

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

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of the Fitness for Duty Rule (SECY-00-0159)

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
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STAKEHOLDER MEETING ON THE IMPLEMENTATION  
OF THE FITNESS-FOR-DUTY RULE  
(SECY-00-0159)  
+ + + + +  
TUESDAY  
MARCH 20, 2001  
+ + + + +  
ROCKVILLE, MARYLAND  
+ + + + +

The public meeting was held in the Auditorium of the Nuclear Regulatory Commission, Two White Flint North, 11545 Rockville Pike, at 9:00 a.m., Garmon West, moderating.

PRESENT:

GARMON WEST	NRR
RON ALBERT	NRR
JESSE ARIDSEN	NRR
BRAD BAXTER	NRR
JIM CREED	Region III
NANCY DURBIN	MPD Consulting
BRUCE EARNEST	Region IV
FRANK GILLESPIE	NRR

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1 PRESENT: (continued)  
 2 BRUCE EARNEST Region IV  
 3 FRANK GILLESPIE NRR  
 4 JON JOHNSON NRR  
 5 TERRY MADEDA Region III  
 6 GEARY MIZUNO OGC  
 7 VONNA ORDAZ NRR  
 8 GARY PIRTLE Region III  
 9 GREG SMITH Region I  
 10 GLENN TRACY NRR

11 ALSO PRESENT:  
 12 BRAD BAXTER  
 13 JERRY BEBB  
 14 SHARON BLUE  
 15 BRETT BOISMENU  
 16 T. SCOTT BRAZIL  
 17 RICHARD BUCHER  
 18 KATHY BURKETT  
 19 MICHAEL BURRELL  
 20 LOREN BUSH  
 21 JEFF CAMPBELL  
 22 PATRICIA CAMPBELL  
 23 RON CASEY  
 24 PEGGY CLARK  
 25 RANDY CLEVELAND

26  
 27 ALSO PRESENT (Continued):  
 28 SHELLY CRAIG  
 29 PATRICIA DAVIS  
 30 PETE DEFLIPPI  
 31 NICK DiPIETRO  
 32 AL DYMOND  
 33 SHERRY ECKERT  
 34 RICH ENKEBOLL  
 35 RICH FITZSIMMONS  
 36 JOHN FLINN  
 37 PETER FOWLER  
 38 SANDRA FRANCIS  
 39 NEIL HARRIS  
 40 PAT HARRISON  
 41 AMY HANSE  
 42 LYNN HAUCK  
 43 LORI HAYES  
 44 LORNA L. HEALEY  
 45 WALTER JOHANSEN  
 46 MARGARET JULIANO  
 47 ROBERT R. KELM  
 48 DARLENE KOPP  
 49 SUSAN LANOUILLE

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1 LISA MATULA  
2 EILEEN MOORE  
3  
4 ALSO PRESENT (Continued):  
5 JOHN MORIARTY  
6 RANDY MUMME  
7 JAMES NOEL  
8 PAMELA O'CONNOR  
9 CINDY PARENT  
10 REBECA L. PATSY  
11 MICHAEL PRIEBE  
12 SHARON QUINN  
13 RICHARD RIST  
14 BILLIE ROOKS  
15 TED SHULTS  
16 ROBERT SOUTHWORTH  
17 REBECCA STANFIELD  
18 MARTHA TAYLOR  
19 SUE TECHAV  
20 JANET THIEL  
21 FREDERICK WHITT  
22 GLENN WILSON  
23 MANCHESTER WOODARD-HALL  
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I-N-D-E-X

<u>AGENDA ITEM</u>	<u>PAGE</u>
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on changes to 10 CFR Part 26	

P-R-O-C-E-E-D-I-N-G-S

(8:59 a.m.)

1  
2  
3 MODERATOR WEST: Good morning to all of  
4 you, and welcome to the Fitness-for-Duty Workshop,  
5 implementation workshop. We are delighted to have you  
6 here.

7 I have a lot of talking to do during the  
8 day. So I am going to sort of save my voice here on  
9 the front end, and I just want to briefly introduce  
10 our introductory speaker.

11 His name is John Johnson. He is the  
12 Deputy Office Director for the Office of Nuclear  
13 Reactor Regulation, also referred to as NRR. We will  
14 try to stay from as many acronyms as we can and, when  
15 we do use them, we will certainly try to explain them  
16 to you.

17 So without any further ado, we will have  
18 some opening remarks from Mr. John Johnson.

19 MR. JOHNSON: Thanks, Garmon. I want to  
20 welcome everybody. I guess this is the first day of  
21 Spring. I saw a robin waiting for the Metro this  
22 morning.

23 I'm glad Loren Bush is here. I don't know  
24 if many of you know him, but -- No, I do want to  
25 welcome all our stakeholders as well as the NRC  
26 people. The success for this workshop will be to  
27 understand the implementation issues with the rule,  
28 the revision to Part 26, discuss a lot of questions.

29 I know there's two days planned to discuss  
30 all the implementation issues and changes to Part 26.  
31 Then Thursday is a time planned to discuss proposed  
32 change to the rule brought about by some stakeholders  
33 that want to reduce the amount of random testing for  
34 individuals that do not have to go into vital areas of  
35 the plant.

36 So I think there's quite a bit of issues  
37 to go over in three days. I was talking to Garmon  
38 last night about all the changes. To go back in  
39 history, this rule change has been being worked on for  
40 a number of years, and it's finally come to fruition  
41 for the NRC Commissioners. The Commission approved  
42 the rule on December 4.

43 I asked Garmon last night when it is going  
44 to be effective and, of course, the rule becomes  
45 effective once it is published in the Federal Register  
46 for a period of time, and we are waiting for the  
47 Office of Management and Budget to give us clearance  
48 to issue that rule, and I know there's a lot of  
49 controversy over the cost/benefit of this rule.

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1           Just to make sure that we all understand  
2 the status of it, the NRC Commission has approved the  
3 rule, and the main purpose of this discussion is to go  
4 over the details of what all those changes are.

5           One of the things that, I think, we all  
6 can agree on, even though we have disagreements on the  
7 costs of the testing and so forth, is that we want to  
8 make sure to maintain safety that all the personnel  
9 that work at a nuclear power plant are reliable and  
10 trustworthy. We want to make sure that they are not  
11 under the influence of alcohol or drugs and that they  
12 are certainly fit for duty.

13           Why did we make this change? Why did we  
14 make a change to Part 26? Well, there's a number of  
15 reasons. We did a regulatory analysis of each one of  
16 these individual changes, and we also did a regulatory  
17 analysis of the integrated sum of them all, at the  
18 Commission's request, and there are many reasons for  
19 the changes.

20           We made some changes to look at areas  
21 where we thought there were some loopholes in terms of  
22 individuals that would want to subvert the testing.  
23 We made some changes to reduce unnecessary burden, and  
24 we made some other changes to make our rule in  
25 conformance with industry or nationwide consensus  
26 standards, in this case with Health and Human  
27 Services.

28           Garmon and the staff will go over some of  
29 the details as to where and why we haven't conformed  
30 100 percent to those Health and Human Services  
31 requirements. There are some differences, and we can  
32 go over those and give you the reasons why.

33           We also -- Part of the change to this rule  
34 was to react to a petition for rulemaking from a  
35 licensee that requested a change in the audit  
36 schedule, and that request was made to change the  
37 audit to every two years instead of every year, and I  
38 think we have made it every three years, if I'm  
39 correct.

40           So we have attempted to address a number  
41 of different issues. So this is a fairly widespread,  
42 complicated change that has a lot of changes -- a lot  
43 of nuances to it, and it was done for a number of  
44 reasons.

45           So it's been very difficult to even  
46 explain to our own employees and explain to our  
47 Commissioners why the change, what's been changed, and  
48 is it a benefit -- and overall benefit. We think it  
49 is.

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1 I mentioned some of the increases,  
2 additional changes we have made to maintain safety.  
3 One of those is in an area of to prevent subversion of  
4 the testing. Now I don't want to mention this from a  
5 standpoint of there is widespread subversion out  
6 there. It's a very small percentage, but there is  
7 some actions we have taken that we think we can help  
8 eliminate that.

9 Also, there's some actions we have taken  
10 to make the alcohol abuse sanctions in line with drug  
11 abuse. We feel that that was warranted.

12 From a reduction in unnecessary burden, we  
13 have reduced some training requirements, some audit  
14 requirements. We have reduced some waiting times. We  
15 believe waiting times for people to be able to work,  
16 and I think some of the overall benefits that we see  
17 in terms of unnecessary burden in terms of cost,  
18 dollars cost, actually go into some of these  
19 considerations for people having to wait around before  
20 they can go in and work at a power plant when they  
21 have no history of drug abuse, and they have properly  
22 been screened.

23 So we feel that overall the change to this  
24 rule is a benefit for safety, a benefit for reducing  
25 some unnecessary burden, and to make our rule more  
26 consistent with Health and Human Services standards.

27 I learned what the term suitable inquiry  
28 means. I'm sure there will be a lot of discussion  
29 about that. There is some relationship, of course,  
30 with security rules and getting access to a plant from  
31 a security standpoint in terms of going through  
32 people's background, doing a background check, and  
33 there is some relationship between this check in terms  
34 of looking into someone's history of drug or alcohol  
35 abuse.

36 So I hope that during the workshop you can  
37 get into the details of those questions and understand  
38 what the rule requires and what it doesn't require.

39 I looked at the agenda, and I see all  
40 these breaks in here, and I tried to figure out why  
41 they were there. As far as I know, they are there  
42 because, if you didn't get a chance -- We had planned  
43 to have a health clinic come over here and test  
44 everyone of you before the workshop, but if you  
45 haven't been tested while you registered this morning,  
46 we have plenty of breaks set up so that we can do that  
47 testing. We want to make sure that you are all fit  
48 for duty, too. Only kidding.

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1                   Anyway, that's about all I wanted to say.  
2 I again welcome you, and hope that we can go through  
3 all the details of this. I know there's a lot of  
4 controversial issues, but understand that the  
5 Commission has approved this rule, and we are prepared  
6 to explain the differences, all the details, and  
7 discuss how to implement it.

8                   Thank you.

9                   MODERATOR WEST: I have several items that  
10 I just want to start off with that are, I guess, more  
11 in the area of just housekeeping, if you will. So  
12 I'll mention those, and then I'll give you more  
13 precisely an overview of what the various workshops  
14 will cover over the next few days and some of my  
15 thoughts on just how that should be done, the format  
16 for it.

17                   We are certainly aware that anytime you  
18 get this many people together, you are going to have  
19 some that would want to perhaps have a smoke break.  
20 So I thought I would mention to you, just in terms of  
21 how the building is set up, it's my understanding that  
22 if you go up this stairwell that is right outside of  
23 the entrance, there is a guard stationed there, and I  
24 believe the guard will be able to indicate where the  
25 closest available place for smoking would be.

26                   I would also note that we have sign-in  
27 sheets. I know that's a hassle, particularly after  
28 you have gone through the main lobby, whichever  
29 direction you came in, and that sort of slows you  
30 down. But we would really appreciate it if you would  
31 complete the sign-in sheet at some point before you  
32 leave. That will be helpful to us.

33                   I might note, too, that we have -- and I'm  
34 very grateful to all my managers as well as my co-  
35 workers that are participating in various time slots  
36 over the next three days, and I just want you to be  
37 aware that on occasion some of them, because of other  
38 commitments, may have to leave, but we really  
39 appreciate the help and the support.

40                   Just briefly on my background and location  
41 with NRC, you can certainly tell from my nametag that  
42 I am with NRR, and I am in the Operator Licensing  
43 Branch, and Mr. Glenn Tracy is out Branch Chief, and  
44 within the section of the Reactor Safeguards Section  
45 it just seems like we are involved in quite a bit of  
46 rulemaking activities these days, and Vonna Ordaz is  
47 our Section Chief.

48                   I am the person that is the focal point,  
49 if you will, for the fitness-for-duty rule. So if you

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1 have questions, as many of you have had in the past  
2 and I am sure you will continue to have in the future,  
3 I'm the person that you eventually want to contact,  
4 either by phone or e-mail.

5 I thank you for this opportunity for me to  
6 learn that the e-mail address for fitness-for-duty  
7 wasn't working. I was wondering why it was so silent,  
8 but through your responses and giving me feedback that  
9 you weren't able to use it, we have gotten that  
10 straightened out. If I'm incorrect on that, let me  
11 know either by phone or sending a message to my  
12 regular e-mail address.

13 As John mentioned, over the next three  
14 days we are going to devote the first two days, today  
15 and tomorrow, to the changes to the Part 26, the  
16 larger rule, and then by design we have a break with  
17 respect to the third day, totally separate; because  
18 sometimes when you go through these changes, it's  
19 confusing enough and, if you are sort of commingling  
20 changes with a larger rule and you've got an amendment  
21 sort of nested into one of the same days, it gets even  
22 more confusing.

23 So we decided we would just separate the  
24 treatment of those two efforts by having the third day  
25 solely devoted to the amendment to reducing the scope  
26 of random testing.

27 I might emphasize that the purpose of  
28 today's and tomorrow's workshop is to take you through  
29 the changes and, hopefully, the hand out materials we  
30 have provided will be helpful in this regard. So that  
31 on one hand, you have a clean copy of the new rule  
32 and, on the other hand, you have essentially and  
33 redline and strikeout that makes visible through the  
34 bold print what the changes are.

35 So we'll go through those literally sort  
36 of section by section, and we have received questions  
37 in advance on implementation, and that is the focus,  
38 as we see it, for these workshops, the first two days  
39 at least, implementation type questions that we will  
40 be addressing some of them -- most of them that we  
41 have received.

42 We received them from various  
43 stakeholders, from NEI as well as even our Regional  
44 inspectors, and we've been so busy working on the  
45 first set of questions that we have neglected our  
46 regional questions. But we will eventually get to  
47 those and, certainly, in instances where we have a  
48 redundancy we will pull the questions together and  
49 just answer them once.

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1 So my point is that we will step through  
2 each section of the rule, indicate what the changes  
3 are, and then, as appropriate for questions that we  
4 received in advance, we will address those questions.  
5 Then at the end of that section, we will provide an  
6 opportunity for any comments.

7 I might add, I would envision that we will  
8 probably potentially get some new questions. We are  
9 not proposing to answer the new questions on the spot  
10 but, as you can certainly tell, the workshops over the  
11 next three days will be transcribed, and if we get any  
12 new questions, we will certainly have them by way of  
13 the transcript, and we will eventually address them.

14 If you are wondering, for either questions  
15 that will be new or we haven't addressed, how we are  
16 going to eventually pull everything together, the  
17 bottom line answer is that our goal and our plan is to  
18 eventually come up with a NUREG type document that the  
19 NRC would publish that would be in the format of  
20 questions and answers with respect to the various  
21 sections of 10 CFR Part 26.

22 That's in the long term. In the short  
23 term, what we would envision downstream of the  
24 workshops over the next two days, we would provide as  
25 the answers are available on the fitness-for-duty  
26 website.

27 Just to revisit the status of the rule at  
28 some level of detail, as John mentioned, the  
29 Commission has approved the rule. We are waiting for  
30 the OMB clearance, and we recognize that we have a  
31 task there with respect to comments that we received  
32 on the OMB clearance, which is certainly appropriate.

33 I might add, and I think you would be  
34 certainly interested, our original date for  
35 essentially, roughly speaking, publishing the final  
36 rule in the Federal Register was April 4 of this year.  
37 However, we asked for and received an extension. So  
38 now we are slated to, roughly speaking, publish the  
39 final rule in the Federal Register on July 4.

40 Connected with that, of course -- Excuse  
41 me, that's July 5. Connected with that is the fact  
42 that, once the final rule is, in fact, published in  
43 the Federal Register, then it would have a 90-day  
44 clock on it with regard to implementation.

45 So that gives you an overview of where we  
46 are at and what our target dates are with respect to  
47 the implementation of the rule. That roughly works  
48 out to be sometime in the time frame of October.

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1 Just a few remaining points. The answers  
2 that we are going to give today -- and I might add on  
3 the front end, the approach we took, we have the  
4 advance questions from stakeholders, and we wanted to  
5 have the maximum amount of time to develop the  
6 responses to the questions we received.

7 So what you are going to see here today,  
8 you'll see the questions, and I will give the  
9 responses verbally. We did that, because again we  
10 needed literally right up until the last hour to have  
11 the benefit of working on and refining the responses.

12 So we would characterize the responses  
13 that we are going to give today as provisional  
14 responses, and I might go further and say that I think  
15 you could certainly contrast that with -- and I'll  
16 have a slide on this at some point with respect to the  
17 rule -- The legal interpretations would, in fact, come  
18 from our Office of the General Counsel. They would  
19 have to be submitted in writing. They would have to  
20 be then in turn provided in writing.

21 I just throw that out to make it known  
22 that, again, what we are going to provide today are  
23 provisional answers. They will be captured in the  
24 transcript, and I would be the first to admit that you  
25 will undoubtedly have some delta perhaps between what  
26 we'll present today and what will finally be captured,  
27 let's say, first opportunity on the website, the  
28 fitness-for-duty website, and then ultimately  
29 downstream of that in the NUREG document that I  
30 mentioned earlier.

31 I noted that we are transcribing the  
32 workshop, and just for your interest, the transcript  
33 will certainly be available in the form of a hard  
34 copy. I can provide additional details on that with  
35 respect to putting something up on the fitness-for-  
36 duty website.

37 It is also my understanding that an  
38 electronic version will be available, and that  
39 certainly lends itself very easily to putting it on  
40 the external Web. So you can have the benefit of that  
41 as well.

42 Then lastly, I would just ask that, as we  
43 go forward and get into the changes to the rule and  
44 particularly at the point where you have to either ask  
45 a question or to make a comment for the benefit of  
46 making sure that it is accurately transcribed and so  
47 on, we would ask you to speak into the various mikes  
48 that we have provided, at least one over here and at  
49 least one over in the other aisle.

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1           That's the overview, and at this point  
2 unless there are questions or comments, I would  
3 propose to go right into the various rule sections,  
4 essentially starting with the first one and then just  
5 working through over the next couple of days.

6           At this point, are there any comments or  
7 questions?

8           So here you have the first section of the  
9 rule that we will be dealing with. As we previously  
10 noted, we are going to have a workshop on proposed  
11 changes to the scope of the rule on Thursday. That's  
12 certainly relevant to the scope section.

13           This morning we are only going to cover  
14 the implementation questions regarding the changes in  
15 the final rule. As I noted also, we are expecting  
16 that those changes -- the final rule, that is -- would  
17 be published sometime in the July time frame.

18           Here there weren't any changes to this  
19 particular section. It's more in terms of just being  
20 complete and at least briefly reviewing what the areas  
21 are that are included in this section. Certainly, it  
22 is relevant to nuclear power plants.

23           It is also relevant to the second category  
24 of licensees that either possess, use or transport  
25 special strategic nuclear material. That's what that  
26 acronym stands for. We won't be devoting any time to  
27 that latter category.

28           (Slide change)

29           MODERATOR WEST: Now still with the  
30 Section 26.2 under Scope of the rule, we will start  
31 working toward -- Here you have a mixture. You have  
32 those things that are essentially the same in the rule  
33 where no changes were made. Individuals continue that  
34 would be required, if they have unescorted access to  
35 the nuclear plants protected area, would still be  
36 covered under the fitness-for-duty program.

37           Similarly, licensee, vendor or contractor  
38 personnel would be required -- those that would be  
39 physically required to report to the Technical Support  
40 Center -- that's the TSC -- and the Emergency  
41 Operations Facility would still be covered under the  
42 new rule. And as I mentioned on the previous slide,  
43 the strategic -- special strategic nuclear material  
44 licensee and transporter personnel would continue to  
45 be covered under the Scope.

46           Here we introduce one of the first changes  
47 in the rule, which you see in bold where we have  
48 broadened the coverage with respect to -- under the

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1 scope of the rule, with respect to fitness-for-duty,  
2 FFD -- fitness-for-duty program personnel.

3 Then the next slide will start to get into  
4 the specifics of what is included under this category  
5 of fitness-for-duty program personnel.

6 (Slide change)

7 As you can see, this category would  
8 include fitness-for-duty program personnel that can  
9 link the test results with the person who was tested  
10 prior to determination of a fitness-for-duty policy  
11 violation.

12 Secondly, it would include program  
13 personnel that make medical or management  
14 determinations of fitness. Third, it would include  
15 fitness-for-duty program personnel that can make  
16 removal or return to work decisions or it would also  
17 include fitness-for-duty program personnel who are  
18 involved in the selection or notification of employees  
19 for testing or in the collection of on-site testing of  
20 specimens.

21 (Slide change)

22 MODERATOR WEST: This slide just further  
23 notes what is currently in the rule. The regulations,  
24 under Scope, do not apply to NRC employees, to law  
25 enforcement personnel or off-site emergency fire and  
26 medical response personnel.

27 Much later in the slides, there are some  
28 appropriate aspects of the rule with respect to NRC  
29 employees, and we'll get into that, as well as  
30 contract personnel.

31 Then lastly on the slide, certain  
32 regulations in this section -- part, actually -- apply  
33 to licensees holding permits to construct a nuclear  
34 power plant.

35 Further, the scope of the rule would  
36 continue to apply to the corporation required to  
37 obtain a certificate of compliance.

38 This section (e), which is not uncommon  
39 with rules, whether they are existing rules or new  
40 rules like this one that are about to be published,  
41 they have certain sections that are reserved for  
42 potentially future efforts. In this case 26.2(e)  
43 would be reserved for any future efforts with regard  
44 to decommissioning.

45 This also helps to just summarize in brief  
46 terms where we are at with regard to the issue of  
47 decommissioning plants and their coverage on the rule.  
48 As you can see, the applicability of decommissioning

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1 plants has not been resolved with respect to the new  
2 rule.

3 In fact, it is going to be dealt with as  
4 a part of a much larger effort that is underway that  
5 cuts across not only this rulemaking effort but others  
6 within our agency as well, and it is through that  
7 effort that this issue would be addressed.

8 Further under the Scope, persons  
9 performing activities under this part who are covered  
10 by a program regulated by another Federal agency or  
11 State need be covered by only those elements of a  
12 licensee's fitness-for-duty program, as long as such  
13 persons -- we would expect that they would have to  
14 meet -- the program that they are trying to take  
15 credit for would have to meet certain standards.

16 I might add that the intent of this change  
17 is to reduce the burden of testing on individuals  
18 covered by multiple Federal and state programs.  
19 Unfortunately, most programs do not meet or come close  
20 to the NRC standards.

21 Having individuals working in the same job  
22 with different standards for their fitness-for-duty  
23 program was not felt to be acceptable, and the NRC  
24 retained the new section with the provision that all  
25 workers must be under a program meeting NRC standards.  
26 Any component of a program meeting such standards can  
27 be accepted.

28 With that in mind, we then go into, as we  
29 do here with the first bullet, some of the particulars  
30 of what would be expected if a licensee was trying to  
31 take credit for individuals participating in another  
32 Federal program.

33 So you would have the aspect of it that  
34 you would expect to have, the pre-access or pre-  
35 employment testing, random testing, and for-cause  
36 testing for the drugs that are specified by HHS.

37 Then you would also expect -- These would  
38 be additional standards that we would be looking at.  
39 You would expect to have urine specimens tested at a  
40 laboratory certified by HHS or the College of American  
41 Pathologists or other comparable certification  
42 programs, and you would expect awareness training as  
43 well.

