

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

July 30, 1990

MEMORANDUM FOR: James M. Taylor
Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: SECY-90-240 - AMENDMENT TO THE FITNESS-
FOR-DUTY RULE

This is to advise you that the Commission (with commissioners Rogers, Curtiss, and Remick agreeing) has approved the proposed amendment to the Fitness-for-Duty Rule with the attached modifications. Chairman Carr disapproved, he noted that as stated in his vote on SECY-90-136, he believes that in the interest of safety, it is not inappropriate for licensee management to remove an individual from duty involving nuclear power plants based on early indications of a potential problem. With final determination by a Medical Review Officer taking up to 10 days, it appears only prudent to take the precaution of removing the individual until that final determination is made.

The Federal Register Notice should be modified as noted on the attached pages, reviewed by the Regulatory Publication Branch, ADM for consistency with the Federal Register requirements and returned for signature.

(EDO) (SECY Suspend: 8/20/90)

Attachment:
As stated

cc: Chairman Carr
Commissioner Rogers
Commissioner Curtiss
commissioner Remick
OGC

NOTE: THE SRM, THE SUBJECT SECY PAPER, AND THE VOTE SHEET OF

COMMISSIONER CURTISS WILL BE MADE PUBLICLY AVAILABLE
WHEN THE FEDERAL REGISTER NOTICE IS PUBLISHED

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The Office of the General Counsel (OGC), advised the staff that the requirement in the rule to prohibit the disclosure of presumptive positive results of preliminary testing to licensee management did not prohibit the licensee from permitting non-management personnel from taking action against an employee on the basis of unconfirmed positive initial screening test results. OGC noted that the intent to preclude the use of onsite testing for any purpose other than screening specimens for forwarding to a certified laboratory was not stated in the present rule with sufficient clarity to make a case against the licensee's use of preliminary test results.

Discussion

During its consideration of 10 CFR Part 26, the Commission determined that the rule achieved a proper balance between individual rights, the assurance of public health and safety, and protecting the safety of fellow workers. Among the many measures that were prescribed to protect individual rights was a prohibition against disclosure of presumptive positive results of preliminary testing to licensee management. Under its procedures, the licensee in question removes persons from nuclear power property and places them in a non-work pay status after a preliminary positive test result indicates the presence of cannabinoids, cocaine, or alcohol. The Commission concludes that the licensee's practice is contrary to the Commission's intent, which is set forth in the responses to public comments accompanying the final rule (paragraphs 11.1.3 and 11.2.3 at 54 FR 24481). Therefore, the Commission is proposing to amend 10 CFR Part 26 to make clear that preliminary test results should not be used as a basis for management action absent corroborative evidence of impairment or safety hazard.

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In certain unusual circumstances the reporting of unreviewed test results to management may be required by 10 CFR 26.24(e). In those rare cases when the Medical Review Officer's (MRO) review of final test results cannot be completed in time to meet the requirement to report the test results to licensee management within 10 days after the initial presumptive positive screening test, the Commission expects the MRO to exercise prudent judgment. The MRO should be informed of initial presumptive positive onsite screening test results if the

HHS-certified laboratory has not reported within the expected time. If the MRO cannot complete the review within the 10 day period because of the unavailability of HHS test results or unavailability of the individual, the report to management should be based on available information and should make it clear that the screening test results have not yet been confirmed, by the HHS-certified laboratory.

Any individual who is impaired, or whose fitness for duty may be questionable based on evidence other than the unconfirmed positive initial screening test result must be removed from unescorted status under the provisions of 10 CFR Part 26.27(b)(1).

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

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Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq). Existing requirements were approved by the Office of Management and Budget; approval number 3150-0146,

Regulatory Analysis

The regulations in 10 CFR Part 26 establish requirements for licensees authorized to construct or operate nuclear power reactors to implement a fitness-for-duty program.

This proposed amendment to 10 CFR Part 26 clarifies the Commission's previous position that no action should be taken against an individual based solely on unconfirmed positive initial screening test results in the absence of other evidence that the individual is impaired or that the individual might otherwise pose a safety hazard.

Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act of 1980, [5 U.S.C. 605(b)], the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of nuclear power plants. The companies

that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards issued by the Small Business Administration in 13 CFR Part 121.

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Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule, and therefore, that a backfit analysis is not

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For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 26.20, 26.21, 26.22, 26.23, 26.24, 26.25, 26.27, 26.28, 26.29 and 26.80 are issued under sec. 161b and i, 68 Stat. 948, and 949, as amended (42 U.S.C. 2201(b) and (i)); §§ 26.70, 26.71, and 26.73 are issued under sec. 161, 68 Stat. 950, as amended [42 U.S.C. 2201(o)].

2. In § 26.24, Paragraph (d) is revised to read as follows (new provisions are underlined):

§ 26.24 Chemical testing.

* * * * *

(d) Licensees may conduct initial screening tests of an aliquot prior to forwarding selected specimens to a laboratory certified by the Department of Health and Human Services, provided the licensee's staff possesses the necessary training and skills for the tasks assigned, their qualifications are documented, and adequate quality controls are implemented. Quality control procedures for initial screening tests by a licensee's testing facility must include the processing of blind performance test specimens and the submission to the HHS-certified laboratory of a sampling of specimens initially tested as negative. Access to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer, the Fitness-For-Duty Program Manager, and employee assistance program staff when appropriate. No individual may be removed or temporarily suspended from unescorted access based solely on unconfirmed positive initial screening test

(Enc. 2)

NRC PROPOSES TO CLARIFY FITNESS-FOR-DUTY REQUIREMENTS

The Nuclear Regulatory Commission is proposing to amend its requirements governing fitness-for-duty at licensed nuclear power plants.

The amendment would clarify the Commission's intent that no individual may be removed or temporarily suspended from unescorted access based solely on the unconfirmed positive results of a drug screening test.

The amendment also would make it clear that an individual may be removed or temporarily suspended from unescorted access if there is evidence, other than unconfirmed positive initial screening test results, that the individual is impaired or might otherwise pose a safety hazard.

The clarifying amendment is being proposed after one licensee advised the NRC, earlier this year, that it had implemented a fitness-for-duty program that included a provision for placing individuals in a non-work pay status on the basis of a positive but unconfirmed drug test.

Written comments on the proposed amendment to Part 26 of the Commission's regulations should be received by (date). They should be addressed to the Secretary of the Commission, Nuclear Regulatory Commission, Washington, D.C. 20585, Attention: Docketing and Service Branch.

(Enc. 3)

DRAFT

IDENTICAL LETTERS TO

Chairman Bob Graham, Senate
Subcommittee on Nuclear Regulation
cc: Alan K. Simpson
Chairman Philip R. Sharp, House
Subcommittee on Energy and Power

cc: Carlos J. Moorhead

The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The NRC has sent to the Office of the Federal Register for publication the enclosed proposed amendment to the fitness-for-duty rule to clarify its intent concerning the unacceptability of taking action against an individual based solely on confirmed preliminary screening test results. The amendment would prohibit management actions based on an unconfirmed positive initial screening test when there is an absence of any other evidence of impairment or an indication that the individual might otherwise pose a safety hazard. The Commission's rule for establishing Fitness-for-Duty programs at nuclear power plants was previously published on June 17, 1989 (54 FR 24468). The notice provides for a 60-day public comment period.

Sincerely,

Eric S. Beckjord, Director
Office of Nuclear Regulatory Research

cc: Representative James V. Hansen

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results in the absence of other evidence that the individual is impaired or that the individual might otherwise pose a safety hazard.

Dated at Rockville, Maryland, this day of 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission