collection of a sample. The underlying reason for supervisor notification of drug testing pertains to lines of authority. Employees are subject to disciplinary action if they refuse an order from a supervisor.

Despite these notification requirements, NRC drug program staff have instructed employees directly to take the drug test. Typically, staff will make three attempts to reach the supervisor, but will contact the employee directly if these attempts are unsuccessful. In cases where the drug program staff make the notification, they sign the notification form in place of the employee's supervisor even though they lack the authority to do so under the HHS regulations. This notification process fails to ensure that supervisors instruct employees on the circumstances of their selection.

Drug program staff explained to OIG that they take these measures in order to facilitate their achievement of goals pertaining to the number of tests that must be given within a test period. They also explained that this "workaround" is necessary because they do not have adequate lists of employees and their supervisors, making it difficult to know whom to call.

The agency lacks an up-to-date supervisor list to facilitate the notification process for drug program staff. Moreover, the agency lacks a quality assurance process to verify that notification procedures are implemented according to HHS requirements.

Noncompliance with HHS requirements concerning notification for drug testing could lead to unwarranted disciplinary action or legal challenge. For example, an employee at a Federal agency who was contacted directly by a drug program official thought the phone call was a practical joke. The employee ignored the call and did not report for the drug test. Consequently, the employee received a serious reprimand and was suspended from his regular duties. In fact, a disciplinary action against an

employee for violation of drug testing procedures or who had a positive drug test result, but had not been notified correctly, could be legally challenged. The disciplinary action would be vulnerable to legal challenge if the testing procedure were not in accordance with the HHS requirements. By instituting a quality assurance process to verify that notification procedures are implemented according to HHS requirements, NRC can protect the agency and employees from legal challenge.

Recommendations

OIG recommends that the Executive Director for Operations:

9. Provide and update regularly employee-supervisor lists for drug program staff to facilitate the drug testing notification process.
10. Institute a quality assurance process to verify that notification procedures are implemented in accordance with HHS requirements.

Summary

NRC can strengthen its random drug testing process by ensuring that all necessary employees are included in the drug testing pool, improving its random sampling methodology, and complying with HHS employee notification requirements. These measures will strengthen the agency's assurance that its employees are not using illegal drugs.

B. Program Oversight Weaknesses

Auditors found the following weaknesses in the oversight of the drug testing program:

- The agency does not maintain sufficient program records.
- Program guidance is not readily available to employees.

Insufficient Program Records Maintained

The agency has not established an effective method for maintaining and compiling records in accordance with *NRC Drug-Free Workplace Plan* requirements. The Plan stipulates that NRC establish a record keeping system that captures sufficient documents to meet operational and statistical needs, including notices of verified positive tests and suspicion of tampering evidence. Drug program staff and managers could not provide these source documents to OIG and stated that they rarely compile program data. Weaknesses in NRC's method for maintaining and compiling records occur because the agency has not established clear guidelines and policy for keeping records on all program aspects. By

establishing an effective method for maintaining and compiling records, NRC can better ensure the accuracy of the information it reports to Congress concerning the number of positive test results.

The *NRC Drug-Free Workplace Plan* requires that the drug testing program record keeping system capture and include:

- Notices of verified positive test results.
- Written materials justifying reasonable suspicion testing or evidence that an individual may have altered or tampered with a specimen.
- Statistical reports.
- Other documents that responsible officials deem necessary for efficient compliance with the *NRC Drug-Free Workplace Plan*.

NRC is required to report drug testing program results to Congress in its annual budget submissions and to HHS for reporting in its annual report.

The agency has not established an effective method for maintaining and compiling records of verified positive results or suspicion of tampering evidence. When auditors requested to review such documentation pertaining to employees, program officials could not provide these records. Instead, drug program staff had to recall the time period and names, and then run a list from the testing database to locate the one verified positive test result that occurred during random drug testing. In addition, drug program staff could not provide documentation of verified positive or adulterated tests that occurred as a result of applicant testing. Drug program staff, however, were able to estimate from memory how many had occurred since 2002.