44 In addition, the expectation would be that  
45 impartial and objective procedures would be provided  
46 with respect to appeals and appealing any findings of  
47 a fitness-for-duty violation, and we would expect that  
48 our provisions for notification of the licensees  
49 granting unescorted access of any Federal FFD

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1 violation by the testing agency or organization must  
2 be in place. So the notification here is the key in  
3 the event someone does test positive for drugs or  
4 alcohol.

5 (Slide change)

6 MODERATOR WEST: So that essentially steps  
7 through the various changes and, certainly, as I did  
8 that, touches on some of the things that have just  
9 rolled over from the current rule. Now I'll go into  
10 the specific question that we received with respect to  
11 this particular section of the rule.

12 The question that you have before you is  
13 as follows: Personnel who meet the criteria defined  
14 in (i) through (iv) but are not FFD, fitness-for-duty,  
15 personnel -- for example, a corporate manager who  
16 might make a management determination of fitness, an  
17 emergency medical physician who determines whether  
18 someone is fit, or an off-site manager who is involved  
19 in scheduling of random testing of his or her workers  
20 -- covered under the Scope.

21 So that's the question. Our response is  
22 this: Individuals who perform one of these functions  
23 on an ad hoc basis are not FFD program personnel --  
24 fitness-for-duty program personnel -- and therefore,  
25 not included in the scope of the rule.

26 I might, just before I go further in the  
27 response, just mention a little caution here.  
28 Certainly, we want to add some clarification on this.  
29 On the other hand, we don't want to give the  
30 appearance, by any means, that this would be -- in  
31 making this statement, that this would be a way to  
32 just sort of have people sort of in and out of the  
33 categories of whether they are fitness-for-duty  
34 program. That's certainly not the intent. But,  
35 hopefully, the distinction here will become a little  
36 bit clearer as I go on.

37 Specifically getting back to the question,  
38 an emergency medical physician should not make a  
39 medical determination of fitness unless trained and  
40 qualified in accordance with the Part 26.3 definition  
41 of medical determination of fitness. There in that  
42 section we have defined medical determination of  
43 fitness.

44 In some cases, such as a corporate manager  
45 who makes management determinations of fitness, or an  
46 off-site manager involved in the scheduling of random  
47 testing, the licensee will have to make a judgment  
48 regarding whether the individual would be considered  
49 an FFD, fitness-for-duty, program personnel.

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1                   One consideration would be whether the  
2 individual's actions could jeopardize the integrity of  
3 the fitness-for-duty program.

4                   The rule requires that provisions of  
5 licensees' FFD policy apply to FFD program personnel.  
6 The NRC expects that individuals who have routine  
7 and/or ongoing fitness-for-duty program  
8 responsibilities of the type described in  
9 26.2(a)(4)(i)-(iv), which is essentially just the  
10 larger list that I covered before of expanding the  
11 scope of fitness-for-duty program personnel covered  
12 under the rule, would be included under fitness-for-  
13 duty program personnel.

14                   I would be the first to admit, that's  
15 somewhat of a long-winded answer, but I think the long  
16 and the short of it is that we are trying to answer as  
17 precisely as we can the question, and I think the  
18 overarching aspect of what I said is with respect to,  
19 certainly, the individuals that are listed out in the  
20 Section 26.2(a)(4)(i)-(iv), which is sort of the focus  
21 of the question, those individuals that are performing  
22 those functions on some consistent, routine basis. No  
23 question, they would be covered.

24                   Getting back to the question again, those  
25 that would not be covered would be more in the  
26 category of infrequent, ad hoc basis, with the  
27 caution, if you will, of perhaps not expecting that  
28 that would be -- the ad hoc basis would be a routine  
29 kind of happening.

30                   Are there any questions or comments on  
31 26.2? Yes, please?

32                   MR. NOEL: James Noel from BWX  
33 Technologies. We are one of the two Category SSNM  
34 facilities that were listed in the scope. You said we  
35 would not be addressing that during this workshop.

36                   Are there any significant differences in  
37 how this rule change is going to affect material  
38 licensees?

39                   MODERATOR WEST: I think that's -- which  
40 I didn't say. That's the bottom line answer on why we  
41 are not really putting a whole lot of time on that,  
42 because there weren't any fundamental changes in that  
43 area.

44                   MR. NOEL: Thank you. Has there been a  
45 determination made whether the MRO -- off-site MRO  
46 will be involved in the scope of the rule?

47                   MODERATOR WEST: I think, again, the  
48 approach I would like to take is we will consider that

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1 to be a new question, and we'll capture it in the  
2 transcript, and we will give attention to it.

3 MR. NOEL: Thank you.

4 MODERATOR WEST: Certainly. The next  
5 section concerns definitions. I'm sorry.

6 MR. BRAZIL: Scott Brazil. I'm with  
7 Dominion. I have a question regarding where you  
8 would draw the line on a manager or a supervisor being  
9 involved in the scheduling of random testing to the  
10 extent that they would be considered fitness-for-duty  
11 program personnel?

12 I have a number of folks who are non-  
13 nuclear employees who are badged for access at one of  
14 my sites. Their supervision is trained to perform CBO  
15 on these folks, and I contact those supervisors when  
16 these people are selected for random testing. They  
17 are the folks who notify the worker he's been selected  
18 and send him for testing.

19 He is involved in the scheduling of those  
20 workers for random testing. Must I now consider him  
21 as fitness-for-duty program personnel or is that an ad  
22 hoc level of involvement?

23 MODERATOR WEST: Okay. Again, I  
24 appreciate the question, and we will take that as a  
25 new question, and we'll give attention to it.

26 I might add, so that I won't neglect any  
27 other related questions for 26.2, if you have  
28 additional ones, let us know.

29 MR. DAVIS: Garmon, Jim Davis, Nuclear  
30 Energy Institute.

31 MODERATOR WEST: Good morning.

32 MR. DAVIS: I have an application kind of  
33 question, the use of other programs. As I read the  
34 restrictions in there, I personally have a little bit  
35 of difficulty finding a place where they would be some  
36 practical applicability to that.

37 Do you have some examples of other  
38 programs that are acceptable and you see where we  
39 would reduce this burden at the sites or does anybody  
40 else in the audience know of a place where we actually  
41 can take credit for another program in some sort of  
42 practical sense? Is it really there?

43 MODERATOR WEST: I think you raise a  
44 legitimate point. I think the intention of this  
45 particular section at the outset has probably not  
46 fulfilled what the goal was, and I think it is largely  
47 due to the fact that the NRC standards, let's say with  
48 respect to DOT as one example, are somewhat higher  
49 with respect to cut-off levels and so on.

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1 I think I was alluding to this as I  
2 presented that particular part of the rule, but I  
3 think you are right. It certainly hasn't done what we  
4 may have originally intended for it to do when this  
5 whole rulemaking process was first started.

6 Along the lines of your question, if there  
7 is anyone in the audience that has any insights on how  
8 this could be applied, we would certainly be open to  
9 that, if you want to mention it.

10 MR. NOEL: I'm one of the other guys, but  
11 there are a lot of guys in this room who are strictly  
12 NRC licensees whose scope of work at their site is  
13 changing, such as those involved in the MOX fuel  
14 projects and the like, who are soon going to be  
15 somewhat dually regulated perhaps or at least on some  
16 regulation that's based on more than one Federal  
17 agency's requirements.

18 At our site, we are dually regulated both  
19 by the NRC and by the Department of Energy due to the  
20 nature of the work that we are doing.

21 MODERATOR WEST: Sure.

22 MR. NOEL: And one of the early concerns  
23 I had when fitness-for-duty was implemented at our  
24 site was how we were going to accommodate those DOE  
25 resident personnel who were our regulators and, as  
26 such, it would be a tremendous conflict of interest in  
27 us subjecting them to licensee testing.

28 This is one of the provisions that was  
29 made early on for us in that the DOE programs and DoD  
30 programs in some cases were deemed to be the  
31 equivalent to the NRC and, as such, we did not have to  
32 test those DOE and DoD personnel on our site. They  
33 were subject to their own agencies' testing program.

34 My concern is I do not know the details of  
35 that program in terms of cut-off levels and so forth  
36 and whether or not this new provision of the rule may  
37 be placing that in jeopardy at our site.

38 MR. DAVIS: So again -- Jim Davis -- So  
39 perhaps the question for you is does the NRC consider  
40 the DOE program equivalent? I mean, we might as well  
41 get that question on the table.

42 Then in the second place, do any of the  
43 power reactors know of any place where there is any  
44 applicability of this provision for us? So we  
45 shouldn't waste a lot of time with that. We'll just  
46 test them all. Right? Okay. Thank you.

47 MODERATOR WEST: Thank you for your  
48 question.

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1           We will now move on to the next section of  
2 the rule, which concerns definitions, 26.3.

3           As you see here, what we have done, we've  
4 tried to take the definitions and group them in  
5 categories with respect to the new rule. So on one  
6 hand, we have new definitions, revised definitions,  
7 relocated definitions, and omitted definitions.

8           The new definitions tend to support other  
9 rule revisions or clarify other parts of the rule.  
10 The revised definitions increase clarity or accuracy,  
11 and the relocated definitions -- these are definitions  
12 of terms used in the rule itself that are now located  
13 in the rule section where they first appear. Then  
14 there were certain definitions that have been omitted,  
15 because -- in the definition section, that is --  
16 because they are defined elsewhere.

17           Here, although they are lumped together,  
18 you have both the new and the revised definitions,  
19 some of the more prominent ones. We have divided  
20 these changed or revised definitions into three  
21 categories, and you will see those categories in a  
22 moment.

23           They include the testing process  
24 definitions, changes that improve the accuracy or  
25 clarity of the rule, and changes that support other  
26 rule changes, which I previously mentioned.

27           So the first category, testing process  
28 definitions, would include these terms, and these  
29 definitions were changed to make the terms used for  
30 the outcomes of testing more accurate and mutually  
31 exclusive.

32           The next category, improved accuracy for  
33 increased clarity, would include these terms. I might  
34 note that the terms on this slide are not  
35 significantly different from the interpretations that  
36 have been used for the last 12 years or so in the  
37 implementation of the fitness-for-duty rule. They  
38 have been either added to clarify a meaning or have  
39 been revised slightly to, hopefully, improve  
40 accuracy.

41           Next we have the supporting definitions  
42 for various rule changes, and you would have this set.  
43 These definitions are relevant to some of the rule  
44 changes we will be discussing later.

45           We have some presubmitted questions, as we  
46 have covered to some extent already, on some of these  
47 definitions which we will be covering later during the  
48 workshop.

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1           You might just want to look over the  
2 various definitions in the definitions section,  
3 perhaps the redline, strikeout version. That will  
4 give you a sense of even some that I may not have  
5 covered here, just what the various definitions are.

6           (Slide change)

7           MODERATOR WEST: Now I'll shift to --  
8 still with this same section on definitions -- to some  
9 specific questions that we received in advance.

10           The first one for Section 26.3 is as  
11 follows: With regard to the definitions of abuse of  
12 legal drugs and substance abuse, how are licensees  
13 supposed to obtain records on the abuse of legal drugs  
14 and substance abuse in light of privacy requirements?

15           Our response is as follows: The current  
16 suitable inquiry requirements for fitness-for-duty as  
17 well as for access of the authorization should provide  
18 adequate tracking and access to records of legal and  
19 employment actions.

20           I note that the NRC recognizes that  
21 licensees will not be able to independently verify  
22 that an individual did not, for example, use, sell or  
23 possess illegal drugs if there is no legal or  
24 employment action.

25           The next question we received is as  
26 follows: In the definition of medical determination  
27 of fitness, what are the standard clinical procedures  
28 referred into the definition?

29           Our answer is as follows: Clinical  
30 procedures are part of a licensed physician's  
31 training. More specific procedures are discussed in  
32 the medical review officer's handbook, and I would  
33 note that this is a particular item where we will and  
34 plan to do some additional follow-up through  
35 discussions with HHS in order to provide any  
36 additional details that we can provide on this  
37 particular question.

38           Before I move forward to the next section,  
39 which will be 26.4, are there any new questions on the  
40 definitions section of the rule, 26.3? If so, we will  
41 entertain those now. Please, you should go to the  
42 mike, please. Thank you.

43           MS. HAUCK: My name is Lynn Hauck from  
44 Rochester, New York. I have a question about the  
45 custody and control form.

46           DOT has indicated as of August 1 that we  
47 are no longer able to use their form. Non-DOT tests  
48 cannot use the Federal Custody and Control Form. I

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1 was just wondering, is there something available to us  
2 other than that?

3 MODERATOR WEST: Okay. We will take that  
4 as a new question, and I'm optimistic that we can  
5 provide you some specifics on that -- not optimistic;  
6 I know we can provide you some specifics on that.  
7 That shouldn't be difficult.

8 The next section, 26.4 -- Sorry.

9 MS. TECHAV: There's a lot more questions  
10 in here that haven't been covered.

11 MODERATOR WEST: You are speaking of the  
12 advance questions we received? Yes. Maybe a point  
13 that I didn't make as clearly as I should have.

14 It's not the expectation that we are going  
15 to cover all the questions in this setting that we  
16 have received in advance. Some, we haven't gotten to.  
17 We did attempt to get to as many as we could. So you  
18 are certainly right. There are some others that are  
19 not going to be covered.

20 There will be others that may be in other  
21 sections that we received in advance that we haven't  
22 covered. The short answer is that, for those that we  
23 haven't covered by the end of the session tomorrow,  
24 the first opportunity would be as those answers become  
25 available, we will put them up the fitness-for-duty  
26 website.

27 The long term answer, for those questions  
28 not covered over the next couple of days and questions  
29 in general that we received would be captured in the  
30 NUREG type document. So you are right. Some won't be  
31 addressed today, but eventually they will be.

32 MS. TECHAV: Hi. Sue Techav with Exelon.  
33 Under the medical determination of fitness it talks  
34 about a licensed physician needs to examine and  
35 interview an individual. I would like that defined on  
36 how that is supposed to be met. Is it an expectation  
37 that the MRO is going to have to be on site with a  
38 face to face type interview for individuals that have  
39 a history of substance abuse?

40 MODERATOR WEST: Okay. Thank you for the  
41 question. Under -- Yes, please.

42 MR. BURRELL: Mike Burrell, Constellation  
43 Energy. Just as a point of clarification, all the  
44 questions will be addressed before publication?

45 MODERATOR WEST: Yes.

46 MR. BURRELL: Okay, thank you.

47 MODERATOR WEST: And just to -- not to  
48 belabor this point, we will certainly address, not  
49 necessarily here in this setting, all the advance

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1 questions we have received, and eventually the  
2 questions and the answers will be captured in the  
3 NUREG document, and we will use the fitness-for-duty  
4 website such that we don't have to then hold off  
5 giving you responses, particularly for the ones that  
6 we can't cover and won't cover today. We don't want  
7 to hold off the responses to those waiting simply for  
8 the NUREG type document.

9 I might add, too -- and again, not to  
10 belabor this point, but the only -- I don't think the  
11 number of questions we've received so far, even if you  
12 combine the ones we see from stakeholders in general  
13 and specifically our regional inspectors, would be of  
14 the number that would be impossible to include in a  
15 NUREG type document.

16 The only caveat I would add is that we  
17 would certainly -- If you don't see a one-to-one match  
18 between everything being in the NUREG document  
19 eventually, the only criteria we would be using would  
20 be that if we looked at an item, looked at a question,  
21 and we didn't find that it had any generic  
22 applicability, then that would probably be the only  
23 reason we wouldn't include something, such as you  
24 wouldn't have a one-to-one match. But except for  
25 that, I think that's -- The answer would be, if we  
26 received the question, it will eventually appear in  
27 the NUREG type document. Please?

28 MS. MATULA: Lisa Matula, STP Nuclear  
29 Operating. On the abuse of legal drugs you had said  
30 earlier that we would get that through the suitable.  
31 The question is: Is that a conviction of legal  
32 action?

33 MODERATOR WEST: Okay. We will take that  
34 as a question. Thank you.

35 For the next section under 26.4, there is  
36 nothing new there. This is part of what I mentioned  
37 briefly at the beginning of the session today, simply  
38 trying to point out the distinction between (a) the  
39 provisional answers that we are giving you here today.  
40 Ultimately, what you will find on the website and the  
41 NUREG, the answers there, which I would characterize  
42 as staff positions, and then lastly what is captured  
43 here in terms of what truly is a legal interpretation.

44 There weren't any changes to this section,  
45 and we didn't receive any presubmitted questions.

46 (Slide change)

47 Next we would have several sections that  
48 are covered here together, the exemption section,

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1 26.6, communications, 26.7, and information and  
2 collection requirements, 26.8.

3 The exemption section deals with the  
4 various considerations the NRC would have with regard  
5 to entertaining exemptions. 50.12 would be one  
6 particular type of licensee, power reactors, let's  
7 say, and then 70.14 would be another type of licensee,  
8 materials licensees. But generally speaking, these  
9 sections would deal with the various considerations  
10 that the NRC would have in mind if it were considering  
11 exemption requests.

12 In the communications section,  
13 clarification of where to send communications and  
14 reports have been added. In the information  
15 collections requirements section there has been a  
16 removal of the estimate of hours. We didn't receive  
17 any presubmitted questions on these sections. But if  
18 there are any new questions in either of those areas,  
19 we would entertain them now.

20 MR. DAVIS: Garmon, I've got a question  
21 for you.

22 MODERATOR WEST: Certainly.

23 MR. DAVIS: Jim Davis, Nuclear Energy  
24 Institute. I thought I saw somewhere you were trying  
25 to close your L Street office or have closed it.

26 MODERATOR WEST: That's correct.

27 MR. DAVIS: Then you need to change the  
28 rule.

29 MODERATOR WEST: You are exactly right,  
30 and I appreciate that feedback, which we received and  
31 we'll give attention to that.

32 The point here is that the -- it's just  
33 been stated, the L Street office has, in fact, been  
34 closed, and the public document room is now located  
35 here in the other building opposite of this one, in  
36 White Flint One.

37 The next section deals with general  
38 performance objectives, which is 26.10. As you can  
39 see here, the first two general performance  
40 objectives, they are essentially the same. That's  
41 items (a) and (b), (a) dealing with reasonable  
42 assurance that personnel covered by the fitness-for-  
43 duty program are reliable and trustworthy, and (b)  
44 reasonable measures for early detection of persons who  
45 are not fit to perform activities. The emphasis there  
46 is early detection.

47 The third has been removed, because it is  
48 not a part of the NRC's mandate, and we didn't receive  
49 any presubmitted questions on this section.

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1 Would there be any new questions regarding 26.10?

2 MS. TECHAV: Sue Techav, Exelon. In  
3 regard to having individuals perform their tasks in a  
4 reliable and trustworthy manner that are not under the  
5 influence of any substance, legal or illegal, we are  
6 constantly getting challenged from the ADA, from EEOC  
7 about people that are under prescription medications,  
8 specifically from Marinol.

9 We just recently lost a case that an  
10 individual that was using Marinol would have to be  
11 provided reasonable accommodation when they are on  
12 that type of prescription medication. Could the NRC  
13 address that issue and how we are supposed to respond  
14 to that type, because it's going, to me, continue to  
15 snowball into other areas of this are of where we are  
16 denying unescorted access for individuals because we  
17 feel that they are not in a safe condition to perform,  
18 even though they do have a legal prescription for  
19 different types of medication?

20 MODERATOR WEST: I think that's a fair  
21 request, and we can and will certainly try to provide  
22 that as one of the questions we will address in the  
23 NUREG. I might add further that the point you make is  
24 certainly the case.

25 MR. MIZUNO: Garmon, can I just interject  
26 here? Gary Mizuno, Office of General Counsel for the  
27 NRC.

28 I think that we might -- We will have a  
29 discussion. I'm not sure we are going to completely  
30 address your question. I think one thing that we will  
31 say is that once the licensee makes a determination,  
32 a medical or management determination, that the person  
33 is not fitness to perform, I'm assuming they have a  
34 reasonable basis for that. Then our requirement  
35 under Part 26 are satisfied.

36 Anything beyond that with respect to the  
37 licensee's responsibilities or liabilities under the  
38 ADA or any other Federal statute or state statute is  
39 something that the NRC would not normally speak to,  
40 because it is beyond our regulatory purview.

41 MODERATOR WEST: And I think there  
42 certainly would be a need for me to coordinate  
43 whatever we could do in this area with OGC, and if we  
44 can provide our position within the context of the  
45 NUREG, then we will certainly do that.

46 The next section, which is 26.20, deals  
47 with written policies and procedures. Here we have  
48 several newly specified areas that licensees'  
49 policies and procedures must cover: Off-site

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1 involvement with illegal drugs, subversion of the  
2 testing process, refusals to provide a specimen, and  
3 use of prescription and over-the-counter medications  
4 that could cause impairment. It's not to say that  
5 some licensees may not, in fact, be doing some of  
6 these, if not all, already, but under the new rule it  
7 would be required.

8 Here you can see with the bold type with  
9 respect to policies and procedures what has been  
10 added. A clear and concise written statement of this  
11 policy must be prepared, and then the portion that is  
12 currently in the rule, and be in sufficient detail to  
13 provide affected individuals with information on what  
14 is expected of them and what consequences may result  
15 from the lack of adherence to the policy, and then  
16 lastly the new addition, this statement must be  
17 readily available to all persons subject to the  
18 policy.

19 (Slide change)

20 MODERATOR WEST: Further on the written  
21 policies and procedures, you see again in bold what's  
22 been added with respect to requiring a statement to be  
23 made by a called-in person, and the addition would  
24 speak to whether he or she considers himself or  
25 herself fit to perform the task assigned and whether  
26 he or she has consumed alcohol within the length of  
27 time stated in the pre-duty abstinence policy.

28 (Slide change)

29 MODERATOR WEST: In the section under  
30 26.20 that you have there before you, yet another new  
31 section which allows licensees to credit verified  
32 fitness-for-duty program coverage from another  
33 licensee when granting unescorted access pursuant to  
34 73.56 and, as is stated, licensees seeking to grant  
35 unescorted access under 73.56 to personnel covered by  
36 another licensee's fitness-for-duty program that  
37 complies with this part may credit that licensee's  
38 program through verification that the individual is  
39 currently or will continue to be subject to random  
40 testing, behavioral observation programs of either his  
41 or her employee or those of the host licensee. Yes,  
42 sir?

43 MR. DiPIETRO: Nick DiPietro with First  
44 Energy Nuclear Operating Company. The requirement of  
45 a statement to be made by called-in personnel -- I'm  
46 looking for some clarification on that as it relates  
47 to individuals as part of an emergency response  
48 organization.

49 MODERATOR WEST: I see.

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1 MR. DiPIETRO: And if there has to be an  
2 affirmative statement made by what I would consider an  
3 EP call-up type situation where most people have  
4 beepers or some type of paging mechanism and there  
5 isn't any real face to face question and answer type  
6 situation when you're calling out the whole EPT type  
7 team.

8 MODERATOR WEST: For emergency type  
9 personnel? Okay. We'll take that as a question that  
10 we will give you an answer to. Thank you.

11 (Slide change)

12 Here we have the first presubmitted  
13 question that we have in this area under 26.20. The  
14 question is: Does the clear and concise written  
15 statement have to be provided to current holders of  
16 unescorted access or can they be grandfathered in and  
17 only new employees be given such a statement?

18 Our response is that the clear and concise  
19 written statement must be made available to all  
20 holders of unescorted access.

21 The next question under 26.20 that we  
22 received: Does the clear -- related to the previous  
23 one: Does the clear and concise written statement  
24 have to be posted in a public place? Do copies have  
25 to be provided on demand? Is readily available  
26 sufficient if it meets the licensee's normal practice?

27 Our response is as follows: Licensees are  
28 in the best position to determine the specific means  
29 of making their policy statements available to their  
30 employees.

31 Currently, just to give some examples --  
32 Currently, some licensees are using brochures or  
33 posters for this purpose. Others provide such a  
34 statement as part of awareness training. Policies  
35 that are only contained in fitness-for-duty procedure  
36 manuals are not provided in a summarized format, would  
37 not be readily available to employees.

38 The next question: This section requires  
39 -- again under 26.20 -- verification that the  
40 individual will continue to be subject to random  
41 testing and behavioral observation at another  
42 licensee's site. What is the expectation for  
43 verification? Is it acceptable to use the industry's  
44 personnel access data system, PADS, which already does  
45 this for active at-a-site individuals?

46 Our response is as follows: The licensee  
47 must verify that the person continues to be tested.  
48 It is not the job of the NRC to evaluate whether PADS

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1 is adequate, but if you use it, will check if it  
2 accurately verifies.

3 Licensees must evaluate whether the PADS  
4 system provides adequate verification or whether  
5 another source of verification such as a call to the  
6 other licensee is required.

7 Lastly, the NRC would expect that the PADS  
8 would be verifiable and inspectable with regard to  
9 these FFD aspects.

10 If there are any additional questions  
11 relative to 26.20, we will receive those now.

12 MR. ALBERT: Garmon, could I ask a  
13 question here?

14 MODERATOR WEST: Please, go ahead.

15 MR. ALBERT: Just as a poll, is everybody  
16 -- Does everybody participate in the PADS program? Do  
17 we have 100 percent participation, all licensees?

18 PARTICIPANT: Yes. All nuclear power  
19 plants are involved with PADS.

20 MR. ALBERT: Okay. Thank you.

21 MODERATOR WEST: Yes, thank you, Ron.  
22 That was very helpful to us. We weren't 100 percent  
23 definitive on that question. We've discussed that  
24 quite a bit.

25 The next section concerns policy  
26 communications and awareness training, which is  
27 Section 26.21. You will note here that training  
28 completed on a -- is now completed on a -- required to  
29 be completed on a 24 instead of a 12-month frequency  
30 and, further, generic portions of training under the  
31 sections that are cited there are completed in the  
32 last 24 months can be accepted from another licensee's  
33 program.

34 We didn't receive any presubmitted  
35 questions on this section. If there are any other  
36 additional thoughts on this section, you could mention  
37 them now before I go on to Section 26.22.

38 26.22 deals with training of supervisors  
39 and escorts. As you note, training must be completed  
40 before assignment except for initial supervisory  
41 assignment which must be completed within three months  
42 of assignment for licensee employees and within ten  
43 days of assignment for contract employees.

44 Secondly, a written exam in lieu of  
45 training may be used in two of the three years, but  
46 not in the third year, I might add.

47 Then lastly, generic portions of training  
48 under the sections that are noted there would be

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1 completed in the last 12 months can be accepted from  
2 another licensee's program.

3 This is the first question that we  
4 received in this section, one of the questions we  
5 received in this section. The question is as follows:  
6 Does "employed by the licensee" limit this section to  
7 licensee employees only or does it also include  
8 contractors?

9 Our response to this question under 26.22  
10 is as follows: If you look at that section that is  
11 being referenced with regard to the question, you will  
12 note that the first part of the section covers  
13 licensee employees, and the second part covers  
14 contractor employees.

15 Further under 26.22 we received the  
16 question: Is classroom training every 36 months  
17 required or can the refresher training include methods  
18 such as computer based training, also referred to as  
19 CBT, specified reading material, and so on?

20 Our response is: The NRC has not in the  
21 past prescribed a specific method of training and did  
22 not add specifics regarding the method of training to  
23 the new rule.

24 Would there be any other questions you  
25 might have on 26.22?

26 MR. CASEY: Ron Casey with the Tennessee  
27 Valley Authority. Going back to the question before  
28 that, I just need clarification. Are we talking here  
29 about if you are a licensee employee, you can have  
30 refresher training every 36 months; if you are a  
31 contractor employee you have to have refresher  
32 training every 12 months? Is there a difference?

33 MODERATOR WEST: Okay. We will take that  
34 as a question that we will clarify. Thank you.

35 (Slide change)

36 MODERATOR WEST: The next section, 26.23,  
37 deals with contractors and vendors. As you see here  
38 in the bold type, the only change to this section is  
39 the addition of "a known history of substance abuse,"  
40 such that it now reads, "Personnel with a known  
41 history of substance abuse or having been denied  
42 access or removed from activities within the scope of  
43 this part at a nuclear power plant for violation of a  
44 fitness-for-duty policy will not be assigned to work  
45 within the scope of this part without the knowledge  
46 and consent of the licensee."

47 With respect to the questions that we  
48 received in this area, the first question is as  
49 follows: Does the NRC expect contractors to pre-

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1 screen workers to determine if they have a history of  
2 substance abuse prior to requesting unescorted access?

3 Our response is as follows: Contractors  
4 are expected to assure that they are not referring  
5 workers with a history of substance abuse into the  
6 protected area without the knowledge and consent of  
7 the licensee.

8 Would there be any further questions in  
9 this area under 26.23?

10 MR. CASEY: Garmon, I have a comment.

11 MODERATOR WEST: Certainly.

12 MR. CASEY: You will also be happy to know  
13 I'm leaving shortly. Jim Davis, Nuclear Energy  
14 Institute.

15 In considering your answers to the  
16 questions that have been asked in this last part  
17 concerning contract employees, I think you need to  
18 consider very carefully how you respond. If we  
19 develop a process that treats licensee employees and  
20 contract or vendor employees differently in any  
21 respect as far as access to the facility and the  
22 treatment under the fitness-for-duty rules, I think we  
23 are going to have some significant legal problems out  
24 there in the industry.

25 I don't know what your answer is on the  
26 training issue, but to pretend that there is a  
27 different training requirement for contract employees  
28 as opposed to the licensee employees gives me some  
29 great concern. If the licensee can do the refresher  
30 training at the three-year cycle, then the answer  
31 better say the contract employees follow the same  
32 criteria.

33 Your answer on that question is evasive.  
34 So I hope you at least clarify that in the final  
35 process and give a definitive answer that, yes,  
36 contract employees follow the same training program  
37 used by the licensee, and that they can test out at an  
38 annual basis and have refresher training on a three-  
39 year process.

40 The screening for history of drug abuse  
41 better be exactly the same for the contract employee  
42 as it is for the licensee's employees, and we better  
43 be applying exactly the same criteria on that  
44 individual. If we start pre-screening people before  
45 we recommend them for the access of the facility and  
46 we are screening people out on different criteria,  
47 somebody is going to have a significant problem in the  
48 legal arena. We can't do that.

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1 MODERATOR WEST: Thank you, sir, for your  
2 comments. We'll certainly factor them into our final  
3 answers. Thank you again.

4 MS. TECHAV: Sue Techav with Exelon. I  
5 just wanted to go back to also what Jim was talking  
6 about, Section 6.21 on the awareness training and  
7 Section 26.22 for training of supervisors and escorts.

8 The NRC took a substantial credit for a  
9 savings that was going to be recognized by reducing  
10 this, and I know that us and a lot of other utilities  
11 combine that and train everybody to the supervisory  
12 level. So no savings is going to be recognized. I  
13 just wanted to make that comment. I didn't know how  
14 many other utilities already are doing that  
15 established practice also.

16 MODERATOR WEST: Okay. Thank you for your  
17 comment. Appreciate it.

18 The next section is 26.24.

19 MR. BURRELL: Excuse me.

20 MODERATOR WEST: Yes, please.

21 MR. BURRELL: Mike Burrell, Constellation  
22 Energy. Just in support of Jim's comment, as well as  
23 I have another, but in support of Jim's comment, when  
24 8901 was written, you took a point in your exception  
25 in .566 to guaranty that we didn't treat contractors  
26 differently than you told the employees with regard to  
27 appeals.

28 Certainly, I think we see this as no  
29 difference with regard to training. It was clear in  
30 566 that the regulatory expectation was we treat  
31 licensee employees and contractors exactly the same  
32 for the purpose of appeals. So for the purpose of  
33 training, it seems only consistent we do the same  
34 thing.

35 MODERATOR WEST: Okay, thank you.

36 MR. BURRELL: That's part one. Part two:  
37 Under known history of substance abuse under 26.23,  
38 again this comment or this new language begs the  
39 definition or clarification of the definition under  
40 history of substance abuse, particularly part 6 where  
41 we talk about any legal or employment action taken for  
42 alcohol or drug use.

43 I think we need some specific  
44 clarification on what the expectation is there, since  
45 we see this language appear throughout this document  
46 with regard to "known history of substance abuse."

47 I think one of the comments -- one of the  
48 early comments, the example was a conviction for a  
49 DUI, but it says by example. So once again, we really

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1 beg for clarification here so that we all know what we  
2 are expected to do.

3 MODERATOR WEST: Okay, thank you. We'll  
4 certainly provide that clarification.

5 I think we are showing on the agenda a  
6 break at 10:30. I think it would probably be  
7 appropriate to take it before getting into the next  
8 section. So we'll take a 15-minute break.  
9

10 (Whereupon, the foregoing matter went off  
11 the record at 10:19 a.m. and went back on the record  
12 at 10:40 a.m.)

13 (Brief housekeeping remarks by Mr. West.)

14 MR. TRACY: I beseech you to please not  
15 worry about formality when you start talking about  
16 taping and microphones and formal settings with all  
17 these tables with 20 NRC employees and only two mikes  
18 for the other stakeholders, it's not the perfect  
19 layout necessarily for a workshop. We can perhaps fix  
20 that tomorrow. But the crucial aspect is that senior  
21 NRC members here right now is that we need to  
22 basically hear the concerns and the need for the  
23 clarities with this very prescriptive rule, and we all  
24 admit in this risk-informed world it is rigid. It is  
25 legalistic, and it's important, and it needs to be  
26 exact, because we're dealing with very personal issues  
27 for people.

28 so while I certainly respect Garmon's  
29 desire to get a very detailed and appropriate answer  
30 bought off by management and the attorneys, the bottom  
31 line is he knows the answers to a lot of the questions  
32 that were asked, and so do these regional folks and  
33 inspectors.

34 So what I'm asking you to do is continue  
35 to ask your questions, and we are going to start a  
36 dialogue, allow Garmon to give his best answer that he  
37 has, and a lot of region folks who are here as well to  
38 express themselves in terms of their views.

39 I would ask those of you in the audience  
40 to please just say, hey, that doesn't make sense, I  
41 don't understand what you are saying, and that will  
42 allow us as managers to make an informed decision  
43 ultimately when the NUREG comes out.

44 I would also ask that if a person asks a  
45 question that, if a person knows a good answer to it,  
46 one they would like to ultimately see the NRC write,  
47 you should, in fact, express that; because that's a  
48 smart thing, in fact, in making an informed decision.

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1 So we apologize for your first hour and a  
2 half, but we need to make the next two days  
3 worthwhile. Let's move forward and allow this to be  
4 a lot more interactive and a lot less rigid than it  
5 currently has been. Thanks.

6 (Applause)

7 MODERATOR WEST: So with Section 26.24 you  
8 can see here the various types of testing that are now  
9 defined.

10 MR. TRACY: Excuse me, Garmon. I think we  
11 have someone who wants to make a comment.

12 MODERATOR WEST: I'm sorry.

13 MR. BURRELL: That's okay. Thank you,  
14 Garmon. Thank you, Glenn, as well. I appreciate it.  
15 Mike Burrell, Constellation Energy.

16 Will you go back to 26.20(e)(1) for a  
17 moment.

18 MODERATOR WEST: I'm sorry, 26.21.

19 MR. BURRELL: 26.21 (e)(1) where we have  
20 added the language there "he or she considers himself  
21 or herself fit to perform the task assigned."  
22 Frequently, when people are called in, the task that  
23 they are going to be working on is not known, I would  
24 say especially in the radiation section in the  
25 maintenance area.

26 Is the expectation that during this call  
27 -- is it your expectation that during this call one  
28 know exactly what they are going to be doing?

29 MODERATOR WEST: I think the intent of  
30 that new language was along these lines. I don't  
31 think it necessarily speaks precisely to your question  
32 in terms of just trying to get from the individual  
33 some knowledge of whether they know what they are  
34 going to be doing, but the broader concern here, I  
35 think, has to do with the fact that there were other  
36 areas perhaps that might speak to an individual not  
37 being fit for duty that would fall outside of the  
38 context of alcohol and drugs.

39 I think the intent here was to expand the  
40 question to the individual with regard to fitness to  
41 take into account some of those areas. For example,  
42 whether the individual is fatigued, whether the  
43 individual is going through some emotional kind of  
44 crisis.

45 Those would be perhaps some examples where  
46 it wouldn't be the traditional kind of concern, and  
47 that perhaps the traditional kind of response  
48 necessarily that you would have received in just  
49 focusing on alcohol and drugs.

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1 MR. BURRELL: So we are not task specific  
2 here?

3 MODERATOR WEST: Well, as I understood  
4 your question -- let me just repeat it -- it seems to  
5 me that you were asking with regard to that language  
6 whether it was intending to try and have some sense of  
7 whether the individual knew precisely what they were  
8 going to be doing on the job, HP, EP and so forth.

9 My sense is that it wasn't necessarily to  
10 tie the question to the expectation of whether the  
11 individual knew what they were going to be doing once  
12 they got to work, but rather the interest was with  
13 respect to broadening what it really means to be fit  
14 for duty; whereas, traditionally it has been with  
15 respect to drugs and alcohol.

16 I think that language was put in, in order  
17 to broaden what that really means and to give the  
18 individual an opportunity to express that, hey, I'm  
19 not fit for duty, and it may not simply be drugs and  
20 alcohol, could in fact be some other areas.

21 MR. ALBERT: Mike, let me ask you to  
22 clarify the question. Are you saying that certain  
23 jobs require a different level of fitness?

24 MR. BURRELL: No, I don't believe certain  
25 jobs require a certain level of fitness. My real  
26 concern is, when we say perform the task assigned,  
27 there seems to be an expectation that on a call-in  
28 sheet there's a list of those things that somebody is  
29 going to be expected to do after they are called in.  
30 Those decisions haven't been made in many cases when  
31 the call is actually executed.

32 In other words, I could call in a  
33 maintenance person and say I need you to come in to do  
34 some work on the reactor vessel head. Now there may  
35 be a variety of work tasks associated with that  
36 evolution.

37 MODERATOR WEST: I see your point.

38 MR. BURRELL: And I don't need -- I don't  
39 think that we need to be so specific in saying I need  
40 you to come in to do this, this, this and this. But  
41 when it says "to perform the task assigned," that  
42 gives me some concern, certainly, from a QA  
43 perspective.

44 MR. MIZUNO: (COMMENT)

45 MR. BURRELL: Okay. So just to paraphrase  
46 that, what we are seeking to achieve here is an  
47 affirmative statement from the person called that they  
48 are fit to come to work. Is that correct?

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1 MODERATOR WEST: Yes. I think along the  
2 lines of the question you were asking, I think it's  
3 certainly reasonable, even though I acknowledge and  
4 once you talked about it in more detail I understand  
5 it a little bit better, the person may not necessarily  
6 know precisely what they are going to be doing once  
7 they get to duty or their employer may not be able to  
8 tell them precisely, but I would think, though, that  
9 historically the individual has some general sense of  
10 what they have done in the past relative to the type  
11 of job that they perform, health physics or whatever.

12 Even that could be connected with -- and  
13 I agree, the general interest here is to find out  
14 whether the person is fit for duty, but that general  
15 interest could be tied to what the person has in their  
16 historical experience done on the job and whether they  
17 are fit to do that. But I think the long and the  
18 short of it is again what you have said, that the  
19 interest is whether the person is fit for duty and not  
20 trying to tie it precisely to the details of what the  
21 person is going to do once they get to the job.

22 MR. BURRELL: Okay. Thank you.

23 MODERATOR WEST: Under chemical and  
24 alcohol testing, as you can see, there's certainly  
25 nothing new about pre-access testing for drugs, random  
26 drug and alcohol testing for cause, follow-up testing.

27 We have made a serious attempt to clarify  
28 much better what we mean by return to duty testing so  
29 that we will have sharp distinctions, hopefully, with  
30 regard to these various categories of testing.

31 (Slide change)

32 On the next slide, you note that pre-  
33 access testing for drugs and alcohol must be conducted  
34 within 60 days before granting unescorted access to  
35 the protected area or assignment to activities within  
36 the scope, unless -- and then you have the  
37 qualifications in bold -- the individual has been  
38 covered by a program meeting the requirements of this  
39 part for 30 of 60 days, and has no history of  
40 substance abuse, which you recall we have defined in  
41 the new rule.

42 Then lastly, any negative test meeting  
43 standards of this part performed within 60 days may  
44 serve as a pre-access test. Further under the same  
45 section, you note a negative test must be obtained  
46 before granting unescorted access unless the  
47 individual has no history of substance abuse, and  
48 that's the important part there, no history of  
49 substance abuse, and has either had a negative test

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1 result on a test meeting the standards of this part  
2 performed within six months before granting unescorted  
3 access or has been covered by a program meeting the  
4 standards of this part for two consecutive weeks  
5 during that period.

6 MS. TECHAV: Okay. Sue Techav from  
7 Exelon. There's a lot of questions surrounding this  
8 whole area. I guess one of the first, I'll start with  
9 the no history of substance abuse. We are going to  
10 have to go back to that definition, because within  
11 that definition it talks about within the last five  
12 years any legal employment, action taken against any  
13 -- what is it, employment or legal action taken  
14 against an individual for something within the last  
15 five years, and that's just one DUI.

16 If a person has had a history of substance  
17 abuse within the last five years ago, are we going to  
18 be able to grandfather these types of people in that  
19 already had unescorted access, that we've already  
20 adjudicated based on the old rules and regulations  
21 that we had, and then move forward; because somebody  
22 -- If we try to apply this moving forward, somebody  
23 that comes to us that had unescorted access within 30  
24 of the last 60 days that they don't need the test or  
25 six months and two weeks, and we have to look at their  
26 PHQ or whatever the person uses when they come in, a  
27 lot of them don't even ask for that information back  
28 five years, because we are just reinstating that  
29 individual.

30 So we need to have some type of a  
31 grandfathering of people that have had unescorted  
32 access and we move forward based on the definition of  
33 history of substance abuse.

34 MODERATOR WEST: Okay. Let me see if I  
35 can characterize your question properly. I think I  
36 would also add, too, that it even came up perhaps in  
37 another context, this whole issue of grandfathering.

38 I think in the response we gave to that  
39 question, it was that we weren't considering  
40 grandfathering on that one. I guess you are  
41 essentially asking the same thing. In applying this  
42 definition of history of substance abuse, are we going  
43 to allow you to grandfather individuals that you've  
44 dealt with in the past and whether we are going to  
45 draw a line and expect you to use the definition  
46 forward in time. Is that fairly close?

47 MS. TECHAV: Well, yes, because if an  
48 individual is coming that was with less than -- well,  
49 usually greater than 30 days, less than 365 days,

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1 that's what we consider a reinstatement or a transfer  
2 if they are coming from another utility.

3 They complete a questionnaire, but they  
4 don't go back five years to get their history of  
5 substance abuse. So that whole philosophy of how we  
6 do that would have to change to capture that to get it  
7 to go back unless we just grandfathered them based on  
8 our old rules. They were good before; why aren't they  
9 good now, and let's move forward for anybody new  
10 coming in.

11 MODERATOR WEST: Okay. I guess my quick  
12 answer is that (a) we haven't really thought through  
13 grandfathering. I think that's the general answer.  
14 So it certainly sounds as if it's something we need to  
15 give some attention to, not necessarily just specific  
16 to this question but maybe even some others where you  
17 are going to have this kind of overlap between what  
18 you are currently doing versus what you propose to do  
19 in the future with the new rule.

20 Beyond that, I guess, if I base it just  
21 simply on the previous answer that we've given to yet  
22 another question in a different area where we didn't  
23 consider grandfathering appropriate, I guess my quick  
24 answer would be that we are not entertaining  
25 grandfathering.

26 I guess, beyond that, I would probably ask  
27 for some help on this with respect to maybe the Office  
28 of the General Counsel in terms of -- As I see it,  
29 it's a broader issue of grandfathering.

30 MR. ALBERT: Okay. Before that, could I  
31 jump in a second? Let me see if I understand your  
32 question. The simplicity of your question is, is the  
33 rule going to be retroactive? Is that your question?

34 So in other words, if you have already  
35 adjudicated someone today while the current rule is in  
36 effect, what you are asking then is, when the new rule  
37 goes into effect, does it become retroactive? That's  
38 your question?

39 MS. TECHAV: Correct.

40 MR. ALBERT: Okay. Garmon, and Geary, you  
41 could jump in at anytime, I would say no in the short  
42 end, because you have already gone through your  
43 process where the person is, in fact, good today.  
44 That person should still be good when the new rule  
45 goes into effect.

46 I don't think it's designed to be  
47 retroactive, but I'll let OGC take a shot.

48 MR. SMITH: Let me -- Can I say something  
49 here, too? That's fine right now, but the guy goes to

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1 another site. You have a five-year window you're  
2 looking back on, on data you don't have. The DUI may  
3 have been adjudicated three years ago, and he's fine  
4 where he is now. But when he goes down the road, that  
5 data is not available. You are going to assume they  
6 would let him in, but in fact you are not going to be  
7 complying with this if he goes back, you know. Unless  
8 you put a five-year window on the grandfathering, it's  
9 not going to do a lot of good. Is that correct?

10 MS. DURBIN: Can I say something here that  
11 kind of takes it back a little bit?

12 Right now the rule requires that anyone  
13 who comes to your site that doesn't have access has a  
14 pre-access test within 60 days and waits until that  
15 result comes back before they can go on-site.

16 You don't have to worry about history of  
17 substance abuse to continue doing that. So the only  
18 time you have to worry about history of substance  
19 abuse is if you want to allow people to go to work  
20 either without a pre-access test because they have  
21 been covered by a program meeting requirements of this  
22 part for 30 of the last 60 days and they have no  
23 history of substance abuse.

24 So those people can go to work without any  
25 pre-access test, or they can go to work without  
26 waiting for the negative test result if you know they  
27 have no history of substance abuse, and they -- There  
28 are a couple of others. I'd have to go to the next  
29 slide -- and they have been covered by a program  
30 meeting the standards of this part for two consecutive  
31 weeks during that period, or had a test meeting the  
32 standards of this part within the last six months.

33 So basically, you only have to worry about  
34 the history of substance abuse if you want to take  
35 advantage of these relaxations. You don't have to  
36 worry about the history of substance abuse if you want  
37 to continue doing things as you are now.

38 I just think it's worth starting with that  
39 basic underlying understanding. If you want to  
40 continue to pre-access test everyone and wait until  
41 the negative test result comes back, you don't have to  
42 find out about somebody's history of substance abuse.