NRC has not established an effective method for compiling these drug testing records because staff compile this type of information only when requested. Drug program staff report the number of verified positive drug test results for the congressional budget submissions based on their recollections. Staff do not consider it necessary to maintain and compile this documentation since there are rarely any positive drug test results and HHS requests for program information do not occur on a regular basis. While HHS' annual report requires more statistical data than the budget report, staff explained that they do not begin compiling this program data until requested due to resource limitations.

Because NRC lacks consistent documentation of program information, on one occasion the agency did not report accurate drug testing program information to Congress, although this information was accurately reported to HHS. As part of its *Budget Estimates and Performance Plan*, each

fiscal year, NRC reports to Congress the status of its drug testing program. Despite a verified positive test result from random testing that occurred in September 2002, the agency reported that all random testing results between October 1, 2001, and September 30, 2002, had been negative. Further, the agency did not make a correction and report the verified positive result in the subsequent report.

Recommendation

OIG recommends that the Executive Director for Operations:

11. Develop and implement policy and procedures to compile all records necessary for compliance with the *NRC Drug-Free Workplace Plan*.

Program Policy and Procedures Not Accessible to Agency Staff

NRC's drug program policies and procedures are not accessible on the agency's Web site and have not been fully incorporated into the agency's official policy and procedure guidance. NRC's management directives require the agency to communicate policies and procedures governing internal NRC functions.

NRC's policy is to communicate to employees the basic NRC policies, requirements, and procedures necessary for the agency to comply with Executive Orders, pertinent laws, regulations, and the circulars and directives of other Federal agencies. Handbooks contain instructional material such as procedures, guides, standards, reporting requirements, exhibits, and pertinent laws that require compliance with the policy stated in the directives.

The *NRC Drug-Free Workplace Plan* and *NRC Drug Testing Manual* are not communicated to employees via the agency's intranet or other conveniently accessible media. The Plan and Manual are available in hardcopy versions only and must be obtained from the Reproduction Department via e-mail request or from the Employee Assistance Program or Assistant Drug Program Managers.

Management Directive 12.3, *NRC Personnel Security Program* (MD 12.3), does not provide employees with specific guidance related to the drug testing program. MD 12.3 contains a description of the drug testing program on a single page and refers readers to the hardcopy versions of the Plan and Manual for specific policies and procedures.

Drug program staff explained that neither the Plan nor the Manual have been incorporated into NRC's management directives because these documents are lengthy (30+ and 56 pages, respectively). These staff further explained that the information does not appear on the intranet because some program information already appears on the Security Branch Web site and more information would be redundant.

However, by adding NRC's drug testing policies and procedures to the management directives, this information would automatically become available on the intranet. This would facilitate employee access to this information and ensure their understanding and confidence in the drug testing program.

Recommendation

OIG recommends that the Executive Director for Operations:

12. Update the Management Directive System to include the drug testing policy and procedures that employees are expected to follow.

Summary

Improvements in drug program records maintenance and accessibility of program guidance will strengthen the agency's oversight of the drug testing program.

[Page intentionally left blank.]

IV. Consolidated List of Recommendations

OIG recommends that the Executive Director for Operations:

1. Fully implement existing NRC policy by including all individuals with incident response duties and with annual access to classified information into the random drug testing pool.
2. Implement a procedure for updating testing designated positions in the random drug testing pool. This procedure should capture individuals whose job responsibilities shift over time to include or exclude employees meeting the criteria for inclusion the drug testing pool.
3. Periodically conduct a quality assurance review to ensure that all jobs with testable attributes are included in the random drug testing pool.
4. Revise the categories of testing designated positions to include computer system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons.
5. Re-evaluate categories of testing designated positions and continue to do so biennially.
6. Develop formal written procedures for staff to follow in implementing the agency's random drug testing selection process.
7. Include in the process a means to drug test the randomly selected employees who are frequently absent.
8. Develop and implement a quality assurance process to periodically verify that employees are randomly selected for drug testing without regard to their name, office, or position.
9. Provide and update regularly employee-supervisor lists for drug program staff to facilitate the drug testing notification process.
10. Institute a quality assurance process to verify that notification procedures are implemented in accordance with HHS requirements.
11. Develop and implement policy and procedures to compile all records necessary for compliance with the *NRC Drug-Free Workplace Plan*.
12. Update the Management Directive System to include the drug testing policy and procedures that employees are expected to follow.