43 If you want to allow them to take  
44 advantage of the relaxations, then you have to have no  
45 history of substance abuse. If they have a history of  
46 substance abuse, they just do what they are doing now.

47 MS. TECHAV: And I think everybody in this  
48 room realizes that and understands that, but in order  
49 for us to take credit or even look at what's been put

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1 in here, added, and what the NRC is taking credit for  
2 in millions of dollars of savings to the industry  
3 based on this criteria, we have to look at the history  
4 of substance abuse in order to take care of it.

5 What I'm saying, basically, is that we  
6 don't even ask for it for a person that is coming in  
7 on a reinstatement back five years. It's only since  
8 their last unescorted access. So we don't have that  
9 information to make the determination.

10 We have streamlined our processes to the  
11 point where everybody is prescheduled before they even  
12 arrive to us based on the information that's in PADS  
13 at the time. For us to sit down, look at a personal  
14 history questionnaire, evaluate whether or not they  
15 have had it in the past, then reschedule everybody,  
16 we've just lost the time, and it's not going to be a  
17 benefit to us whatsoever.

18 I mean, that's basically the point. It's  
19 really not a benefit to the industry at all if we have  
20 to go back and look back five years on one DUI that  
21 the person may have had five years ago that we don't  
22 even look at somebody who has had a DUI within the  
23 last 12 months based on the expertise of our MRO who  
24 is an expert in substance abuse.

25 I mean, that's what we are taking our  
26 recommendations from, but now we've got a rule in here  
27 saying we have to go back five years based on the  
28 definition for just one DUI, and I think that's a big  
29 problem that this part of the industry has with this  
30 particular part of the definition of history of  
31 substance abuse and then how it's pertained to this  
32 part of the rule.

33 MR. EARNEST: Well, when someone transfers  
34 in -- Let me make sure. I'm like Ron now. I'm a  
35 little bit unclear as to what the concern is.

36 Number one, it's an advantage to the  
37 utility if someone comes in and, say, you don't want  
38 to give him -- you don't have to give him a drug  
39 screen, because they just had access at another  
40 facility. They were in good shape.

41 Now when you transfer that individual in  
42 there, you're going to have to look at the PADS  
43 information. And if the individual hasn't had a hit  
44 on PADS, and it would be in there if he had -- correct  
45 me if I'm wrong --

46 MS. TECHAV: No, not for history of  
47 substance abuse.

48 MR. EARNEST: Okay. Then you're going to  
49 have to look at your background screening information

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1 and get that information, unless you want to give him  
2 the test. So you're going to have to look to find  
3 out. You're correct on that.

4 MS. TECHAV: And for utilities that do  
5 testing on site, it's only a two-hour turnaround. So  
6 by the time you are doing all that, there's no benefit  
7 is the point we are trying to make, because of the  
8 definition of history of substance abuse.

9 It's been changed and added to the rule,  
10 and it's binding us now even more.

11 MR. MIZUNO: -- I think everyone here  
12 acknowledges that that point will have to be looked at  
13 clearly. We'll have to look at that.

14 MS. TECHAV: The second point under (a),  
15 it talks about pre-access testing for an individual  
16 that during the previous 60 days that had unescorted  
17 access for at least 30 days. I mean, currently, if  
18 somebody's drug test isn't valid within the 60 days  
19 and they leave our site and they come back after 30  
20 days, we will drug test them. But if they go back  
21 beyond the 60 days but they didn't have unescorted  
22 access for 30 days, we're going backward, because this  
23 is saying that a person had to have unescorted access  
24 for 30 days within the last 60 days to take advantage  
25 of that.

26 I mean, it's just getting shorter and  
27 shorter. These contractors are only badged for maybe  
28 five days. Even if you take it out 90 days, we're not  
29 going to be able to take advantage, because people  
30 aren't having unescorted access for 30 days anymore.  
31 So it's another part that we are just not going to be  
32 able to take advantage of, and actually we are going  
33 backwards.

34 MS. THIEL: That kind of leads into my  
35 comment. I'm Janet Thiel with South Carolina Electric  
36 and Gas.

37 This whole part of the 30 of the 60 and  
38 the six month and the two week, during that period, we  
39 want to know what that period is. But it's very  
40 confusing to us in the industry, and a lot of us have  
41 talked about this 30, 60, two week periods, that we  
42 don't even have a clue how to write a procedure, much  
43 less track this type of situation, and it's going to  
44 be very burdensome for us to try to figure it out when  
45 the guy is standing in front of us exactly what this  
46 guy needs.

47 So it's going to take us all the way back  
48 to drug testing everybody.

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1 MODERATOR WEST: Do you think the  
2 difficulty -- and I'm trying to better appreciate it  
3 myself. Do you think the difficulty is simply that  
4 the way the rule is written or is it some aspect of  
5 trying to better clarify what we intended in the way  
6 that it's written? Is it a clarification issue or is  
7 it an issue of, the way the rule is written, you're  
8 just not going to be able to get any substantial  
9 benefit from it?

10 MS. THIEL: Exactly. There will be no  
11 benefit.

12 MR. SMITH: That sounds like an NRC  
13 answer.

14 MS. THIEL: Well, it was good. It is so  
15 unclear, when we have talked in task force and  
16 meetings, everybody sees it differently. Everybody  
17 reads it differently. Everybody sees "that period"  
18 as a different period. We are all very, very, very  
19 confused, and for us to have to sit down and write  
20 procedures to this, we're having a hard time.

21 MODERATOR WEST: Any suggestions on -- I  
22 mean, the rule has been approved. So that's part of  
23 what we are wrestling with, but using that as the  
24 frame of reference, do you have any thoughts on what  
25 we could do in the context of, for lack of another way  
26 to put it, implementation through the NUREG type  
27 clarification, through the NUREG type implementation  
28 document that we are contemplating, or specific  
29 suggestions on how we could better give you something  
30 that you might be able to better match with your  
31 procedures in particular?

32 MS. THIEL: I think, as my utility, what  
33 we would like to see is any access within the past 30  
34 days and any pre-access or drug screen within the past  
35 60, to be able to accept them into the workforce.

36 MODERATOR WEST: Okay. Thank you for your  
37 comment.

38 MR. SMITH: That would require a rule  
39 change, I believe.

40 MODERATOR WEST: Yes, that's why I was  
41 trying to sort out whether it's just the way it's  
42 written versus something we could do to better clarify  
43 things.

44 MR. SMITH: I don't think you can  
45 interpret the rule back the way that it needs to be.

46 MR. EARNEST: We can give examples. For  
47 example, in a NUREG examples that might clarify  
48 wording in it, that might be of some help. But like

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1 Greg said, the rule is already out. Can't go back to  
2 30 days and 60.

3 MR. BURRELL: But, fortunately, it hasn't  
4 been published yet. So there is an opportunity for  
5 clarifications.

6 As far as a suggestion, I would suggest  
7 that we work together, get some industry  
8 professionals, if you will, working with regulatory  
9 professionals to try to clarify some of what the  
10 expectation is and produce some kind of a document  
11 that everybody understands and can apply. I believe  
12 that --

13 MODERATOR WEST: Well, we certainly --

14 MR. BURRELL: The industry representatives  
15 in this room all want to do what you expect to have  
16 done. It's just hard to get there from here.

17 MODERATOR WEST: We'll certainly take you  
18 up on that offer.

19 MR. BURRELL: I think there are three  
20 points to this that really beg for some explanation.  
21 First, as Ms. Techav indicated, there are very few  
22 conditions where there are periods of access now that  
23 span a 30-day period. We have outages that don't go  
24 30 days anymore, and you only have utility workers  
25 coming through your cycle for the period of time they  
26 absolutely need to be there.

27 In many cases, that is substantially less  
28 than 30 days -- a week, two weeks. So they never an  
29 opportunity to meet Part (a) of that definition. part  
30 (a) of that definition then combines itself by the  
31 word "and" with Part (b), "and has no history of  
32 substance abuse."

33 So you've got the combination of those two  
34 elements in that definition that create a problematic  
35 condition.

36 Third is the definition in and of itself  
37 where we still haven't defined what "history of  
38 substance abuse" means. Go back to that Part 6 of the  
39 definition. What does that mean? We have legal or  
40 employment action, underscore action. That can be  
41 almost anything.

42 When we add to that the limitation imposed  
43 in 73.56 in the statement of considerations that we  
44 can't do any of these things related to unescorted  
45 access prior to a person's employment, we compound the  
46 problem even further.

47 I would ask you to look back at the  
48 statement of considerations for 73.56 where it  
49 addresses the expectation of the regulator that we not

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1 involve ourselves in pre-screening activities. That's  
2 fundamentally what you are asking us to do here, not  
3 only asking us to do it, but you're driving the vendor  
4 population to do that as well, and according to the  
5 statement of considerations of 63.56, we're not  
6 supposed to do that.

7 I hope that's provided some clarification  
8 from our perspective.

9 MODERATOR WEST: I think it was very  
10 helpful, and I would just reiterate your offer to try  
11 to dialogue outside of this setting with the industry  
12 to try to have a better bridge between what we are  
13 requiring and the problems you have in implementing  
14 it. Thank you for your comment.

15 MR. DAVIS: Jim Davis, NEI. You are  
16 probably regretting now having opened the thing up.

17 MODERATOR WEST: No, not at all. I think  
18 it's certainly the right thing to do.

19 MR. DAVIS: Let me give you a point that  
20 may help you understand why this provision is of  
21 minimal use to the industry. I don't think that's  
22 been brought out yet.

23 When an individual, for the very first  
24 time, goes to a facility for employment, he gets a  
25 five-year investigation, a fingerprint check, and all  
26 these other things, and the reviewing official  
27 adjudicates that record and makes a decision that that  
28 individual can have access to the facility. They  
29 grant him access, and that access is documented.

30 The industry accepts that decision as  
31 being a good decision. If a year later this  
32 individual tries to access another facility, we do a  
33 check for the year that's in between, and we presume  
34 that the other utility did their job correctly and we  
35 do not ask for the record from that facility unless  
36 there is some adverse information that would require  
37 adjudication against the rest of his history.

38 A preponderance of the people we see in  
39 that case will have no history, no arrests, nothing in  
40 that one year time frame and, therefore, you don't  
41 have the history of drug abuse that may be preexisting  
42 and has been adjudicated in years two through four.

43 So all of the transfers that we are doing  
44 in the industry will force you to continue to do the  
45 drug screening, get the results, and then allow the  
46 individual access. So although this looks like a  
47 relaxation of the rule, in fact, it is not.

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1           It will require the same level of effort  
2 from the industry, and there will be no savings in  
3 this area.

4           MODERATOR WEST: And the reason it's not  
5 is because the rule is going to require that you are  
6 going to have to look back over a five-year period?

7           MR. DAVIS: Because we will have to be  
8 aware of this guy's drug history for a five-year  
9 period. If you get into the legal arena and start  
10 looking at transfer of potentially adverse information  
11 on individuals, it becomes very difficult in putting  
12 that into a global system and transferring that from  
13 facility to facility. It becomes very, very difficult  
14 to move that information around.

15           So just adding somewhere that we put all  
16 the adverse information in that you can then access is  
17 not going to work. We'll just test all the people.

18           I mean, the premise is, once the  
19 individual's record is adjudicated by a licensee, we  
20 should accept that adjudication and move on with  
21 history and not continually have to go back and review  
22 and consider past history.

23           We've got a number of people who have had  
24 a DUI who have been through the remediation. The  
25 facility has accepted that individual for access at  
26 that facility, and other facilities based on that  
27 decision will grant that individual access, and will  
28 not go back and look to see whether that DUI is there.

29           MODERATOR WEST: Thank you. Please.  
30 Would you use one of the mikes. Would someone get the  
31 mike over there to Geary. Thank you.

32           MR. MIZUNO: Can I respond? I think that,  
33 given the parameters of the workshop where we're  
34 saying that we're taking the rule as is, and unless I  
35 hear from the NRR managers that they are willing to  
36 pull back the rule because it is, in fact, legally  
37 true that the rule hasn't been published yet and so  
38 there is still the possibility for it to be changed,  
39 pulled back and changed, I will leave that and just  
40 assume that that's not going to happen.

41           I guess my only comment is that I  
42 understand your point. We are going to have to go  
43 back, clearly, and look and see whether the so called  
44 burden reductions are, in fact, illusory.

45           My only comment, though, is that what your  
46 are proposing does not sound as an unreasonable system  
47 or concept for dealing with pre-access testing. My  
48 only response is that, while it may on its face be  
49 reasonable, I do not recall the industry raising this

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1 in the context of the proposed rule or in the many  
2 interactions that we've had.

3 So while it sounds reasonable and I guess,  
4 if the NRR managers and, I guess, the EDO and the  
5 Commission still see it as being something that they  
6 want to do, I guess they could pull the rule back, it  
7 comes somewhat late at this point in time to say,  
8 look, we think that there is another better way of  
9 dealing with the system .

10 I'm not saying that it doesn't sound  
11 reasonable. In fact, I understand the approach that  
12 says -- it's like hearing. Some licensee has done the  
13 initial five year screening and all those things, and  
14 now let's build upon that sounds like a reasonable  
15 approach.

16 My only point is that it comes very late  
17 now in the process to talk about that, because that  
18 clearly is not the conceptual approach that is  
19 embodied in the current final rule.

20 MR. CASEY: Ron Casey from Tennessee  
21 Valley Authority. Hopefully, I'm not beating a dead  
22 horse here, but I wanted to kind of take this into  
23 another angle. That is, if we -- and just make sure  
24 I'm understanding this. If we cleared an individual  
25 at one of our plants who had a DUI or substance abuse,  
26 we tested them and, let's say, 62 days later -- which  
27 I know that's not common anymore, but we do have some  
28 contract workers that had the DUI that we did clear  
29 that terminated our Sequoyah plant on a Friday  
30 afternoon, because the job was done and we pulled  
31 their unescorted access.

32 Monday morning they showed back to Brown's  
33 Ferry on another job assignment with the same  
34 contractor or another. I would have to go in and say,  
35 well, they held access 30 in the last 60, but he has  
36 a history of substance abuse. So, therefore, I've got  
37 to retest that person again before I can grant them  
38 access, and maybe even have another medical  
39 determination of fitness when we have just dealt with  
40 that, you know, over 60 days ago.

41 MODERATOR WEST: Let me see if I can  
42 repeat your question. You have an individual at,  
43 let's say, Licensee A where you've, through your  
44 background check and suitable inquiry, you've  
45 identified that the individual has a DUI which would  
46 fall into the category of history of substance abuse,  
47 and you've taken the appropriate actions that the rule  
48 would call for.

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1 Now the individual is moving on to yet  
2 another licensee?

3 MR. CASEY: Yes, a plant within our own  
4 system, but they check out on a Friday from that job,  
5 and the following Monday they may show up as  
6 pipefitter on another job and are checking back in,  
7 getting hired back in, getting re-requested for  
8 unescorted access at our other facility.

9 The way I'm reading that, now do I have to  
10 retest that person again and put them back through a  
11 medical determination of fitness?

12 MODERATOR WEST: If I understand it  
13 correctly -- and my colleagues can help me with this  
14 -- the individual under Licensee A was covered by the  
15 program, and now is going to Licensee B and is still  
16 covered by the program. I guess your question is can  
17 Licensee B take credit for what's been done by  
18 Licensee A?

19 MR. CASEY: Actually, we're still talking  
20 about Licensee A, just at plant -- like we have  
21 Sequoyah and Brown's Ferry plants under TVA.

22 MODERATOR WEST: Okay. Still the same  
23 utility.

24 MR. CASEY: Still the same utility. We go  
25 through all of this, the medical determination, the  
26 good drug test. We grant access. Friday afternoon,  
27 again my scenario is, the job ends. We terminate  
28 unescorted access and terminate that person at  
29 Sequoyah.

30 The following Monday he shows back up or  
31 she to our Brown's Ferry plant, hires back in for  
32 another job assignments, gets re-requested for  
33 unescorted access. Now we've got to look at it and  
34 say, well, they had 30 and 60 days, but they have a  
35 history of substance abuse.

36 Now am I understanding this correctly? In  
37 that scenario, I cannot -- I have to retest that  
38 person. I have to wait for the drug test to come back  
39 again, and I have to send them to a licensed physician  
40 to determine their medical fitness.

41 MR. MIZUNO: The short answer is yes.

42 MR. CASEY: That's what I was afraid of.

43 MODERATOR WEST: That is the correct  
44 answer.

45 MS. DURBIN: Can I ask a question, just to  
46 clarify for these issues? What proportion of your  
47 workforce do you think has some kind of history of  
48 substance abuse, if it was defined as, say, a  
49 conviction for drunk driving would be a legal action

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1 and being fired for being drunk on the job would be an  
2 employment, just as an example?

3 MR. CASEY: Well, I'm glad you asked that  
4 question.

5 MS. DURBIN: What proportion of your labor  
6 force would --

7 MR. HARRIS: Excuse me just a moment. I'm  
8 Neil Harris from TXU Electric. You just brought up  
9 one of the points that a lot of us have been  
10 discussing, the legal action. You said conviction.

11 If I'm not convicted of it, however it is  
12 on a record somewhere, where do we stand, or it's been  
13 adjudicated? That legal action, that's what we're  
14 trying to find out. Is a legal action actually a  
15 conviction or is it just an action taken?

16 If I go to a judge and the judge says,  
17 Neil Harris, what we are going to do is we're going to  
18 put you out there and we're going to make you do  
19 public service; we're going to remove this from your  
20 record in 20 days.

21 I now still have to go and tell my  
22 management about it. However, that's going to be  
23 adjudicated from my record. It will be expunged after  
24 a period of time. It will never show up. However,  
25 that's -- Where do we stand? There's too many  
26 questions right there without actually having legally  
27 -- you know, the word legal used or defined within the  
28 rule.

29 MODERATOR WEST: And your reference point  
30 is -- and correct me if I'm wrong -- is with respect  
31 to the latter portion of the definition that we have  
32 provided in the new rule on the history of substance  
33 abuse, and I'll just mention that for the benefit of  
34 all of us.

35 The last part of that, Part 6 states, "or  
36 had any legal or employment action taken for alcohol  
37 or drug use." As I understand, your question is  
38 whether or not this reference to legal action, in  
39 particular, in terms of a DUI, whether that means  
40 simply stopped and given a DUI versus you actually  
41 went to court and you were convicted.

42 MR. EARNEST: I think the key to this one  
43 here is how do you define legal action.

44 MR. MIZUNO: And I guess our -- at least  
45 my understanding was that being stopped, in and of  
46 itself, does not constitute a legal action, and given  
47 the ticket. I mean your conviction is the legal  
48 action that's involved there. But by the same token  
49 --

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1 MODERATOR WEST: I might interject on  
2 this. Excuse me for interrupting, Geary. I think  
3 it's fairly clear what your question is. I wouldn't  
4 necessarily -- We can discuss it as much as we like,  
5 but I wouldn't necessarily see that we can give you a  
6 clear answer to it in this setting, but I think it's  
7 clear that there is need for an answer on this one,  
8 and we'll attempt to address that.

9 MR. MIZUNO: You know what might help us.  
10 I understand this thing about being ticketed and  
11 stuff, but what are the other situations that are of  
12 interest or raise a question as to whether it  
13 constitutes a legal action, I guess.

14 If you are going to -- Garmon, are you  
15 going to allow them to submit some further amplifying  
16 comments in writing in the near future or something?

17 MODERATOR WEST: Yes. I might suggest  
18 that the way to do that -- and correct me if I'm wrong  
19 through some feedback -- but you certainly have  
20 available to you several means. You have the fitness-  
21 for-duty web page. You have my own personal e-mail  
22 address, gxw@nrc.gov, and you also have the fitness-  
23 for-duty mailbox, which is simply  
24 fitnessforduty@nrc.gov, and you also have available my  
25 phone number, which is 301-415-1044.

26 So I think the answer clearly to Geary's  
27 question is that we would envision anything that's  
28 downstream of this workshop that we would want to hear  
29 about it. So you have some possible ways of  
30 communicating that.

31 MR. MIZUNO: Garmon, let me just go back  
32 to that legal thing again, because I didn't finish.  
33 I don't think the intent was to be anymore Draconian  
34 than what the law would otherwise require with respect  
35 to the civil --

36 MR. EARNEST: Access authorization rule,  
37 for example.

38 MR. MIZUNO: Yes. I mean, someone raised  
39 this thing about a record being expunged. Okay? I do  
40 not think that we would -- If it's expunged legally  
41 from the record, I don't think that it would be  
42 something that we would, you know, expect the licensee  
43 to make a FFD determination based upon that.

44 MR. EARNEST: One of the things that --  
45 You know, going back in the history -- and I mean,  
46 this changes this rule. I looked at Loren back there,  
47 and he almost made a career out of it. It's gone back  
48 several years.

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1           In my memory, I keep thinking about how  
2 did this get in the rule, and one of those was we were  
3 trying to reduce some of the burden on you that the  
4 good guys who were the "nuke nomads" out there moving  
5 from plant to plant, that we would be able to quickly  
6 get them in and not have to test them every time. But  
7 at the same time, some of this was put in there, if my  
8 memory serves me right, that (1) if they had just been  
9 tested, then a short period of time and there is no  
10 history of substance abuse, you could go ahead and get  
11 them in, and you still can.

12           However, if there is a history of  
13 substance abuse, then that's a person that you would  
14 want to test, because you don't want somebody in there  
15 that is going to be a problem to you once he gets  
16 there.

17           So, you know, the definition of legal --  
18 to me, I have to agree with Geary that, you know, you  
19 are going -- you know, when you apply that to, for  
20 example, the access authorization rule, someone may be  
21 arrested but not convicted. Well, you don't hold that  
22 against them as far as the access authorization rule.  
23 You adjudicate it. You move in.

24           So I think that Geary is pretty much right  
25 on as far as the legal aspects of it.

26           MR. CASEY: But I think -- To try to get  
27 to your question just in a second, though. I think  
28 what we are saying is that, yes, we understand a  
29 person that has a DUI, but we've already adjudicated  
30 and put them through that process and, if they've  
31 broken a period of time and come back, you're having  
32 us to go back and do that again under what basis,  
33 because four years ago they had a DUI. But since that  
34 time we've put them in. They have been under our C-  
35 BOB. There has been no additional history, you know,  
36 that we don't have that period of time, which we  
37 typically do. It's 30 days for right now, as far as  
38 not testing.

39           You asked me the question about the  
40 percentage. We've just started to try to look at that  
41 because, quite frankly, we had never tracked that  
42 before. So, you know, I can give you a 20 percent,  
43 which I'm probably not going to be too far off. It  
44 could be higher in some cases. In some, it could be  
45 lower.

46           You've also got to remember, along with  
47 the legal history you've greatly expanded the suitable  
48 inquiry written questionnaire from the individual when  
49 you say have you ever possessed, used all those

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1 others. Yeah, I smoked marijuana four and a half  
2 years ago. Well, now we have another issue here on  
3 this same individual that I just described that now I  
4 can't take credit for any waiving pre-access testing  
5 from either a Monday to a Friday or from another  
6 utility coming in here until I go back and find out  
7 what all of that is, you know.

8 Then if it was just -- Then you say, well,  
9 we just test them. Okay, well, I mean, that's what  
10 we're going to do. We're going to test everybody now,  
11 because there's no way I can go and have 200 people  
12 checking in with clerks sitting out there in the  
13 badging office doing the best they can, when I'm  
14 worrying in the corporate office them making the  
15 decisions out there whether this guy gets to go tested  
16 or not.