[Page intentionally left blank.]

V. AGENCY COMMENTS

The agency provided comments during an exit conference that was held on September 29, 2004, and subsequently submitted written comments. Where appropriate, OIG modified the report in response to these comments. Appendix C contains a copy of the agency's written comments and OIG's response to each.

[Page intentionally left blank.]

SCOPE AND METHODOLOGY

Auditors assessed NRC's implementation of its drug testing program with regard to the random drug testing process and general program oversight.

Auditors reviewed Executive Orders relevant to Federal drug testing programs; NRC Management Directives and Handbooks pertaining to personnel security, Privacy Act, and information technology to identify agency requirements relevant to random drug testing policies and procedures; the *NRC Drug-Free Workplace Plan* and *NRC Drug Testing Manual* to identify agency drug testing program policies and procedures; and the Department of Health and Human Services *Model Plan for a Comprehensive Drug-Free Workplace Program* and *Mandatory Guidelines for Federal Workplace Drug Testing Programs* to determine Federal requirements for drug testing programs.

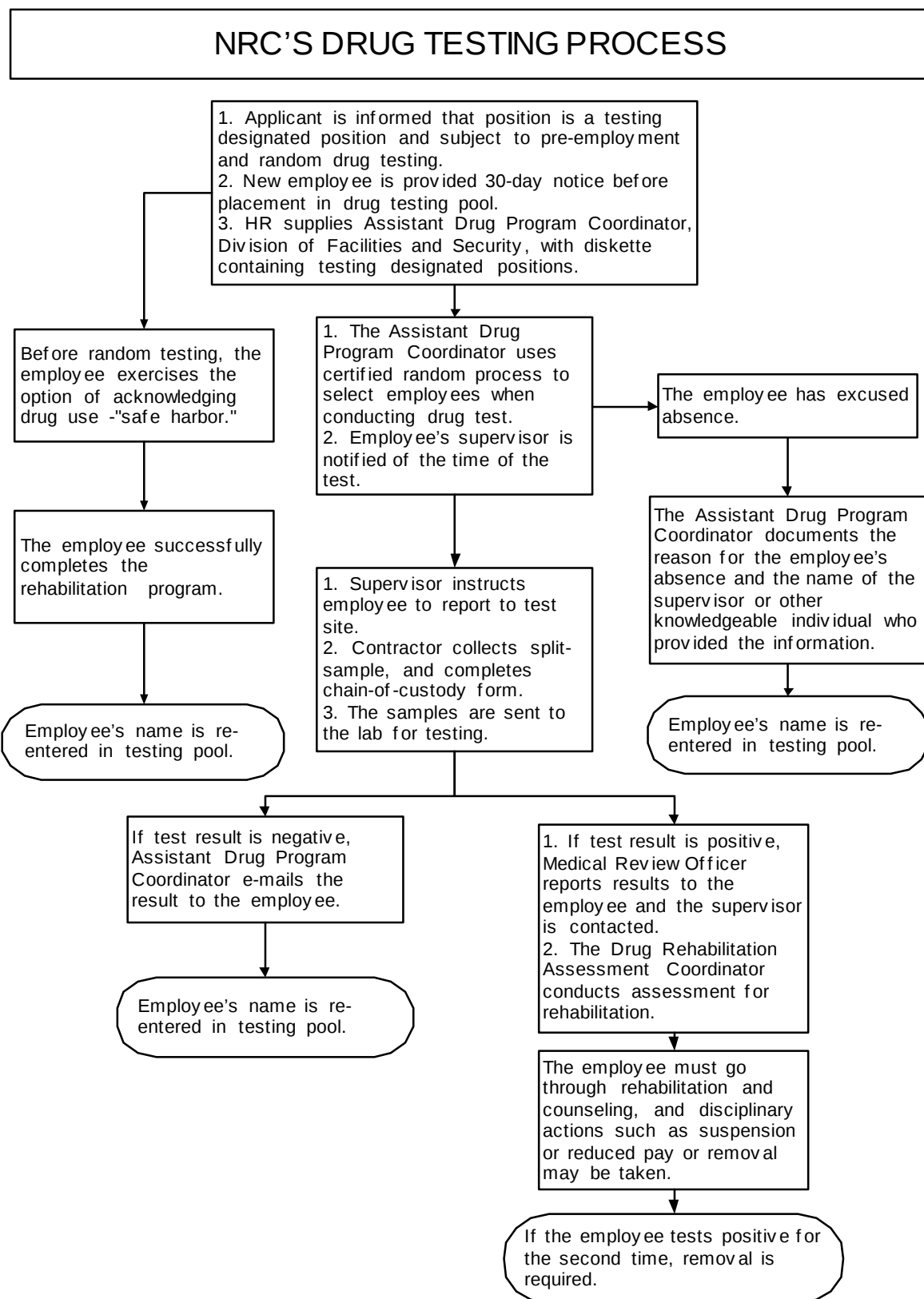
Auditors collected test results data in accordance with *Privacy Act* regulations and analyzed this data to determine whether drug program staff were employing an effective random selection process for drug testing purposes. Auditors also collected and analyzed data pertaining to the employees and the testing designated positions that have been identified for random drug testing.