17 We're just going to have to test them.  
18 But I know that's the way it's got to be. It's the  
19 way it's got to be. I don't know any way around it,  
20 you know, to get around what we are doing right now.

21 Again, you have expanded this. Then I  
22 still have the question. Even the guy that said he  
23 smoked marijuana four and a half years ago that got  
24 cleared somewhere else, is that still a legal history  
25 in the sense that, if he comes to me again, then am I  
26 going to have to send him back through my MRO or  
27 medical review officer?

28 MR. MIZUNO: The answer is yes.

29 MR. CASEY: Each time?

30 MR. MIZUNO: Each time. The reason why --  
31 I mean, it's no different than what you are subjected  
32 to now. The concept here is this. Okay? Once you've  
33 had an incident of drug abuse -- okay? -- the NRC made  
34 the determination that successfully performing, i.e.,  
35 not being tested positive during a time of employment,  
36 is still not a basis for removing the requirement for  
37 pre-access screening when that guy goes on to another  
38 site or to another licensee. I mean, that is the  
39 basic concept.

40 Now I understand that you guys have some  
41 problems with that, but that was something really to  
42 have been raised at the proposed rule stage, and we  
43 are beyond that point now. So --

44 MR. CASEY: So I guess what you're saying  
45 is we do have this obligation that we have to go out  
46 and obtain all of this history each time before we  
47 grant --

48 MR. MIZUNO: No. You can either -- The  
49 regime is test everyone for pre-access screening

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1 unless they fall into these categories, and we assume  
2 that, you know, this -- You have to be careful that  
3 we're talking about pre-access screening as opposed to  
4 -- What's the other kind of screening?

5 MODERATOR WEST: For cause or return to  
6 duty.

7 MR. MIZUNO: Yes, return to duty. I mean,  
8 we make the assumption that we are not talking about  
9 return to duty. Okay? So if you're not in a return  
10 to duty status, then you are in pre-access  
11 authorization testing, and the concept here is that  
12 one hit, for five years you are now in a suspect  
13 category, and normally that person needs to be tested  
14 every time they move on to a new licensee or to a new  
15 site.

16 MR. CASEY: One other comment, too, and  
17 then I'll yield to the gentleman behind me. It's  
18 another problem I've experienced. When you go over  
19 the access rules and access management, we talk about  
20 reinstates, updates, transfers.

21 When you go over to this rule, it's just  
22 not meshing in and trying to determine exactly what  
23 category you're talking about, because I have to make  
24 those decisions and communicate that on down to our  
25 sites and then within our office.

26 So when you are talking return to duty  
27 testing, is that a reinstatement less than 365 days or  
28 is that somebody that's been out more than a year  
29 where we then go back to the beginning of the rule and  
30 have to collect all of this initial data again?

31 I'll just say this personally. It's  
32 confusing to me when I'm trying to read this rule,  
33 mesh that with 73.56, which they go hand in hand, and  
34 determine what do I require for this individual.  
35 Thank you.

36 MODERATOR WEST: Thank you. And I'll make  
37 some comments on return to duty either separate from  
38 the slides, but certainly when we get to a future  
39 slide. Loren?

40 MR. BUSH: I want to make a couple points.  
41 I'm Loren Bush. First of all, those of you that are  
42 crying about having to go back and obtain a five-year  
43 history, if you haven't been doing a five-year  
44 history, you've been violating the current rule,  
45 because the current rule requires you to obtain a  
46 history on a best effort basis for the past five years  
47 but no less than three.

48 If you go in saying all I'm going to do is  
49 three -- right, on the initial granting, not every

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1 time out. Okay? But what I'm hearing is that, geez,  
2 we did it for three years; now we have to go back for  
3 five. No? Okay.

4 The other point is, when we wrote the  
5 legal and employment history, we intended that legal  
6 included arrest and conviction as two separate legal  
7 actions. Part of that is that in some cases it takes  
8 some considerable time between arrest and conviction.

9 So you're going to have an individual  
10 showing up who was arrested a couple of weeks before,  
11 and if you interpret it as only reporting conviction,  
12 then you have the possibility of placing somebody on-  
13 site without having a clear understanding of what the  
14 situation is and being afforded an opportunity to do  
15 whatever you want to do about it.

16 As far as employment actions are  
17 concerned, that was intended to cover the spectrum of  
18 actions from suspension to termination. Okay?

19 MODERATOR WEST: Thank you, Loren.  
20 Appreciate your comments. Unless there's some --  
21 please.

22 MR. BURRELL: I'm glad that Loren  
23 clarified that for us. As a former member of the law  
24 enforcement of the community, I can assure you the  
25 legal action does begin with an arrest. As part of a  
26 prosecutor's office for a period of time, I can  
27 further substantiate that. It does begin with an  
28 arrest. So we're on the same page there, Loren.

29 That gives us some other issues, however.  
30 You have only given us the opportunity to determine  
31 this information by virtue of submitting fingerprints  
32 to the FBI. It takes an awful long time to get that  
33 return back. So we've asked for some relief in the  
34 context of being able to acquire this information much  
35 sooner, given that legal action does begin with an  
36 arrest.

37 Many of you who have worked for the FBI  
38 realize that, not only do they make mistakes, but they  
39 are a little bit slow, and the information is  
40 obtainable through other resources that we should have  
41 access to.

42 This definition of history of substance  
43 abuse also lends itself to the abuse of legal drugs.  
44 So we are driven to go look at another definition as  
45 well. That then drives us to a medical determination  
46 of fitness.

47 So again -- and I just offer to you for  
48 your consideration the use of some industry expertise  
49 in helping refine this to some degree, so that we can

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1 all come to a common conclusion and meet with what the  
2 real objective is, keeping the plant safe.

3 MODERATOR WEST: Thank you.

4 MR. DiPIETRO: Nick DiPietro, First  
5 Energy. Just trying to put it into perspective from  
6 an access manager's view. Basically, a lot of these  
7 things come into play when we are going into an outage  
8 situation.

9 Now I've done a lot of research on this  
10 myself. Typically, in an outage situation plants will  
11 bring in approximately 1,000 workers. Thirty or 35  
12 percent of those workers are what we consider  
13 transferable, which means that they have been working  
14 at a nuclear facility within the last 30 days and been  
15 covered under all elements of a program.

16 Thirty to 35 percent of the people are  
17 reinstatable, which means they have been in the  
18 environment within 365 days, and 30-35 percent or it  
19 could be up to 45 percent, depending on what jobs they  
20 are going on that area, you may get new employees  
21 coming into the nuclear industry. Okay?

22 Now -- and this has been a practice that  
23 we've been doing in the past. If somebody is  
24 transferable, they leave one of my sites, Davis,  
25 Bessie or Perry, and they come to Beaver Valley, if  
26 it's less than 30 days and they have been subject to  
27 testing, we're not doing a pre-access test, whether  
28 they had history or not, and they are coming in and  
29 going to work. Okay?

30 If they are reinstatable, which means 30  
31 to 365 days, they are given a questionnaire to update  
32 us from when they last held unescorted access, and we  
33 look at when they actually had the last drug test. If  
34 it was less than 60 days, they can go ahead and go to  
35 work.

36 If it's been over 60 days since the last  
37 drug test, we'll give them a drug test, update the  
38 background, let them go to work. Then naturally, the  
39 new people coming in, you're going to do all the  
40 elements of the temporary and follow up with the  
41 elements of full.

42 Now if we go back to what Geary said, that  
43 an individual has a history of substance abuse, that  
44 we need to go ahead and test them again and have a  
45 medical determination made again, you're going to  
46 completely -- You'll probably get us all fired in this  
47 room, because we've been doing these things in the  
48 past, and now it seems like we're going to take a step  
49 backwards. Okay?

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1           If I have a person that comes to Perry and  
2 they adjudicate -- you know, they'll ask the  
3 suitable inquiry questions; they will ask all the pre-  
4 employment type questions. Perry makes the medical  
5 and management determination, that individual meets  
6 the minimum requirements for unescorted access. They  
7 grant the individual unescorted access.

8           They leave Perry, and six months later  
9 they come to Beaver Valley, I'm not going to go back  
10 and rehash a DUI, you know, an underage drinking that  
11 they had four years ago and go through that whole  
12 process again. It does not make sense.

13           If there is a change in status from when  
14 the individual leaves Perry and comes to Beaver  
15 Valley, yes, absolutely, we will look at that, and we  
16 will make another determination on whether this person  
17 has an added problem. But if there is no change in  
18 status from when they last held unescorted access at  
19 an approved program, it doesn't make sense for us to  
20 go back and revisit all of that.

21           That's what I think everybody has been  
22 doing in the room. Now we're going to take a huge  
23 giant step backwards when there is more -- and I don't  
24 want to say pressure, but there's more obligation,  
25 more responsibility for us to make these processes,  
26 especially in an outage, as efficient as possible.  
27 I'd like that to be taken under consideration.

28           MODERATOR WEST: I think what you are --  
29 If I've heard you correctly, basically, what you are  
30 doing in practice is looking at the delta, if  
31 something is changed from one plant to the next.

32           MR. DiPIETRO: The individuals, at least  
33 at our plant, still fill out a suitable inquiry, and  
34 we know that they may have had a DUI four years ago,  
35 but if they are transferring from another licensee,  
36 we're saying that that's been taken into  
37 consideration, and we're taking their professional  
38 opinion that they meet the minimum requirements.

39           MODERATOR WEST: You're basically taking  
40 credit for what's been done previously.

41           MR. DiPIETRO: Absolutely. In regard to  
42 what Nancy's question is, I could say from research  
43 you are talking about 50 percent or more of the people  
44 are coming in and having an FFD type event. Okay?  
45 Past drug or alcohol abuse or use, a DUI, underage  
46 drinking -- you know, now, especially with the craft  
47 population, you're looking at about 50 percent of the  
48 individuals that are coming in fall into that  
49 category.

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1 MODERATOR WEST: Thank you. Those  
2 percentages are very helpful.

3 MR. ALBERT: Garmon, could I make a  
4 comment?

5 MODERATOR WEST: Please, Ron.

6 MR. ALBERT: Okay. I want to get to the  
7 heart of this. I want to break it down so I'll  
8 understand it.

9 Okay. Let's talk about the two  
10 populations. Let's talk about happens the day the  
11 rule goes into effect. What you're saying is  
12 everybody who has unescorted access and is good to go  
13 is transferable or whatever their status is at that  
14 point -- they should be good to go in the future, and  
15 you shouldn't have to look back. That would work for  
16 you.

17 Okay. On the other hand, from that day  
18 forward, once the rule goes into effect, with the  
19 understanding now that you are going to do all of  
20 those things that the new rule now requires for  
21 persons getting initial access -- you're going to do  
22 all of those things. Initial -- we're talking about  
23 initial. We're not talking about people who have  
24 already been granted unescorted access.

25 It's two different populations. People  
26 who are already good to go; they are working in the  
27 industry right now. They have unescorted access.  
28 They are transferable. They qualify for all of those  
29 things that you have been doing. That's one  
30 population.

31 The day the rule goes into effect, now  
32 people who have not had access before, now they are  
33 going to have to do all of those things. But your  
34 main concern is how do you process those people who  
35 have already been granted unescorted access from point  
36 A to point B without having to go back.

37 MS. TECHAV: Well, eventually, they are  
38 going to turn into the same thing, though.

39 MR. ALBERT: No, not if they are going  
40 from plant A to plant B at some point. It's not going  
41 to be initially, and they are going to still have  
42 access. You're just transferring them. Correct?

43 MR. TECHAV: But if we apply this rule --

44 MR. ALBERT: But what I'm saying, I'm  
45 asking. My question is should you have to apply it to  
46 people who are already in that category when the rule  
47 goes into effect?

48 MODERATOR WEST: It gets back to the  
49 grandfathering issue.

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1 MR. ALBERT: Right. And that's what you  
2 don't want to do. I guess your question is then, how  
3 do we come up with some mechanisms for making that  
4 happen that's acceptable to us, acceptable to you, so  
5 that you don't have to go back and do all of those  
6 things, and still be able to use those people as you  
7 have used them in the past.

8 MS. TECHAV: That's part of it.

9 MS. THIEL: And use those people in the  
10 future on the new initial access.

11 MR. ALBERT: That's what I mean. After  
12 you have used them in the past and the future.

13 MS. THIEL: And keep them rolling without  
14 having to go back.

15 MR. ALBERT: Okay. That's what I'm trying  
16 to understand. That's where you want to get -- and if  
17 you are able to do that, then that would be the burden  
18 reduction then, if you are able to do that, to use  
19 these people without having to go back to meet the  
20 newest requirements of the rule.

21 MS. THIEL: There would be no burden  
22 reduction, because that's what we're doing now. The  
23 thing that is going to hurt us and the burden to us is  
24 the medical determination. None of us do that now.  
25 None of us send our people through an MRO for an  
26 interview and examination. Now we're going to have to  
27 do that. The MRO is going to have to come up with a  
28 set price of what that is going to cost.

29 MR. ALBERT: Okay. So I misspoke. So it  
30 wouldn't be a burden reduction. It would be business  
31 as usual. It wouldn't be anymore additional burden.  
32 Okay, I got that. I understand that.

33 So but that's what you're looking at, and  
34 that's where you want the guidance from us on how you  
35 can do that and make the program work without having  
36 to go back. If we come up with some things that can  
37 accommodate that, then that's something that we can  
38 look at, I would think.

39 MR. MIZUNO: I guess -- I don't think that  
40 it can be accommodated under the language of the rule  
41 as now written, the rule that the Commission has sent  
42 over to OMB for resolution.

43 So I think it's up to the staff to  
44 determine whether they are willing to pull that rule  
45 back. I mean, I tried looking to see whether we could  
46 reinterpret return to duty testing in a way that would  
47 allow that, and I do not think the language would  
48 allow you --

49 MR. ALBERT: And we couldn't get there?

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1 MR. MIZUNO: No, because it talks about  
2 under that site licensee's program, and that's not  
3 going to cover the situation where they are moving  
4 from one licensee to another or even conceivably a  
5 same licensee but one site to another site.

6 So I did look at the language to see  
7 whether we could accommodate you under the rule. I  
8 don't think it can, and I think it's up to the  
9 management and the Commission ultimately to decide  
10 whether they want to pull the rule back or not.

11 MODERATOR WEST: I think the -- just to  
12 interject a point here. I think the challenge we are  
13 going to have, not only with this section but with all  
14 the sections over the next two days, as I see it, is  
15 twofold.

16 We are going to have some issues, and we  
17 will entertain all of your comments and concerns and  
18 so on, but inevitably we are going to end up where we  
19 are going to have a certain set of issues that are  
20 going to be in the category that we can't -- we have  
21 the rule, and it's written.

22 We are going to have another set, and it  
23 seems to me this is the more appropriate aspect of  
24 what we can accomplish in this setting over the next  
25 couple of days and downstream of this, of things that  
26 we can have some impact on: Clarifications that are  
27 interpreting the rule for you in some various means,  
28 whether it's the website or a NUREG type document.

29 I don't see in the context of the way the  
30 rule is written in certain areas that in some  
31 instances we are going to be able to address your  
32 issues and concerns.

33 MR. MORIARTY: Garmon, I think that's the  
34 challenge. John Moriarty from Maine Yankee. Not to  
35 be presumptuous to suggest guidance in the NUREG, but  
36 if you could show us ways in the NUREG how we will  
37 determine no history of substance abuse in cases where  
38 we're talking about reinstatements and transfers, that  
39 kind --

40 Currently, under the access rule we  
41 require people to report to us in a statement of  
42 activities if they have been arrested or -- That's  
43 what sets forward that assessment. If in the  
44 reinstatement process we could do something similar,  
45 ask for a statement of activities or include it in the  
46 suitable inquiry -- "have you in the last 365 days, by  
47 reason of the definition of a history of substance  
48 abuse, developed one?"

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1 I think, if we had a mechanism to ask the  
2 question quickly in the process that is acceptable to  
3 you and gets the information to us, we could move on  
4 off of this point without --

5 MODERATOR WEST: I think, if I heard you  
6 correctly, some aspects of what you are proposing gets  
7 down to maybe some way of operationalizing what the  
8 definitions means and some aspects of even what's  
9 folded into definitions, particularly this one on  
10 history of substance abuse.

11 MR. MORIARTY: An acceptable way of making  
12 the determination that the history of substance abuse  
13 has not developed during this period of time that we  
14 are talking about here, without having to go back to  
15 square one.

16 It's right in step with the access rule,  
17 because we do rely on people who have been granted  
18 access within the last 365 days to be reinstated, and  
19 these are folks that we rely on to bring the arrest to  
20 us, in the first place, some of us.

21 MODERATOR WEST: We certainly are  
22 receptive to that suggestion, and I thank you for  
23 that. We are also receptive to specific aspects of  
24 trying to better define what we mean by some of these  
25 definitions.

26 MR. MORIARTY: From a process standpoint,  
27 I think it would enable us to get what you want very  
28 quickly and for our process not to bog down. Thank  
29 you.

30 MODERATOR WEST: Thank you very much.

31 MR. MIZUNO: I mean, I don't want to give  
32 you a false sense of hope. I mean, looking at the  
33 language again of the definition of history of  
34 substance abuse, it would take a magician to change  
35 five years into 365 days.

36 MODERATOR WEST: But again, I think the  
37 point and the challenge is one of, if there are  
38 aspects of clarification that we can provide that's  
39 going to better serve the regulatory side of this and  
40 at the same time there's some benefit with respect to  
41 the implementation, and if we can accomplish that, we  
42 can attempt to do it. But inevitably, we will also  
43 have a certain set of issues and concerns that will  
44 undoubtedly fall into the category that the rule as  
45 written, which you well know, is fairly prescriptive,  
46 that we may not be able to address. But we will do  
47 what we can when we can. Please?

48 MR. CLEVELAND: Randy Cleveland with the  
49 Nuclear Management Company, NMC. One of the things I

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1 would invite the NRC to take a look at is maybe  
2 putting out a regulatory guide which would clarify  
3 that on the date that the rule is published and goes  
4 into effect that all individuals that hold current  
5 access would effectively be grandfathered, and that we  
6 would apply the new requirements of the rule to  
7 individuals requesting access subsequent to that.

8 That would enable us to continue the  
9 existing practices with respect to transfers,  
10 reinstatements where we would apply the new rule  
11 provisions to the period subsequent to the last access  
12 forward. Where an individual hasn't had access in the  
13 last five years, then we are going to go back and do  
14 that full five-year.

15 That would be a more workable situation.  
16 I would also like to share with the NRC some operating  
17 experience that exists out there in the industry right  
18 now with respect to substance abuse as we define in  
19 legal or employment action.

20 Some of the licensees already have worked  
21 through their medical review officer's acceptable  
22 criteria for when we would refer an individual for a  
23 medical evaluation, and some of us might have a  
24 matrix: Well, if an individual has had two DWIs  
25 within five years, we are now going to go and formally  
26 seek that medical assurance of fitness.

27 One of the things you could consider doing  
28 is leaving to each licensee, in concert with their  
29 medical review officer and/or EAP, a determination of  
30 those situations, be it legal -- for example, I don't  
31 think it's going to serve any of us to take somebody  
32 that had an open bottle four years and nine months ago  
33 and put them formally through this process. We're not  
34 going to gain anything as an industry. But if we had  
35 criteria that our MRO had agreed to with the FFD  
36 managers at a site where we would prompt this review,  
37 then it's going to make a little bit more sense.

38 We could effectively, I think, take what  
39 you've got there roughly in the rule and apply it, if  
40 left the flexibility to establish those types of  
41 criteria.

42 MODERATOR WEST: Okay. Thank you for your  
43 comment and your suggestions.

44 MR. DAVIS: Garmon, one closing comment.  
45 Jim Davis, NEI. It seems to me the biggest danger  
46 here is that you may be generating a requirement to  
47 divide the workforce into two categories of people,  
48 one of which would be those with a drug history.

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1 I will tell you that we are going to have  
2 major difficulty in that arena if that's what the  
3 intent of this rule is, in that we track a certain  
4 portion of the population as it moves around from  
5 facility to facility and transfer this concept that  
6 this is an individual with a history of drug abuse.

7 We are going to have some major problems  
8 with the rest of the world if we start transferring  
9 information on that area.

10 So I guess my question for the record is:  
11 Does the licensee have to determine whether an  
12 individual has a five-year history of drug abuse  
13 before they give you a sample, get the results of the  
14 sample and grant him access? In other words, they do  
15 it the way they were doing it in the past without  
16 trying to figure out years two through five. Are you  
17 now requiring that the licensee determine whether this  
18 individual has a history of drug abuse independent of  
19 how your sampling is?

20 You see the problem I've got?

21 MODERATOR WEST: Yes. And I think the  
22 answer is that the rule is looking with respect to  
23 that five-year window regarding whether the individual  
24 has a history of substance abuse.

25 MR. DAVIS: It says, if he doesn't have a  
26 history of drug abuse, you can exempt from something.  
27 I think most of the industry would just say we're not  
28 even going to look at that part of it. We're just  
29 going to test everybody and wait the two to four  
30 hours. We're going to get the results and put them in  
31 the plant.

32 Are you going to come back and say you've  
33 got a problem, because you didn't determine whether  
34 the individual has a history of drug abuse? I looked  
35 at the last year. I didn't look at the five years.  
36 I looked at the last year, because I'm not required to  
37 do a full five-year background investigation to  
38 reinstate this individual. He had prior access, and  
39 he has no history in the last year. I can grant him  
40 access.

41 MODERATOR WEST: And you are only looking  
42 at the past one year window? Is that what you are  
43 saying?

44 MR. DAVIS: That's all the history I have  
45 at my sites, the last year. I'm relying on Carolina  
46 Power and Light to have done it correctly or Dominion  
47 Resources or -- what are the names? -- Progress  
48 Energy. I can't even keep the names straight.

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1 MODERATOR WEST: I think the way the rule  
2 is currently written, under the new rule it would be  
3 a five-year window in terms of considerations of  
4 whether the individual has a history of substance  
5 abuse.

6 MR. DAVIS: Okay. So I think some of us  
7 missed that. So the cost to the industry has just  
8 gone up significantly. Our estimate that we provided  
9 to OMB was incorrect, because we didn't consider this  
10 added cost.

11 MR. TRACY: Could I ask a question on that  
12 note? Jim, you may want to stay. The comments on the  
13 proposed rule -- is it just that there was a  
14 miscommunication and it wasn't understood what this  
15 section of the proposed rule stated? Geary has  
16 already mentioned that, but I didn't get a definitive  
17 answer so that I can talk to my management and the  
18 Commission.

19 I don't understand, when it is the way it  
20 is written -- and those of us that are new to this  
21 area now reading it and now seeing, okay, we're not  
22 doing that. I understand, but why wouldn't we have  
23 heard comment in the proposed rule?

24 MR. DAVIS: Well, I think in 1996 we made  
25 substantial comments on this particular area, and I  
26 admit that that's long enough ago I can't remember  
27 exactly what we said. But we had some significant  
28 issues in this particular area.

29 I think part of the problem is the words  
30 have changed somewhat since that 1996 time frame, and  
31 the nuances of that is significant. We were sort of  
32 taking this in the same context as it was presented in  
33 '96 where, if you want to take this exemption, then  
34 you can do the following items.

35 Now you have rewritten it so you now have  
36 -- It appears in the discussion, you are saying you  
37 have an obligation to determine whether this  
38 individual has a five-year history of substance abuse.

39 MR. MIZUNO: No, you don't have an  
40 obligation. I mean, let's just be clear. The only --  
41 Your obligation under the rule, the default is test  
42 everyone. Okay? If you don't want to do the five-  
43 year thing, you don't have to do it under this new  
44 rule. Default is test everyone. Okay?

45 MODERATOR WEST: So you just go with  
46 status quo.

47 MR. MIZUNO: Now what I'm hearing is that  
48 that's not the status quo.

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1 MS. DURBIN: Can I insert something here?  
2 There are two issues that are being discussed, I  
3 think. One is the pre-access testing. Under pre-  
4 access testing, I think that Geary is correct.  
5 However, I think you are bringing in the changes that  
6 are in 26.27 under Management Actions and Sanctions as  
7 well.

8 So it may be worth waiting until we get to  
9 that section of the rule to talk about the suitable  
10 inquiry requirements, since even though they are  
11 linked, I think part of the difficulty is that we are  
12 not looking at the right section of the rule in terms  
13 of what the changes are.

14 So just a comment that in 26.27 there has  
15 always been a requirement for a suitable inquiry for  
16 the last five years. There have been some changes,  
17 but the access -- the pre-access testing requirements  
18 are, if you don't want to test someone, you have to  
19 know about their history of substance abuse. So in  
20 that sense, I think it might be more useful if we move  
21 forward and discuss the access of the suitable inquiry  
22 in that section.

23 MR. DAVIS: I would like to get the answer  
24 to the opposite part of that question. If I don't  
25 care and I test the individual, I don't have to go  
26 back and try to build the history of substance abuse  
27 on that individual.

28 MR. MIZUNO: No. I think that was a good  
29 comment, because you've got -- Right now, all we are  
30 focusing now on was the pre-access testing, which is  
31 completely separate from the suitable inquiry  
32 determination.

33 It was always a requirement for conducting  
34 the suitable inquiry determination. The pre-access  
35 testing was only a question of whether you were going  
36 to allow him access before you completed our suitable  
37 inquiry determination. Okay?

38 MODERATOR WEST: That's an important  
39 point, I think, and a very good distinction. Thank  
40 you.

41 MR. DAVIS: People have been waving pieces  
42 of paper behind me, and just to put one issue: You  
43 know, why didn't we raise this issue? History of  
44 substance abuse was not a definition in the '96 rule  
45 when it was issued for comment. It's been five years  
46 almost, and somebody else showed me that the extensive  
47 comments we made on this section when we submitted our  
48 comments in 1996, this is not a new issue. From what  
49 we had access to, we commented on that part.

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1           You have made significant changes to the  
2 rule in this particular area, and very clear from the  
3 discussion today, the industry is having great  
4 difficulty figuring out what this means and what the  
5 implications of this particular piece of the rule are.

6           I'm hearing, and I'm still not sure I've  
7 gotten an answer, that you have added a significant  
8 burden in developing these two classes of people  
9 within the industry.

10          MR. MIZUNO: Well, let me respond to that,  
11 respond to the thing about the public comment. I  
12 agree that the history of substance abuse was  
13 something which was added post-rule, but my comments  
14 originally with respect to hearing the industry on a  
15 concept of pre-access testing -- that was in the  
16 proposed rule.

17          What I was -- I was not referring to that,  
18 the history of substance abuse. I was rather focusing  
19 on this overall process which we are talking about,  
20 this alternative process of taking advantage of the  
21 previous inquiry and a history for a subsequent  
22 licensee's pre-access testing and for also, I guess,  
23 transfer to a different site of the same licensee.

24          That's the portion that I would have  
25 expected you to raise an issue about. Like I said, I  
26 don't recall those kinds of comments being raised.  
27 Now perhaps you did not understand what the proposed  
28 rule was actually proposing to do in terms of pre-  
29 access testing, and so you didn't really quite  
30 understand the implications of the proposed rule  
31 language.

32          I can understand that, but I guess I can  
33 say from my perspective that I do not understand that  
34 the industry had any significant comments on what the  
35 NRC was proposing with respect to pre-access testing,  
36 and we really did understand that what we are  
37 providing here was some relaxation over what we  
38 thought was the existing requirement for pre-access  
39 testing of every person.

40          MR. SOUTHWORTH: Bob Southworth from PPL.  
41 I'd like to make one comment real quick. I think  
42 what's happening here -- I think I speak for most of  
43 the people here -- is this was like the end of the  
44 road here. Everybody is coming here now, and this is  
45 -- Everybody is starting to interpret it, trying to  
46 see what's going to happen to us, and this has ben  
47 dragging out for year after year after year.

48          I started in this business six years ago,  
49 and they said, oh, the new rule is going to come out

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1 any day now, and it's six years later. Now it's  
2 coming out, and reality is starting to hit everybody  
3 here, and we're starting to read it more carefully.

4 We're seeing what the final rule is here,  
5 and now we want to know what we're supposed to do with  
6 it. Maybe it was there before, but I think a lot of  
7 people are busy. They didn't have a chance to really  
8 look at it closely until now when they see they really  
9 have to do it. It may be possible, I don't know, but  
10 I think it's really hitting a lot of people here and  
11 they starting to look at it more closely and interface  
12 with you people with how we're supposed to interpret  
13 it. I think that's part of the problem.

14 MODERATOR WEST: Thank you for your  
15 comment. Good comment.

16 MS. HAYES: Lori Hayes, Progress Energy.  
17 I have a direct question. If an individual reports on  
18 reporting of arrest that he was arrested for DUI, does  
19 he now have a history of substance abuse; and if so,  
20 how is that conducive with letting individuals report  
21 under 73.56 and keep that trustworthiness going where,  
22 if now they have a history of substance abuse, they  
23 may be put in a follow-up program, and this may carry  
24 with them for the next five years?

25 MODERATOR WEST: Well, I think the answer  
26 to your first question of whether, as I would reword  
27 it, whether a DUI is considered to be a data point  
28 regarding a system's history of substance abuse, I  
29 think the answer would be yes, given the way the  
30 current rule is written and the definition of history  
31 of substance abuse.

32 I don't know clearly the link with respect  
33 to 73.56, but I think in the context of our Part 26,  
34 the answer would be yes, that would be considered and  
35 relevant.

36 MS. TECHAV: In the actual text of the  
37 rule, it talked about pre-access testing and what is  
38 required, and it had a statement of history of  
39 substance abuse. I think the contention here is that,  
40 back to the definition of how to interpret that was  
41 not there in 1996. It's been added.

42 So now it's being interpreted totally  
43 different. So that's why we have these concerns. We  
44 couldn't comment on it back in 1996, because it wasn't  
45 there. It is there now, and the NRC is taking over a  
46 \$6 million credit for this part that it's going to be  
47 a reduction to us, and it's not. It's a burden.

48 That's our whole point. It wasn't there  
49 to comment on before, because you're saying this is

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1 it, this is final, you've commented on it. But we  
2 didn't comment on the definition.

3 MR. TRACY: You said it's a burden, but  
4 you would have to be testing anyway. Am I incorrect  
5 in that statement? So while it's not a savings, and  
6 I fully understand that argument, your point -- it's  
7 a burden -- could you explain that for me?

8 MS. TECHAV: It's a burden because when  
9 Mick was up and saying the whole process of how we  
10 currently test, if anyone had unescorted access within  
11 less than 30 days, we wouldn't initially test somebody  
12 or retest them when they are coming back for  
13 unescorted access.

14 If it was greater than 30 days but less  
15 than 365, we would retest somebody unless their actual  
16 fitness-for-duty drug test date was within 60 days.  
17 So based on this definition that's been added in here,  
18 it's saying that we would not have to test somebody  
19 unless they had a history of substance abuse, and  
20 before this all the discussion was that, if they went  
21 from one licensee to the next licensee to the next  
22 one, even if it was from one actual plant to the next  
23 -- We've got 17 different units, 11 different plants  
24 that a person can go to, and if we've got to redo and  
25 readjudicate and retest somebody every single time,  
26 that's going to create a burden which we currently  
27 don't do.

28 MS. DURBIN: Can I ask you what changed in  
29 the rule that allowed you to do that in the past and  
30 does not allow you to do that now?

31 In other words, I don't recall the  
32 language in the rule that said that you did not have  
33 to do a pre-access test on someone who was moving from  
34 one site to another within 30 days. This is just a  
35 point of clarification, because I didn't realize there  
36 were significant numbers of people that could move  
37 from site to site without being tested.

38 MR. DiPIETRO: I may need some back-up  
39 from Loren on this, but I remembered Loren saying in  
40 a meeting one time that, if an individual terminates  
41 his unescorted access and they walk out in the parking  
42 lot, then all of a sudden there's a determination made  
43 that they need to have the unescorted access back,  
44 they need to be drug tested to be put back in the  
45 fitness-for-duty pool and meet the requirements of  
46 unescorted access. Okay?

47 We said that's burdensome to do that. We  
48 have a number of people that transfer from site to  
49 site, especially the professional employees, the

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1 Westinghouse, Framtone, B&W, Bartlett. They are  
2 moving from site to site, outage to outage. Okay?

3 We asked Loren at the time what was  
4 reasonable, because there were words -- and I may be  
5 in 1385 -- that a three to five-day period was  
6 reasonable. Okay? That was the standard until we  
7 said, okay, when you're talking about continual  
8 behavior observation, it's a 30-day window is what  
9 most people are dealing with.

10 So that kind of migrated into the industry  
11 standard, that if a person was subject to random  
12 testing within the last 30 days, they could come into  
13 your site without having the need for a pre-access  
14 test. Okay? That's been the standard -- I mean, I've  
15 been doing this for many years, like I said, and  
16 that's been the standard from back, I think, when we  
17 had the conference back in St. Louis. Loren could  
18 help me out with that.

19 That's what everybody has been doing.  
20 Okay?

21 MODERATOR WEST: Correct me if I'm wrong.  
22 This is the same issue that would be related to  
23 whether you would have to do a suitable inquiry for  
24 less than 30 days. I guess what I'm hearing is that  
25 you -- It would be different?

26 MR. DIPIETRO: It's not the same issue.

27 MS. TECHAV: In NUREG 1385, Number 7,  
28 Infrequent Access, it talks about if a  
29 contractor/vendor's program has been reviewed and  
30 accepted by more than one licensee under provisions of  
31 10 CFR 26.23, then any of the contractor/vendor  
32 employees may transfer between the licensee's  
33 facilities without having to repeat the pre-access  
34 test, if all the provisions of the rules have been  
35 met. To illustrate, if a pre-access test was  
36 administered before unescorted access was initially  
37 granted at the first facility, and if the employee was  
38 continuously covered by both behavioral observation  
39 program and a random testing program while he or she  
40 worked for and transferred between the two licensees,  
41 another pre-access test is not required when an  
42 employee starts to work at a different site.

43 Then in parentheses it says, "The NRC  
44 staff recognizes that in some cases, i.e., an employee  
45 my need to travel between job sites, a reasonable  
46 short period of time to accomplish such a transfer  
47 need not be included in the continuous coverage."

48 Then contract employees who are not  
49 covered by a program reviewed and approved by a

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1 licensee under the provisions of 10 CFR 26.23 should  
2 be tested again before being granted unescorted access  
3 to a site. Any pre-access or random test conducted  
4 under a program covered by the rule at the previous  
5 site and completed within the last 60 days will  
6 satisfy 10 CFR 26.24(a)(1).

7 I think what the discussion was back in  
8 Houston -- I wasn't there, but I heard all about it --  
9 was that the reasonable time was 30 days because the  
10 individual was covered under CBOP during that time,  
11 and it kind of went back, and that date kind of in  
12 conjunction was picked because of the 30-day CBOP  
13 issue. So the 30 days was picked at that point. At  
14 least, that's what I believe happened back in Houston.

15 MODERATOR WEST: Well, certainly, what you  
16 have read from 1385 is relevant, and we'll take that  
17 into account. Thank you very much.

18 MR. BRAZIL: Scott Brazil, Dominion. Two  
19 comments. One, I agree with Ms. Durbin up front that  
20 my source of concern regarding all of this work you  
21 have to do to determine before you grant the access,  
22 we've been talking about it in terms of pre-access  
23 testing, whether or not you can excuse someone. But  
24 I think you're right.

25 When we get to 26.27 we're going to have  
26 a lot of heartburn about that, because that's where,  
27 I think, most of our consternation is coming from,  
28 because we're going to have to deal with it when we  
29 get there. It just applies here, and it's our first  
30 opportunity to talk about it.

31 Second of all, with respect to the  
32 gentleman a couple of speakers ago, I've been doing  
33 this since 1990, and I am not worked up over this,  
34 because I haven't had time to look at it. I'm worked  
35 up over what's different here than what we talked  
36 about in '96.

37 Specifically, one example would be our  
38 addition of a definition for history of substance  
39 abuse, because that is going to throw up an entirely  
40 new bunch of requirements that we perform, once we get  
41 to 26.27, and we'll get there. Thank you.

42 MODERATOR WEST: Thank you. I would  
43 propose that we could either proceed -- We have a fair  
44 amount left. We were originally thinking of having a  
45 lunch break at 12:30. We still have a fair amount to  
46 wrap up on 26.24.

47 I would propose that perhaps we have the  
48 lunch break now, and after lunch within an hour --

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1 it's 12:10 -- let's say at 1:10 then we would pick up  
2 26.24 again.  
3           Could I just mention before you leave for  
4 lunch, just to remind everyone again if you would  
5 remember to sign in on the sign-in sheets, and also to  
6 point out that we do have public meeting feedback  
7 forms that are available out in the entrance to the  
8 auditorium. Thank you.  
9           (Whereupon, the foregoing matter went off  
10 the record at 12:11 p.m.)  
11  
12  
13

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:12 p.m.)

1  
2  
3 MODERATOR WEST: My apologies. Before we  
4 went out to lunch, I had intended to give you some  
5 sense of maybe what some possibilities might be for  
6 lunch, but I'm sure you are probably familiar with  
7 this area as much as I am. But certainly, we have the  
8 cafeterias here in this building and the other  
9 building and a fair number of places up and down the  
10 Pike that are within walking distance.

11 I had mentioned earlier, while we are  
12 waiting for folks to get back -- I had mentioned  
13 earlier that there were a couple of pages missing in  
14 the handout on the presubmitted questions that we had  
15 received from NEI, pages 4 and 9, and they are now out  
16 on the handout table.

17 I wanted to -- We'll pick up with Section  
18 26.24 starting with page 37 of the slides, but before  
19 I do that, I wanted to at least for one question I can  
20 remember that I received this morning in the first  
21 session that I can give you an answer to and,  
22 hopefully, I recall the question clear enough that I'm  
23 going to give you the answer that matches the question  
24 that you had in mind.

25 This is the one that had to do with the  
26 custody and control form. I think the general  
27 question -- and correct me if I'm wrong -- had to do  
28 with whether you can use that Federal form.

29 I think the answer is within the  
30 definitions that we provide on the custody and control  
31 form, but my interpretation of that would be that, if  
32 you have an identical match with the HHS guidelines in  
33 terms of the panel of drugs and cutoffs and so forth,  
34 that form would be appropriate; and if you don't,  
35 which is probably, certainly, the case for most of  
36 you, if not all of you, you would have to use  
37 something that would be a look-alike or comparable  
38 form to the Federal form.

39 Okay. We'll now get into random testing.

40 MR. DiPIETRO: Can I ask one other  
41 question? I just got a question on -- There was an  
42 opportunity there for us not to test somebody that's  
43 coming back for a pre-access. Give me a cookbook of  
44 a guideline of when we would not have to test  
45 somebody.

46 Obviously, when there is no history of  
47 substance abuse and 30 days -- that's where I'm  
48 missing a little bit.

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1 MR. MIZUNO: Are you talking under the new  
2 rule or under the existing rule?

3 MODERATOR WEST: I think he's talking  
4 about the new rule.

5 MR. DiPIETRO: Do you understand my  
6 question, what I'm asking?

7 MODERATOR WEST: I think what you are --  
8 Just to repeat your question and see if we've captured  
9 it correctly, the question is: The regulation under  
10 the new rule is written such that there is presumably  
11 some opportunity to take advantage of some relaxation.  
12 So what would be the instances for taking advantage of  
13 that relaxation.

14 MR. DiPIETRO: Yes.

15 MODERATOR WEST: I guess you've certainly  
16 mentioned the one that's the one that will come to  
17 mind, first of all, if you don't have a history of  
18 substance abuse. Can anyone think of any others?

19 MS. DURBIN: If you don't have a history  
20 of substance abuse, as is right up here, and you've  
21 been covered by a program meeting the requirements of  
22 this part for 30 of the last 60 days. So this would  
23 mean if you are moving from one licensee to another  
24 and you have been continuously employed, you wouldn't  
25 have to have one.

26 The other thing that's changed here -- and  
27 this addresses another question that came up -- was  
28 any negative test meeting the standards of this part  
29 performed within 60 days may serve as a pre-access  
30 test. This means, if you are coming from another  
31 licensee and you have had a pre-access test or a  
32 random test within the last 60 days and you have a  
33 record of it, you can use it as your pre-access test.

34 So that's now specified in the rule as  
35 something that is, in fact, approved, and you can do  
36 it. Okay? Does that answer your question?

37 MR. DiPIETRO: Yes. Thank you.

38 MODERATOR WEST: Thank you. What I would  
39 also ask before I get started with the remaining parts  
40 of 26.24 -- We want to continue with this interactive  
41 kind of dialogue, but what I would ask you to do is  
42 to, if you can -- we don't have to be super rigid on  
43 this, but generally speaking, if you would hold your  
44 questions and your comments to the end of the section,  
45 then we can use that as the window, and we can spend  
46 whatever time is needed and, even if we have to back-  
47 pedal to some of the slides.

48 (Slide change)

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1 MODERATOR WEST: So here under random  
2 testing we have increased the focus on unannounced,  
3 unpredictable aspects of randomness. Certainly, this  
4 is not a new topic, by any means. I think someone  
5 mentioned the NUREG 1385 document and, certainly, we  
6 give a fair amount of attention in that document on  
7 random testing.

8 Then secondly, specific information  
9 regarding how to deal with persons unavailable when  
10 selected for testing has been added. Again, that is  
11 also something that's been dealt with in the future.  
12 We are trying to be a little bit more focused and  
13 explicit on some of these issues in the new rule.

14 So we have here the reasonable efforts  
15 must be made to test persons selected for random  
16 testing. I know this issue comes up quite a bit.  
17 Persons off-site when selected for testing and not  
18 reasonably available for testing in a timely manner  
19 must be tested at the earliest reasonable and  
20 practical opportunity.

21 I think the emphasis there is certainly on  
22 the earliest reasonable and practical opportunity.  
23 This slide carries over to 39.

24 (Slide change)

25 MODERATOR WEST: "And without notification  
26 to the individual until immediately prior to his or  
27 her reporting to the test." And it is also noted that  
28 these tests will fulfill any return to duty testing  
29 required for these persons and would be reported as  
30 random tests.

31 Now we go to for-cause drug and alcohol  
32 testing. There are two points here. First of all, if  
33 a person is tested under for-cause, unescorted access  
34 must be suspended until the individual is pronounced  
35 fitness-for-duty by management and medical  
36 determination of fitness.

37 Then secondly, there would be instances  
38 where an individual tests negative under for-cause,  
39 and there wouldn't be any requirement for a medical  
40 and management determination of fitness, perhaps with  
41 the exception that we are trying to note there where,  
42 unless you had an impaired individual and with respect  
43 to 26.27 be one independent of the for-cause test,  
44 perhaps the consideration that there was some reason  
45 to question the individual's fitness.

46 (Slide change)

47 MODERATOR WEST: Then on slide 41 for-  
48 cause drug and alcohol testing must be conducted as  
49 soon as practicable after the occurrence of the event

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1 except under documented unusual circumstances. We try  
2 to give an example of this. Such testing must be  
3 conducted within no more -- don't give a specific  
4 example, but at least some sense of what the time  
5 frame would be. such testing would be conducted  
6 within no more than two hours when alcohol test and  
7 eight hours for specimen collection for drug testing.

8 Now we shift to follow-up testing.

9 (Slide change)

10 MODERATOR WEST: Follow-up testing must be  
11 conducted on an unannounced and unpredictable basis to  
12 verify continued abstention from the use of  
13 substances, and an individual must have a tailored  
14 program and tested not less frequently than once every  
15 30 days for four months and once every 90 days for the  
16 next two years and eight months if unescorted access  
17 is or will be reinstated, essentially covering a  
18 three-year period.

19 (Slide change)

20 MODERATOR WEST: Then under return-to-duty  
21 testing on slide 43, after a person seeks to regain  
22 access after an absence from the possibility of being  
23 tested under that site licensee's program for more  
24 than 60 days, any test conducted within 60 days can  
25 serve as the return-to-duty test.

26 When a person seeks to regain access after  
27 being denied access under 26.27(b), they must be  
28 tested and a negative test result obtained.

29 (Slide change)

30 MODERATOR WEST: Then we have on slide 44  
31 that a testing process must conform to the guidelines  
32 set forth in Appendix A.

33 (Slide change)

34 MODERATOR WEST: Now under selection and  
35 notification, the period of time between notification  
36 of the individual and actual collection must be kept  
37 at a minimum consistent with operational constraints.

38 Further, the alcohol testing changes: You  
39 will note here in these two bullets a blood alcohol  
40 content of .04 when an individual arrives at the site,  
41 at .03 one hour after arriving at the site, and .02  
42 hours after arriving at the site is a violation.

43 Then lastly, blood tests for alcohol are  
44 for additional information that could be considered in  
45 an appeal. Clearly, in the first bullet the direction  
46 we were initially going was some sort of  
47 extrapolation, and we eventually ended up with this  
48 way of addressing this concern about the condition of

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1 the person with respect to alcohol when they first  
2 come on shift.

3 We were hoping that this would be in some  
4 ways better, particularly for the medical review  
5 officer who would perhaps have to actually do the  
6 extrapolation, if that was the approach we had taken.

7 (Slide change)

8 MODERATOR WEST: So now we would shift to  
9 the specific questions that we received in this area  
10 under 26.24.

11 The first question is as follows: What is  
12 the difference between pre-access testing and return-  
13 to-duty drug and alcohol testing requirements? Please  
14 clarify the parameters spelled out in 26.24(a)(1).

15 Our response is as follows: Pre-access  
16 testing is required of all individuals before granting  
17 of unescorted access to protected areas or assignment  
18 to activities within the scope of this part, unless  
19 the individual has been covered by a program meeting  
20 the requirements of this part for at least 30 day  
21 during the 60 days immediately previous to the  
22 granting of unescorted access and has no history of  
23 substance abuse.

24 We've certainly gotten into that  
25 previously. In contrast, return-to-duty testing  
26 applies to individuals who have either been denied  
27 access under 26.27(b) or to those individuals who are  
28 employees of the licensee with unescorted access but  
29 have been aware from any possibility of being tested  
30 for 60 or more days. So certainly, in this latter  
31 category, individuals that are still employed by the  
32 licensee but, for one reason or another, they have  
33 been away from the -- maybe for detail or something of  
34 that sort.