Auditors interviewed staff in NRC Headquarters and Region IV to determine how staff were implementing drug testing program processes and procedures. They interviewed staff at the Department of Health and Human Services to obtain clarification on drug program requirements and staff at the Department of Energy to learn about their drug testing program implementation.

This review was conducted from February 2004 to May 2004 in accordance with generally accepted Government auditing standards. Internal control weaknesses have been noted and considered for reporting. The work was conducted by Beth Serepca, Team Leader; Vicki Foster, Senior Management Analyst; and David Ditto, Management Analyst.

[Page intentionally left blank.]

Flowchart of the Drug Testing Process



[Page intentionally left blank.]

EDO COMMENTS AND OIG RESPONSE



UNITED STATES
 NUCLEAR REGULATORY COMMISSION
 WASHINGTON, D.C. 20555-0001

November 17, 2004

MEMORANDUM TO: Stephen D. Dingbaum
 Assistant Inspector General for Audits

FROM: *Luis A. Reyes*
 Luis A. Reyes
 Executive Director for Operations

SUBJECT: DRAFT REPORT: AUDIT OF THE NUCLEAR REGULATORY
 COMMISSION'S DRUG TESTING PROGRAM

I am responding to your October 29, 2004, memorandum requesting comments on the subject report. The following three comments are provided:

Page 11, recommendation #4

The wording of recommendation #4 should be changed to, "Evaluate the categories of testing-designated positions to consider including computer system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons." According to the Department of Health and Human Services (HHS) guidance, neither one of these categories is considered to be a presumptive testing category. The staff plans to evaluate these categories as part of its re-evaluation of testing-designated positions in response to recommendation #5.

Page 15, 1st and 2nd paragraphs

These paragraphs indicate that for a notification to be proper, the employee's supervisor must be the person to notify the employee that they have been selected for a drug test. HHS does not require that the supervisor be notified before the employee. The HHS Model Plan which describes this process states, "An individual selected for random testing, and the individual's first-line supervisor, shall be notified the same day the test is scheduled, preferably, within two hours of the scheduled testing. The supervisor shall explain to the employee that the employee is under no suspicion of taking drugs and that the employee's name was selected randomly." Based on this information, the report should be revised.