35 This second category, as I've stated,  
36 applies to licensee employees who are away from the  
37 program for extended periods, and for that reason or  
38 in this instance, wouldn't be covered by -- wouldn't  
39 necessarily be covered by a FFD program.

40 Further, on the return-to-duty testing, it  
41 is not applicable to individuals who are not in either  
42 of these categories. It would not apply, for example,  
43 to an individual who had been employed by the licensee  
44 in the past and either left the licensee's employ or  
45 continued to be employed by the licensee but was  
46 reassigned to another job and did not have unescorted  
47 access to the protected area and was reapplying for  
48 access to the protected area. These individuals would  
49 be covered by pre-access testing.

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1 Another question we received in this area:  
2 Does return-to-duty testing have to be conducted for  
3 those individuals who have no history of substance  
4 abuse and were under an FFD program for two  
5 consecutive weeks prior to granting of access or  
6 within six months?

7 Our response is as follows: Return-to-  
8 duty testing only applies to individuals being  
9 reinstated after being denied access under the  
10 provisions of Section 26.27(b) or to those individuals  
11 who are licensee employees with unescorted access but  
12 have been away from any possibility of being tested  
13 for 60 or more days.

14 This second category applies to licensee's  
15 employees who are away from the program for extended  
16 periods of time and, therefore, have not in actuality  
17 been covered by an FFD program, which I previously  
18 mentioned.

19 This would apply, for example, to an  
20 individual who had an extended illness, leave of  
21 absence, or assignment to a non-nuclear facility.  
22 When this individual returns, he or she must have a  
23 return-to-duty test.

24 The individual can be assigned to duties  
25 pending the results of this test, if the individual  
26 has no history of substance abuse and had a negative  
27 test result when a test meeting the standards of this  
28 part performed within the past six months or has been  
29 covered under an FFD program or two weeks during that  
30 six-month period.

31 Another question that doesn't have nearly  
32 the length of our response as some of these others  
33 that I have mentioned had to do with, first of all:  
34 What is no history of substance abuse? Is it a lack  
35 of hits of any of the six items listed under the  
36 definition?

37 Secondly, does behavioral observation  
38 coverage for two weeks during a previous six-month  
39 period allow for unescorted access without waiting for  
40 a negative test result?

41 The quick answer for the first one is yes,  
42 the first bullet; and the answer for the second bullet  
43 is as follows: The individual must be covered under  
44 a program meeting the standards of this part during a  
45 two-week period in the previous six months. This  
46 would require inclusion in a random testing program,  
47 awareness training and so on, as well as behavioral  
48 observation.

49 Further question -- Yes, sir?

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1 MR. BUSH: Garmon, you said that the  
2 answer to that first bullet was yes?

3 MODERATOR WEST: Let me go back to that.  
4 Yes.

5 MR. BUSH: It says "on any of the six  
6 items," which means if one of the six items is a hit,  
7 that still means, according to what you said, if I  
8 understand it correctly, it's no history. I think  
9 that should be lack of hits on all of the six items.

10 MODERATOR WEST: That's a good point.  
11 Thank you. I appreciate that.

12 MR. MIZUNO: If you hit on any of the six,  
13 then you have a history. To not have a history, you  
14 cannot have anything. You cannot come up on any of  
15 those. I think everyone understands that.

16 MODERATOR WEST: The next question: If  
17 the individual was not available for random test when  
18 selected and returns to duty when FFD personnel are  
19 not scheduled to be available, what is the requirement  
20 for testing at the next reasonable and practical  
21 opportunity?

22 What we provide here is as follows: This  
23 would be the first opportunity when both the  
24 individual and the FFD personnel are available such  
25 that, if the individual came back on a Monday and the  
26 testing is not done until Wednesday, then in this  
27 example the Wednesday would be the first available  
28 opportunity.

29 NRC expects that licensee will assure that  
30 the period between the selection and testing is  
31 reasonable, and we give some example of what is the  
32 criterion for reasonableness, within two or weeks of  
33 being selected, and that the individual does not  
34 receive prior notification of the test; that is, that  
35 the test remains unannounced. That's the key there.

36 Licensees that have inappropriately  
37 selected another person when the first person selected  
38 was not available, and not tested the first person  
39 selected, are not meeting the requirements. I  
40 mentioned earlier this issue is discussed with respect  
41 to the current rule in NUREG 1385.

42 This does not provide a random selection.  
43 As those who are rarely available, they are not  
44 subject to testing at the same rate -- and that's the  
45 issue -- as those who are always available.

46 At one site the individual successfully  
47 used the licensee's policy of only selecting and  
48 testing those who were scheduled for work to subvert

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1 the testing process by essentially just changing his  
2 or her work schedule from one schedule to the next.

3 This individual traded shifts on a regular  
4 basis. So he was never available for random testing  
5 when selected.

6 The next question under this section --  
7 please?

8 MR. EARNEST: You said wait until the end  
9 or can we --

10 MODERATOR WEST: We don't have to be 100  
11 percent rigid on it, if you've got something that's  
12 really burning. Go right ahead.

13 MR. EARNEST: It says persons off-site  
14 when selected for testing not reasonably available for  
15 testing in a timely manner must be tested at the  
16 earliest reasonable and practical opportunity. Well,  
17 you defined that pretty well.

18 "And without notification to the  
19 individual until immediately prior to his or her  
20 reporting for the test." Now I've got -- On random  
21 test out there I've got sites that, for example, an  
22 individual reports for work is notified that they have  
23 been selected for random, but yet they have two hours  
24 which they can go in the plant before reporting over  
25 to fitness-for-duty to take a test. Is that pretty  
26 common out there?

27 Well, is that going to affect that? So  
28 what's a good definition of immediately? I thought  
29 you just said that's going to affect it. How is it  
30 going to affect it? Do you want it up or down?

31 MODERATOR WEST: Why would they need tow  
32 hours? I'd be interested in getting some insights on  
33 that.

34 MR. EARNEST: Well, all you got to do on  
35 that is just have the fitness-for-duty personnel  
36 notify their supervisor.

37 PARTICIPANT: Well, there's a new rule  
38 right here that the minimal number that I can see  
39 that's even put into the rule is one hour for a .03  
40 BAC. So isn't that enough? I would say one hour.

41 MR. EARNEST: That sounds reasonable to  
42 me, too. But I'm saying that there's a spate, a good  
43 number of you out there that are using two hours, and  
44 I have a little problem with that being immediately.  
45 I'm just looking for a little guidance here, a little  
46 feedback as to what the NRC expectation is and what  
47 your plants can handle.

48 MODERATOR WEST: Good question. Please?

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1 MS. SMITH: Monica Smith from TVA. We  
2 don't use the two hours. We do what you say, and we  
3 go through the supervisor, which allows him some  
4 flexibility. If they are on a critical task, he can  
5 delay notification, but once they are notified, they  
6 report promptly. It works well for us.

7 MR. EARNEST: That's one thing, but what  
8 if they are notified at the minute that they come to  
9 site by, say, Security?

10 MS. SMITH: Well, that's why we go through  
11 the supervisor. Security doesn't do it. There are  
12 expected to begin coming to the collection site once  
13 they are notified. You know, certainly, some people  
14 may be further away from the collection site than  
15 other people, but by going through the supervisor that  
16 allows us to fit that into our work process.

17 MR. EARNEST: What did I do, leave the  
18 corral gate open?

19 MS. MATULA: Lisa Matula, STP Nuclear  
20 Operating Company. The question I have in this area  
21 -- I don't know if it's a practice across, but we used  
22 to call these people infrequent. What we do is we  
23 put their badge on hold, because it may be the  
24 elevator maintenance man that nobody knows when they  
25 are going to get there.

26 I mean, the only time is when the elevator  
27 goes out, and that might be two in the morning. So  
28 how is that -- He's going to be notified when his  
29 badge comes across, and they say, no, he's got to go  
30 to fitness-for-duty. I mean, I don't know how we're  
31 -- If we can't, he's not supposed to know. I don't  
32 know how we are going to do that.

33 MS. THIEL: I have a comment on that,  
34 exactly what she's saying. When we have those  
35 infrequent type people, the only way for us to track  
36 that they do need a test is to pull their badge,  
37 because that's how we have that link. When everybody  
38 comes back, they are going to know that they have to  
39 go report. There's no way for us to track within two  
40 weeks we get this person.

41 We have to pull their badge so that we  
42 know when they come and say why can't I get in, here's  
43 why. But on the other hand, if that happens and it's  
44 two in the morning, we're not open. So it's not  
45 unannounced now.

46 I don't know how you all expect us to do  
47 that.

48 MS. MATULA: On this same note is the  
49 vacation people, the people that are off-site for a

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1 long time -- this is going to close that window, and  
2 they are going to know that every time I come off an  
3 extended period, I will probably be subject to a test  
4 within the next week.

5 So they are all going to know that,  
6 because that's the pattern that this is going to  
7 follow. It's too predictable.

8 MR. MIZUNO: Let me just be clear. The  
9 fact that you have return-to-duty testing, in and of  
10 itself, does not remove you from the random testing  
11 pool. Right? So conceivably, you could get that  
12 test.

13 I mean, there is no way -- I mean, yes,  
14 the person who goes off on a vacation -- I mean, yes,  
15 because of the return-to-duty requirement, they are  
16 going to know that they have to be tested. I don't  
17 think there is any way of avoiding that unless the  
18 Commission were to change its mind and say, no, we  
19 don't need return-to-duty testing. Okay? That's just  
20 an unavoidable consequence.

21 The fact is that -- The fact that you are  
22 still subject to random testing provides the  
23 additional uncertainty that says, well, I don't have  
24 a free window. Just because I've cleared return-to-  
25 duty testing, I can't relax my guard and now start,  
26 you know, dealing with my illegal drug, because I  
27 still know that I'm subject to your random testing.

28 MS. MATULA: But on the other side of that  
29 issue, why have return-to-duty for your employees that  
30 are out on illnesses or they are somewhere else on  
31 another job, if they are still in your random pool and  
32 you can't excuse anybody.

33 They are still in your pool on your random  
34 list. They are still subject to your program. So why  
35 also subject them to return-to-duty when they are out  
36 there?

37 MS. DURBIN: If they are covered by your  
38 program, they don't have to have return-to-duty.

39 MS. MATULA: Even if they are out 60 days  
40 and they are in my random pool and if their name comes  
41 up, I'm going to collect them. So I do not have to do  
42 a return-to-duty.

43 MS. DURBIN: When they come back, you do  
44 the random, and it counts as a random, even if it's a  
45 return-to-duty. You don't --

46 MODERATOR WEST: If they have been  
47 selected.

48 MS. MATULA: Okay. But if they haven't  
49 hit my random list, I have to do a return-to-duty?

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1 MODERATOR WEST: Here's the key. If they  
2 are away from your employee for greater than 60 days,  
3 if this is your question -- for greater than 60 days,  
4 and if they have been covered by an acceptable  
5 program, let's say another licensee's program, when  
6 they return to duty you wouldn't have to subject them  
7 to a return-to-duty test, because they have been  
8 covered by another program. However, if they have  
9 been away from your employee for greater than 60 days  
10 and they haven't been covered by an acceptable  
11 fitness-for-duty program, again the example being  
12 another licensee's program, you would have to subject  
13 them to a return-to-duty test.

14 MS. MATULA: Okay, but they are still in  
15 my pool. They are still out there with the  
16 possibility of hitting my random list while they are  
17 out there. So that's not covered. Is that correct?

18 MR. EARNEST: I guess the point is they  
19 are saying that, if the person is out -- say he's out  
20 for three or four months and he's out there for --  
21 he's ill. He has an operation. He has to heal up.  
22 He comes back in three or four months.

23 One, you got to do a --

24 MS. MATULA: An evaluation for the CBOP.

25 MR. EARNEST: Right, and he got picked up  
26 on a random. You only have to do the one test for the  
27 two causes, regardless. He's going to get tested as  
28 soon as he gets back, one way or the other.

29 MODERATOR WEST: I see your point. I  
30 missed that. You are saying, if they are obliged to  
31 have a return-to-duty test and also they have been  
32 picked up in a dual fashion on a random.

33 MS. MATULA: Well, I'm still saying they  
34 are covered by my fitness-for-duty program, because  
35 they are still in my pool, is what I'm saying.

36 MODERATOR WEST: No, I heard that. But  
37 they are still in the random pool?

38 MS. MATULA: They are still in the random  
39 pool, even if they are gone 60 days. I'm saying they  
40 are in my program.

41 MR. MIZUNO: Well, but the return-to-duty  
42 only applies to greater than 60 days. Right?

43 MODERATOR WEST: Correct.

44 MR. MIZUNO: So if they are in your pool,  
45 they haven't gone out for more than 60 days, then  
46 there is no return-to-duty testing. Right?

47 MODERATOR WEST: Correct.

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1 MS. MATULA: So it's 75 days, but they  
2 have been in my pool all 75 days. So they are in my  
3 program. I do not have to do a return-to-duty?

4 MODERATOR WEST: No. Here's the deciding  
5 factor on that.

6 MS. MATULA: I understand what you all are  
7 saying. I got it.

8 MS. DURBIN: There are some more pre-  
9 submitted questions on this area, and it might be  
10 worth finishing those so that, in case we've already  
11 answered your question, we can cover it, and then  
12 going on to new questions.

13 MODERATOR WEST: I'll go on to the slide  
14 52.

15 MS. DURBIN; We haven't -- We didn't do  
16 51, although --

17 MODERATOR WEST: Fifty-one, I could  
18 mention this. I don't think it adds any specific  
19 insights that perhaps you are looking for in terms of  
20 quantifying immediately prior, but it would be worth  
21 mentioning the response here.

22 (Slide change)

23 MODERATOR WEST: What is meant by  
24 "immediately prior to report," which we have been  
25 discussing? is this the minimum time it would take an  
26 individual to walk directly to the fitness-for-duty  
27 station? So maybe there would be some insights here.  
28 Under what conditions would there be leeway?

29 Then the second bullet: What is meant by  
30 credible information?

31 The response to -- The answer to the first  
32 bullet is as follows: The minimum time it would take  
33 an individual to arrive at the testing station after  
34 notification is a reasonable definition of  
35 immediately.

36 The purpose of this requirement is to  
37 reduce opportunities for subversion. So subversion is  
38 the focus here. The licensee is expected to use  
39 judgment with regard to what is a reasonable amount of  
40 time to arrive at the testing station and to evaluate  
41 whether an extenuating circumstance is justifiable.  
42 They should assure that the individual has an  
43 unannounced test after being selected for random  
44 testing.

45 Then for the second bullet, what is meant  
46 by credible information: The definition of credible  
47 is reasonable. The rule has not changed in the use of  
48 the term credible, and licensees have been  
49 successfully interpreting it for over ten years.

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1 MR. EARNEST: You know, it seems like we  
2 just raised another issue with the answer. I mean,  
3 what's reasonable? I mean, we are asking everybody to  
4 start using reasonable here. Well, what's reasonable?  
5 Can anybody here tell me they can't get to the testing  
6 station within an hour? What's reasonable? What's a  
7 good reasonable --

8 MR. BRAZIL: I'm here to tell you that  
9 there is at least one case where that can happen.  
10 I'll go back to my -- Scott Brazil, Dominion.  
11 Earlier, I talked about the people who are not nuclear  
12 station employees who are badged for unescorted  
13 access.

14 I work in the corporate office, for  
15 example. I've got folks in a division office who are  
16 linemen or work in the substation, who cover that  
17 whole area. They happen to have to cover one of my  
18 stations. So they are badged for unescorted access.

19 Now they are not doing that that often.  
20 When they get picked out of my pool or testing, they  
21 are going to come to the corporate office to be  
22 tested. But they may be in a substation doing a job  
23 by themselves or with another guy where, when I call  
24 that supervisor to say that guy has been picked, he  
25 needs to come to the office for testing, he's got to  
26 find someone to go and replace him. That guy may be  
27 more than an hour away from my facility.

28 Granted, as soon as he finds out -- is  
29 told he is going to be randomly tested, he's going to  
30 start the process to get over there and be tested, but  
31 it may take more than an hour for him to get over  
32 there, once he's been told he's been picked.

33 So there's just one example of where that  
34 could happen.

35 MR. EARNEST: Well, that goes back to his  
36 answer. You know, he's asking you to apply good  
37 judgment as far as that, and that sounds like good  
38 judgment to me. That's the way I would see it, if I  
39 was reviewing an incident, for example, on a positive  
40 hit or an allegation of some kind or something.

41 At the same time, where you say you are  
42 coming to the site. The collection is done at the  
43 site. You're a site employee. How long should you be  
44 allowed before you go over and get a test, once you  
45 are notified?

46 MODERATOR WEST: Except for extenuating  
47 circumstances.

48 MR. EARNEST: If there's extenuating  
49 circumstances -- I mean, if there's an emergency,

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1 okay, I don't think anybody is going to really care  
2 how long it takes him to get over there for that hit.  
3 Okay? That's that safety/safeguards interface coming  
4 into play. But routine basis, all you do is call a  
5 supervisor and say, hey, this guy has been picked up  
6 for a random. He's going to testing. Shouldn't he go  
7 directly there?

8 MR. NOEL: Excuse me. James Noel from  
9 BWXT. My concern with going with a minimal reasonable  
10 time frame is in the context of some of the other  
11 changes that we're seeing in the proposed rule and  
12 that of not accepting samples that don't have the  
13 minimum quantity.

14 We have had scenarios where a supervisor  
15 provides notification to the employee immediately upon  
16 his exit of the restroom, and he comes to our site.  
17 We are no longer able now to mix samples that don't  
18 meet a minimum quantity. We are going to be  
19 packaging, sealing and sending off all kinds of little  
20 partial samples.

21 You get a positive on the first partial  
22 sample. Where there wasn't enough in there for a  
23 split and for an appeal, it comes back positive. The  
24 second one comes back negative. The first one is one  
25 with the ascension number that we are dealing with.  
26 The employee doesn't understand why he doesn't have a  
27 right to appeal. He's given me five bottles.

28 Now we can have some real issues with  
29 this.

30 MR. EARNEST: Yes, and if that's the case,  
31 then I got a little bit of a problem with your  
32 program, to start with. Once you get -- The purpose  
33 of this "immediately" is so that there won't be any  
34 hydration and all the other things that they are  
35 trying to do.

36 Once you get him over into your facility  
37 for testing, you've got him under your control. Feed  
38 him some coffee or some water, and wait him out. But  
39 --

40 MR. NOEL: I have also gridlocked my  
41 program in that I'm trying to test a lot of people in  
42 a very short period of time, and I'm also trying to  
43 keep the privacy issues in charge there, and with the  
44 other thing we are talking about of testing everybody  
45 as reasonably soon as we can, even if they are not on-  
46 site at the time, I'm now going to have a backlog of  
47 people I'm trying to test, while I'm trying to keep my  
48 percentages up to meet my minimum quota for the year.

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1           It's going to be very complicated when you  
2 add all of the changes together.

3           MS. DURBIN: I don't understand why this  
4 issue arises. The supervisor, as one person  
5 mentioned, can notify the person when it's appropriate  
6 for them to go. There is no reason that everybody has  
7 to be notified at the same time and sent.

8           I'm a little bit confused about why --

9           MR. NOEL: It may be that there are some  
10 unique circumstances at my site in that we do not have  
11 even a medium size fitness-for-duty staff. I have one  
12 employee who is handing out notifications to  
13 supervisors, who is also scheduling the arrival time,  
14 if you would, working with the supervisor to  
15 coordinate the arrival time of the employee and then  
16 beating it back to the collection site to be there  
17 when those people start showing up.

18           MR. EARNEST: It sounds to me like you've  
19 got a staffing problem on your hands.

20           MR. NOEL: It sounds like --

21           MR. EARNEST: Not a problem with the rule  
22 there.

23           MR. NOEL: It sounds like I'm going to  
24 have a staffing problem as a result of the changes in  
25 the rule, and that creates a burden for us.

26           There's another issue, as long as I'm here  
27 and trying up everyone's attention for a moment.

28           MODERATOR WEST: Please, go ahead.

29           MR. NOEL: There may be some circumstances  
30 at our site for people not on-site when selected that  
31 may differ for some others, too, in that we have some  
32 shifts that do work a A shift and a B shift, and they  
33 change every two weeks.

34           We can draw a list today and, quite  
35 honestly, no one would be there. It has happened to  
36 us. We have some people who are permanent third-shift  
37 workers. They are all in one pool. When we pull a  
38 list, it's not unusual for us to get a list of five  
39 names or ten names, and none of those people are  
40 there.

41           They all go into a backlog at that point,  
42 and we are going to have -- My fear, we are going to  
43 have this continually growing backlog, and the machine  
44 is going to be driving us to decide when the testing  
45 periods are going to be, instead of us establishing a  
46 testing period, pulling the names and testing the  
47 people who are available there.

48           I don't have a problem with the seldom  
49 people who are on-site, the off-site contractors or

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1 someone who works in a corporate office. It's the day  
2 to day employees who at any given time, half of them  
3 may not be there, and that can change. It can roll  
4 over every two weeks, and does, and it is going to  
5 create a burden for us.

6 I don't think that the burden that we are  
7 going to be realizing from that is going to be worth  
8 the increase in the public health and safety that we  
9 think is going to come out of this. Thank you.

10 MODERATOR WEST: Okay. Thank you for your  
11 comment.

12 MR. NOEL: Loren had the question of  
13 whether any of those people were ever tested. Yes,  
14 they are. One of the questions I had as a result of  
15 that is: Is it feasible for us to have separate pools  
16 for people that are in a third shift only program or  
17 an A shift group and a B shift group, so that we can  
18 reasonably say that we will stratify the testing  
19 process so we draw from each pool on an equally  
20 frequent basis, and everybody in that pool would be  
21 tested if they are selected, because we would be  
22 testing during the time of day that they are actually  
23 there?

24 I think early on in the process there was  
25 some discussion about people having their fitness-for-  
26 duty random selection software tied into the access  
27 control software. Did anybody ever do that? Okay.

28 Now what's happening with those sites is  
29 before the fact the random selection computer is only  
30 drawing from the people that are on site. No? Then  
31 how was it tied into the access control? How do you  
32 deal with that?

33 MODERATOR WEST: Does someone want to  
34 provide some insights on that?

35 MS. THIEL: In my program, as soon as I  
36 badge an individual for unescorted access, it  
37 automatically goes into the fitness-for-duty pool. If  
38 I terminate their access, they are out of the fitness-  
39 for-duty pool. That is tied together.

40 MODERATOR WEST: Thank you.

41 MR. NOEL: Okay. There's no real time  
42 reading of who is on site and who is not, as far as  
43 the random selection?

44 MS. THIEL: No.

45 MR. NOEL: Well, I would be interested in  
46 insight -- any insight you guys could provide, both  
47 from the licensees and from the NRC, on how to do that  
48 without creating a Big Mac log for us that may make it  
49 difficult for us to keep our normal selection and

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1 testing process going forward while we are trying to  
2 work off the backlog of people when we can have a very  
3 high percentage of people not on site when selected.

4 MS. THIEL: We'll have a backlog, too,  
5 same situation as he will. But if we pull people that  
6 are on nights, weekends, holidays, then we send  
7 somebody in to actually do those tests nights,  
8 weekends, holidays, whenever. But there will be a  
9 backlog of people that are gone for this week, because  
10 they are at this meeting or whatever and, if we pull  
11 them, we won't be able to put them back in the pool.  
12 We'll have to wait until they get back and then try to  
13 pull them, whether they are on nights, weekends,  
14 holidays. We will get to them, but the backlog will  
15 be a little bigger.