In addition, the Nuclear Regulatory Commission (NRC) intends to modify the Drug-Free Workplace Plan to routinely notify the person to be tested before the supervisor and, as part of the notification, confirm the name of the person's supervisor, and then notify the supervisor. This is permitted by the HHS Model Plan.

Page 17, 1st paragraph under heading "Insufficient Program Records Maintained"

NRC has a System of Records established under the Privacy Act to establish requirements for maintaining drug testing records. The staff maintains records consistent with those

S. D. Dingbaum

- 2 -

requirements, including records of both positive and adulterated tests. Due to the very low number of positive test results, a more automated approach to recording this data has not been necessary and is not used. Drug testing results information is compiled, although not necessarily in the most efficient manner, when needed or requested. The last sentence on page 18 states that drug program staff could not provide documentation of verified positive or adulterated tests that occurred as a result of applicant testing. This information was available but apparently not in a sufficiently timely manner from the perspective of the auditor. This sentence should be deleted.

OIG'S ANALYSIS OF THE EDO'S COMMENTS

Below are the agency's comments to the draft audit report, followed by OIG's response to each comment. NRC's comments appear in bold italics.

Page 11, recommendation #4 (which appears on page 8 of this final report)

The wording of recommendation #4 should be changed to, "Evaluate the categories of testing-designated positions to consider including computer system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons." According to the Department of Health and Human Services (HHS) guidance, neither one of these categories is considered to be a presumptive testing category. The staff plans to evaluate these categories as part of its re-evaluation of testing-designated positions in response to recommendation #5.

OIG did not change the wording of recommendation #4 from "revise" to "evaluate." OIG contends that the categories can be revised based on guidance contained in the HHS memorandum to Federal agencies dated August 2, 1999, titled, "Guidance for Selection of Testing Designated Positions (TDP's)." This document established criteria for testing designated categories of employees whose drug use could cause significant harm to the agency. Although this guidance describes the presumptive testing category as the core group of testing designated positions that must be included in all plans, it also describes preferred and discretionary designations. These latter two designations are suitable for NRC's system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons.

Preferred testing designated positions are described in HHS guidance as categories representing strong government interests and specifically include employees authorized to carry firearms. The rationale for including these positions as testing designated positions is the same as that for employees with a security clearance who see classified documents only rarely – granting security clearances in advance improves flexibility and ensures employees can be given access to classified material as soon as the need arises.

Discretionary testing designated positions are agency specific sensitive positions that may warrant designation for testing. For example, courts have supported testing for confidential security clearances holders, health care professionals responsible for direct patient care, and firefighters. Many testing designated positions that have not been court tested are also appropriate as required by agency needs. In order to categorize a position as discretionary, an agency would need to establish a connection between the employee's duties and the feared harm to the agency from the employee's illegal drug use. System administrators would be categorized as discretionary testing designated positions because of the potential harm they could cause to the agency's computer security due to their levels of access.

OIG contends that NRC's system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons should be included as testing designated positions because the criteria for preferred and discretionary designations are applicable.

Page 15, 1st and 2nd paragraphs (which appear on page 11 of this final report)

These paragraphs indicate that for a notification to be proper, the employee's supervisor must be the person to notify the employee that they have been selected for a drug test. HHS does not require that the supervisor be notified before the employee. The HHS Model Plan which describes this process states, "An individual selected for random testing, and the individual's first-line supervisor, shall be notified the same day the test is scheduled, preferably, within two hours of the scheduled testing. The supervisor shall explain to the employee that the employee is under no suspicion of taking drugs and that the employee's name was selected randomly." Based on this information, the report should be revised.

In addition, the Nuclear Regulatory Commission (NRC) intends to modify the Drug-Free Workplace Plan to routinely notify the person to be tested before the supervisor and, as part of the notification, confirm the name of the person's supervisor, and then notify the supervisor. This is permitted by the HHS Model Plan.

OIG modified the text to clarify the guidance contained in HHS' *Model Plan for a Comprehensive Drug Free Workplace Program* (Model Plan). However, OIG contends that the supervisor must be notified before the employee in order to explain to the employee the circumstances concerning the employee's selection for random testing. OIG's contention is based on HHS requirements, NRC guidance, legal interpretation, and observation of the agency's current notification process. As stated in the report, the underlying reason for supervisor notification for drug testing pertains to lines of authority. Employees are subject to disciplinary action if they refuse an order from a supervisor.

In addition to the statement in the agency's response from HHS' Model Plan, Section IX D, Random Testing, Notification of Selection, *NRC Drug-Free Workplace Plan* (Plan) and *NRC Drug Testing Manual* (Manual) contain language that indicates that the supervisor is to inform the employee that they have been selected for testing. Specifically:

- The Plan requires in Section VI, Special Duties and Responsibilities, that NRC's Headquarters Assistant Drug Program Coordinator shall notify the selected employee's supervisor approximately 1 hour prior to actual collection. This section of the Plan does not mention direct notification of the employee as an option.

- The Plan, in Section IX E, Random Testing, Notification of Selection, contains the same requirements as HHS' Model Plan for the timeliness of employee and supervisor notification and for the supervisor's explanation to the employee of the circumstances of their selection.
- The Manual requires in Chapter II F, Random Testing, Employee Notification, that the supervisor shall verbally and privately inform the employee that he/she has been identified through a random selection process for drug testing by urinalysis, normally, approximately 1 hour before the actual collection. The employee shall be clearly informed in writing by completing a "Notice To Appear for Random Drug Test" form. This form requires signatures from the employee to be tested and his or her supervisor.

Until HHS approves NRC's proposed modifications, the agency should notify employees according to the required procedures outlined in its existing guidance. Modification of required procedures, prior to HHS approval, places NRC at risk of legal challenge and fails to protect employees from unwarranted disciplinary action.

Page 17, 1st paragraph under heading "Insufficient Program Records Maintained" (which appears on page 12 of this final report)

NRC has a System of Records established under the Privacy Act to establish requirements for maintaining drug testing records. The staff maintains records consistent with those requirements, including records of both positive and adulterated tests. Due to the very low number of positive test results, a more automated approach to recording this data has not been necessary and is not used. Drug testing results information is compiled, although not necessarily in the most efficient manner, when needed or requested. The last sentence on page 18 (which appears on page 13 of this final report) states that drug program staff could not provide documentation of verified positive or adulterated tests that occurred as a result of applicant testing. This information was available but apparently not in a sufficiently timely manner from the perspective of the auditor. This sentence should be deleted.

OIG did not modify this section of the report because, contrary to the agency's comment, the drug program does not maintain the type of documentation required by both the *NRC Drug-Free Workplace Plan* and *HHS' Model Plan for a Comprehensive Drug Free Workplace Program*. Requirements in these documents direct the agency to maintain a recordkeeping system that captures sufficient documents to include: 1) notices of verified positive test results referred by the Medical Review Officer and 2) evidence that an individual may have altered or tampered with a specimen. OIG's finding does not challenge the agency's compliance with the Privacy Act or timeliness in responding to OIG requests for information. Instead, this finding pertains strictly to the availability of documentation of test results.

OIG contends that sufficient record keeping for notices of verified positive test results referred by the Medical Review Officer and evidence that an individual may have altered or tampered with a specimen need not be automated, but at a minimum must be

documented and not compiled from memory. Program staff never provided OIG with documentation of the verified positive test that was reported to HHS in FY 2002 and never provided documentation of altered or tampered specimens. Program staff stated early in the audit that they do not maintain separate records of positive results from random testing or any applicant test results because there are so few positive results from random testing. Furthermore, they believed a different office should maintain the records of applicants denied employment due to "invalid" or positive test results. Later in the course of the audit, OIG asked the program staff for the number of applicants who were denied employment due their drug test result. On this occasion, drug program staff compiled from memory a list of six applicant positives/invalids since 2002, but did not provide documentation of these test results.