16 MODERATOR WEST: Thank you for that  
17 suggestion.

18 MR. BUSH: Loren Bush. If my memory  
19 hasn't failed me over the last couple of years since  
20 I've been retired, my recollection is the NUREG 1385  
21 has something in it about setting up small populations  
22 for random testing, but you can't discriminate within  
23 the population kind of thing. It has to be equal to  
24 the other.

25 So some of you who have that can probably  
26 quote chapter and verse.

27 MODERATOR WEST: That's correct. Yes.  
28 The point there in 1385 is what we touched on, on one  
29 of these slides, that you don't want to penalize folks  
30 that are being tested with respect to not testing  
31 individuals that have been pulled up for random  
32 testing.

33 That's sort of what's driving this  
34 emphasis on first opportunity for testing as opposed  
35 to they come up, and they are not available, and they  
36 just simply go back into the pool.

37 MR. CLEVELAND: Randy Cleveland, NMC. Is  
38 the intent here on the return-to-duty testing with  
39 respect to random selection, if we select a worker and  
40 they are not on site and we can't collect them, we  
41 would track that. At the point they go beyond 60 days  
42 without completing that random collection, we would  
43 then in effect move them into a return-to-duty test  
44 prior to granting unescorted access?

45 MODERATOR WEST: Yes. I think the key  
46 here is that, clearly, the person (a) is still in your  
47 employ. They have reached the threshold of 60 days or  
48 greater, and now they are coming back. So, clearly,  
49 this would -- from trying to tighten up the

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1 definitions on testing, if you will, they would be  
2 subject to return-to-duty testing.

3 MR. CLEVELAND: You would then call it a  
4 return-to-duty test, no longer be considered a random.

5 MODERATOR WEST: Correct.

6 MS. DURBIN: No, no. It would be -- What  
7 we did was we didn't want people to do both a return-  
8 to-duty and a random test, if somebody had been  
9 selected for a random test while they were away. So  
10 you do one test, and we have it count as a random  
11 test. So it would count as part of your 50 percent of  
12 your population who are random tested.

13 MODERATOR WEST: I'm sorry. I misspoke on  
14 that. You had originally selected them for a random  
15 test. They have come up on the random testing.  
16 That's correct. Thank you.

17 MR. CLEVELAND: Okay. If we select them  
18 today for a random test, they are not available. We  
19 track that for 60 days.

20 MS. DURBIN: Well, the return-to-duty --  
21 I'm sorry. The return-to-duty is for somebody who is  
22 supposed to be covered by this program, but they are  
23 really not available for testing for 60 days, which  
24 means they really weren't covered by the program.

25 So, yes, after 60 days you would have to  
26 make sure they got tested, and you would test them.  
27 But you would call it --

28 MR. MIZUNO: You would treat it as a  
29 random test.

30 MR. CLEVELAND: You would still go on and  
31 call it a random and not say it's a return-to-duty  
32 test for this provision?

33 MS. DURBIN: Yes. It's just how do you  
34 count it.

35 MR. CLEVELAND: Practically, as an  
36 industry how are we going to define that someone is  
37 not available for random testing? Well, the easiest  
38 way to do that is at the point of selection, if they  
39 are not available for 60 days.

40 MS. DURBIN: After you select them, if you  
41 can't get them into a random testing facility for 60  
42 days, it means they weren't available. Yes.

43 MR. CLEVELAND: Okay. So other than the  
44 cases where we have denied somebody and we are doing  
45 a return-to-duty test, let's say on a positive, when  
46 would we be doing a return-to-duty test per the  
47 provision here?

48 MODERATOR WEST: Putting aside any  
49 considerations of random?

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1 MR. CLEVELAND: For the random.

2 MODERATOR WEST: It would be instances --  
3 and this is what I was focusing on earlier. It would  
4 be instances where you have someone in your employ,  
5 and they are away from your employ, but you haven't  
6 pulled their unescorted access, and they are gone for  
7 greater than 60 days. Now they are coming back.

8 The concern here is that they haven't been  
9 covered by an acceptable fitness-for-duty program.  
10 They haven't been away on a detail, let's say, to  
11 another licensee. So the concern here would be that  
12 span of time that they have been away and they are  
13 uncovered.

14 So then they would come back, and you  
15 would conduct a return-to-duty test with respect to  
16 the fact that they have been away for greater than 60  
17 days.

18 MR, MIZUNO: Garmon, can I just add  
19 something on that, and maybe the staff will have to  
20 correct me. But my understanding is that -- Let's  
21 suppose you had the employee, and during that 60 day  
22 period he was -- he or she was selected for random  
23 test. If that person, in fact, actually came back as  
24 part of that and gave the test, he or she would be  
25 covered under the test program.

26 So, therefore, when they came back, they  
27 would not be subject too return-for-duty testing,  
28 because --

29 MODERATOR WEST: If it was less than 60  
30 days?

31 MR. MIZUNO: Yes.

32 MODERATOR WEST: Correct.

33 MR. MIZUNO: Or even if it was greater  
34 than 60 days, because that person was in the random  
35 access pool. That person was subject to possibility  
36 for testing. In fact, that person was selected. That  
37 person actually came in to be tested at the first  
38 reasonable opportunity, with minimal -- you know,  
39 meeting all the other requirements for a random test,  
40 and was still in the pool after that test.

41 It just so happened that their extension  
42 away from the site was longer than 60 days. From my  
43 perspective, they were subject to coverage under the  
44 licensee's program. So the fact that they were away  
45 from the site for 60 days is not relevant, because the  
46 words of the rule say away from coverage of the  
47 testing program for more than 60 days.

48 MR. EARNEST: That's what she was saying  
49 earlier. Exactly right.

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1 MODERATOR WEST: Thank you, Geary, for  
2 that clarification.

3 MS. MATULA: Lisa Matula, STP Nuclear  
4 Operating Company. That's what I was asking, because  
5 they are still in my random and, if --

6 MR. EARNEST: And he answered it that way,  
7 too, before.

8 MS. MATULA: But I thought earlier that  
9 the other lady had said that, if that person didn't  
10 hit my random list while they were 75 days out, I  
11 would have to do a return-to-duty, even though they  
12 were in my pool.

13 MS. DURBIN: The issue is that they are in  
14 your pool, but they haven't been under behavioral  
15 observation. They haven't been subject to for-cause  
16 testing. If they are selected for testing, they know  
17 they are not going to get a test.

18 If I were one of these people, if I'm an  
19 employee of the licensee and I have unescorted access,  
20 it hasn't been pulled, but I am off in the Caribbean  
21 for two months -- you're all jealous -- and I know  
22 that I can do whatever I want to do during that  
23 period, because nobody can test me. I am absent from  
24 the possibility of being tested for more than 60 days.

25 That's what we are looking at, people who,  
26 because they have unescorted access, are supposed to  
27 be covered by a program, but they are not being  
28 covered by a program for more than 60 days. That's  
29 the idea.

30 We want people who are supposed to be  
31 covered by a program to be covered by a program and,  
32 if they haven't been covered by a program for more  
33 than 60 days, they have to take a test when they  
34 return. That's the idea.

35 MS. MATULA: Okay. But I've got -- and  
36 maybe I missed it, but I thought it was a different  
37 answer, what Geary just said.

38 MS. DURBIN: Well, what Geary said is, if  
39 you selected them for testing during that 60 days and  
40 then when they show up again they get tested because  
41 of that selection --

42 MS. MATULA: I count that as a random.

43 MS. DURBIN: You count it as a random.

44 MS. MATULA: But if they weren't selected  
45 on my random pool in that 75 day period, then I'm  
46 going to have to return-to-duty?

47 MODERATOR WEST: If they have been away  
48 for more than 60 days and haven't been covered by a  
49 fitness-for-duty program, the answer would be yes.

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1 MR. MIZUNO: You see, this is why we were  
2 saying that all these answers are sort of preliminary,  
3 because we, obviously, haven't discussed it. I mean,  
4 from my perspective, if -- Let's assume that that  
5 person was in the Caribbean. Okay? I mean,  
6 obviously, you're not going to come back to the site  
7 to get tested, but they went to an off-site place that  
8 met the requirements for a HHS testing facility.  
9 Okay?

10 From my standpoint, I think that the NRC's  
11 interest is satisfied by the fact that they got  
12 immediately tested. I guess the staff is concerned  
13 that, well, yes, they were subject to the random  
14 testing requirements, but they weren't subject to  
15 behavioral observation and, therefore, not subject to  
16 the potential for-cause testing. I guess that's where  
17 we are trying to deal with that.

18 Is that sufficiently important in this  
19 context such that it should not be considered to be  
20 under that licensee's program? I think that's  
21 something that we need to work out.

22 MS. MATULA: Okay.

23 MR. MIZUNO: And I think you're going to  
24 get a definitive answer in the NUREG, but thank you  
25 very much for raising it.

26 MS. MATULA: One other question, though,  
27 on the infrequent. Really, there is nothing in here  
28 that ever sees infrequent. But the way we handle  
29 those, again like the elevator repairman only comes  
30 out when -- and it could be anytime --

31 MODERATOR WEST: How do you handle that  
32 situation?

33 MS. MATULA: Well, I put his badge on hold  
34 in Security.

35 MS. THIEL: But our elevator repair is  
36 under CBOP. He might not come for 75 days, but his  
37 supervisor down an hour away is trained in our CBOP.

38 MODERATOR WEST: I see. So he's still  
39 covered.

40 MS. THIEL: He is covered, and he's in the  
41 random, but it's over 60 days. Is he going to need a  
42 return-to-duty?

43 MR. EARNEST: Yes, if he was selected for  
44 the random.

45 MR. BRAZIL: I think part of the problem  
46 here is right here the regulation says one thing, and  
47 you guys are saying a different thing. It says  
48 return-to-duty testing must be conducted when a person  
49 seeks to regain unescorted access to protected areas

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1 of the site in question after an absence from the  
2 possibility of being tested. And you folks are saying  
3 --

4 MODERATOR WEST: That's the key.

5 MR. BRAZIL You folks are saying out of a  
6 program. You can be away from the possibility of  
7 being tested, but still in the program because you are  
8 in the random pool, and still be covered under CBO,  
9 because the off-site supervisor has been trained.

10 So is it that he's not been there to be  
11 tested or is it that he's not under a program?

12 MR. EARNEST: Read that section again, and  
13 you said when he attempts to regain unescorted access.  
14 Correct me if I'm wrong, somebody up here, because  
15 when I read that, I took that to mean that the  
16 individual had left the site and his unescorted access  
17 had been terminated. Okay?

18 AUDIENCE: No.

19 MR. EARNEST: Okay? All right. Now you  
20 got the question.

21 MR. BRAZIL: See, regain implies that  
22 you've lost it at some point. We're saying you still  
23 have it. You still have a badge. You still have  
24 access. You're still covered under CBO. You're  
25 still in the random pool.

26 MS. MATULA: And we ascertain the CBO when  
27 they come back with an interview.

28 MODERATOR WEST: Loren?

29 MR. BUSH: Loren Bush.

30 MODERATOR WEST: Please.

31 MR. BUSH: Somewhere in that beast of a  
32 package that I left behind when I exited, there were  
33 words that talked about this specific problem, and we  
34 basically said that the licensee basically had two  
35 options.

36 One was this elevator repairman could be  
37 notified by his supervisor to come in either to the  
38 licensee's facility or some other facility and provide  
39 a specimen, meeting the requirements to be tested, or  
40 whenever he shows up on the site in the future kind of  
41 thing and all that sort of thing.

42 So we tried to provide a little bit of  
43 flexibility, but you guys seems to want to be very  
44 inflexible.

45 MODERATOR WEST: Thank you for your  
46 comments, Loren. Appreciate that.

47 MR. MIZUNO: I think -- I just found it,  
48 Loren. It says here -- I'll just read it: "One  
49 commenter stated that the rule addition to return-to-

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1 duty testing may cause inconsistency implementing  
2 because of the various ways of interpreting the phrase  
3 'possibility of testing for returning workers.'  
4 Licensees must determine if the worker was absent at  
5 the time selection or not reasonably available for  
6 testing in a timely manner. It was recommended that  
7 the section be revised," and it gives a thing.

8 Then our response is: Return-to-duty  
9 testing covers two circumstances. One, someone has  
10 been denied access under 26.27(b). Two, someone was  
11 not at risk of being tested, regardless of reason.  
12 The deterrence effect of random testing is lost if the  
13 individual is free from the possibility of being  
14 tested, whether for legitimate or illegitimate  
15 reasons. Therefore, the NRC believes the two  
16 circumstances covered by the rule are appropriate and  
17 declines to adopt the comment.

18 The NRC will accept reasonable  
19 inconsistencies arising from good faith efforts to  
20 determine whether a person can be tested during an  
21 absence.

22 See, to me, the response goes back to this  
23 thing about being available for testing in a random  
24 fashion. It's not really coverage under a program.  
25 It really focuses on the fact that are you subject to  
26 testing.

27 I do recall some situations where they  
28 were talking about the employee being off-site, not  
29 available for the on-site testing but possibly being  
30 able to be tested at another facility that met the HHS  
31 standards, and that -- I recall us internally  
32 discussing it and saying, yes, that person is subject  
33 to random testing and so, therefore, return-to-duty  
34 testing would not apply if that person was, in fact,  
35 tested as a random test during that period, you know.

36 MS. MATULA: But these people -- licensees  
37 that are out sick are in the random pool. They are  
38 subject and, if they hit that random while they are  
39 out 75 days, they will be tested now, because there is  
40 no excuse for random. They will go into the backlog.  
41 So they are subject to it -- to the test.

42 If they get called while they are not  
43 here, they will be put on the random list to be called  
44 when they come in. Now they may not be called, but  
45 they are in the random pool is my point.

46 MS. DURBIN: But during that period, they  
47 are not at any risk of being tested, actually tested.

48 MR. MIZUNO: That's right. The coverage  
49 was intended to be you're in the pool and you get

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1 tested. If you have to delay it for whatever reason,  
2 then that's really defeating the purpose of seeing  
3 that you are being subject to random testing.

4 Delaying it for whatever reason beyond 60  
5 days takes you outside of that what I would call the  
6 safe harbor of saying you are subject to testing.

7 MS. THIEL: I think where the confusion  
8 may be coming in is there's two terms. One is  
9 eligible for testing, which we as an industry say that  
10 they are in a random pool. I think you are referring  
11 to available for testing. Right?

12 I guess we've always said, if somebody was  
13 in the pool, they are eligible. They are meeting the  
14 intent of the rule. Like the elevator situation, if  
15 somebody is off for 75 days, they are eligible. They  
16 may not come up on the random test. Their name might  
17 not be selected, but they are in a CBOP, because their  
18 supervisor has been trained in that.

19 So why wouldn't they meet that intent, and  
20 would not have to be tested when they come back?

21 MR. MIZUNO: I think they would.

22 MR. BUSH: Loren Bush here. I'd like to  
23 make a comment. One of the reasons for this  
24 particular requirement is that we had several cases  
25 where licensees would select people for testing and,  
26 because they weren't readily available, went on to  
27 somebody else, and so forth.

28 A couple of things happened. In fact, I  
29 witnessed this a couple of times myself, watching the  
30 people on-site call 20 or 25 people, just trying to  
31 get five to come in for a test.

32 The other thing that we had a couple of  
33 times was we found that there were certain populations  
34 of the on-site workers, because of the hours that they  
35 were working, that kind of thing, they had been  
36 selected for testing a number of times over a number  
37 of years, but never tested.

38 So we said, if we change the requirement  
39 so we put some leverage into the selection process  
40 that it means something to be selected for testing,  
41 and then the person is tested, it would solve a lot of  
42 these problems, help the people who are getting tested  
43 a number of times because other people aren't being  
44 tested, that sort of thing. So that's the reason for  
45 that.

46 MODERATOR WEST: Thank you.

47 MS. MATULA: But didn't you achieve that  
48 when you went to the random and there is no excuse on  
49 the random anymore? Didn't that achieve that? I

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1 thought that's what achieved that, that there's no  
2 longer any excuse, if the random is going to be  
3 tested.

4 MR. MIZUNO: Yes, but random is -- There  
5 is no excuse if you're on site and you are actually  
6 available for testing. The question here for return-  
7 to-duty testing and whether you have to test them or  
8 not is the person is, in fact, not "available" for  
9 testing on-site. The question is at what point is it  
10 that you say, look, the person is really not really  
11 subject to coverage under your fitness-for-duty  
12 program such that --

13 MODERATOR WEST: Or some other program.

14 MR. MIZUNO: -- or some other program such  
15 that you need to have a "return-to-duty" testing. The  
16 concept here -- Again, I have to go back -- is that if  
17 you are within the random pool of tests and you  
18 actually get selected --

19 MS. MATULA: You will be tested.

20 MR. MIZUNO: -- and you take the test, and  
21 you take that test immediately. Okay? I mean, then  
22 you are within coverage, and you are not really  
23 separated from coverage of a fitness-for-duty testing  
24 regime.

25 So, therefore, there is no reason to  
26 single out that employee when they come back onto site  
27 to be subject to return-to-duty testing. That is not  
28 the case when the employee is off-site and is  
29 reasonably not subject to random testing. At that  
30 point, if it extends for greater than 60 days, at that  
31 point you have two things, not subject to random  
32 testing and that period of time is 60 days, and the  
33 Commission made a determination. We can tolerate  
34 something less than 60 days, but beyond 60 days we now  
35 believe that we need to have testing, because the risk  
36 of that person being potentially abusing an illegal  
37 drug or misusing a illegal drug is sufficiently high  
38 enough so that we feel that we need to do this return-  
39 to-duty testing.

40 MS. MATULA: I know, but I was addressing  
41 Loren Bush, that now that there's in the random -- you  
42 all changed the random definition, that, you know, you  
43 don't excuse people anymore. What he was saying,  
44 that's going to fix a lot of that, that when you get  
45 told that they are on two week vacation, we would  
46 excuse them no longer.

47 If they are on two week vacation, they hit  
48 that random, we are still going to collect --

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1 MR. MIZUNO: If they are on two week  
2 vacation, they are not subject to return-to-duty  
3 testing, because --

4 MS. MATULA: No, but they are going to --  
5 But I mean, they are still in the random pool. That's  
6 going to stop what Loren had --

7 MR. BUSH: If I can -- Okay, if you can  
8 picture return-to-duty testing as a separate, unique  
9 requirement. A person has been away from testing.  
10 They come back. They get tested. Later in another  
11 testing program, if you would, is random testing, and  
12 they can be selected on Day One, ten, 15, 60, 80 or  
13 90.

14 If they get selected during that initial  
15 60 days when they are away from random testing, they  
16 are going to be randomly tested, right, when they  
17 return?

18 MS. MATULA: Correct. Under the new --  
19 They are going to be tested. If they hit the random  
20 list, they are going to be tested.

21 MR. BUSH: Now in your example of the  
22 person comes back at 75 days, at 65 days he's been  
23 selected for random testing. He's going to be tested  
24 when he comes back, but as Nancy was pointing out  
25 earlier, what we said was that test that you give him,  
26 since he has been selected for random testing, for  
27 statistical purposes you will call it a random test so  
28 that you don't have to do another random test, if you  
29 will. Okay?

30 MODERATOR WEST: Hopefully, that was some  
31 clarity on this. I think it's certainly clear, and we  
32 will entertain additional comments in a moment. But  
33 I think it's certainly clear that we, the staff, need  
34 to sharpen up our response to you in this particular  
35 area, and we will certainly do that.

36 Your comment, please?

37 MR. CLEVELAND: Randy Cleveland again,  
38 with NMC. So the expectation is that, if we select  
39 somebody for a random test, and they go beyond the 60  
40 days, now they are coming back to us. We are going to  
41 collect them and call that a random?

42 MR. MIZUNO: Yes.

43 MODERATOR WEST: Correct.

44 MR. MIZUNO: For statistical purposes.

45 MR. CLEVELAND: And if there are other  
46 people in our population that, by definition, as we've  
47 defined our program, would know that they are away  
48 from random testing, we have to track those people

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1 and, when it goes beyond 60 days and they come back,  
2 do a return-to-duty test.

3 MODERATOR WEST: Irrespective of random  
4 testing, right?

5 MR. CLEVELAND: Right. Irrespective of  
6 random.

7 MODERATOR WEST: Irrespective of random  
8 testing, you would have to track them with respect to  
9 whether they have met the 60 day threshold and, if  
10 they have exceeded the 60 day threshold and they are  
11 coming back, given the caveat that they haven't been  
12 covered by an acceptable fitness-for-duty program, you  
13 would indeed have to test them as a follow-up test.

14 MR. MIZUNO: Yes, that is correct.

15 MODERATOR WEST: I'm sorry, excuse me.  
16 Return to duty test.

17 MS. DURBIN: And if I can just add  
18 something to make things more confusing, in the case  
19 of the elevator repair person, if anytime during that  
20 60 days they had been on-site, then the 60 days starts  
21 all over again. I mean --

22 MODERATOR WEST: Right. The clock resets.  
23 It's a good point. Thank you, Nancy.

24 MS. TECHAV: Maybe I missed it, but going  
25 back to the elevator person, if they are gone from  
26 site, they are still eligible because they are in a  
27 pool. They don't come up random, just because it is  
28 random and they haven't come up for 60-75 days. They  
29 are in a CBOP, because their supervisor has been  
30 trained. They don't need anything. They are still  
31 good and they just come and go as they please.

32 MODERATOR WEST: If they have exceeded  
33 the 60 days and they are covered by a program, then  
34 they wouldn't have to be tested under the return-to-  
35 duty testing.

36 MS. TECHAV: You said they would not.  
37 Right?

38 MODERATOR WEST: They would not, if they  
39 are covered by a program. They would not.

40 MS. TECHAV: Right. Okay.

41 MR. ALBERT: Let me ask you a question on  
42 the CBOP program for your contractor. You've trained  
43 the individual or somebody has trained the individual.  
44 Right? That --

45 MS. TECHAV: That's not how we currently  
46 practice, but there are some people that do that.

47 MR. ALBERT: Okay. But that elevator  
48 technician is also subject to for-cause testing, if  
49 need be. Correct?

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1 MS. TECHAV: Correct, because their  
2 supervisor is trained in that. If they see any type  
3 of behavior --

4 MODERATOR WEST: And that's a program that  
5 you as a licensee have accepted?

6 MS. TECHAV: Correct.

7 MODERATOR WEST: And you audit the program  
8 and so on?

9 MS. TECHAV: Correct.

10 MODERATOR WEST: It would be acceptable.  
11 Okay, let's have some remaining comments, and then we  
12 need to move on. I would suggest that we then could  
13 have any additional comments at the end of this  
14 section, which we haven't gotten to yet. Go right  
15 ahead.

16 MS. TECHAV: Okay. To continue on with  
17 the contractor, I guess just to give you a feel of how  
18 some of the utilities do it is if we run reports on  
19 our security computer of the last time an individual  
20 has used their unescorted access. So they have been  
21 inside the protected area and they are under the CBOP,  
22 and we run reports that, if a contractor goes dormant  
23 after 30 days, we cancel their unescorted access. We  
24 retest them when they come back. We ascertain when  
25 they come back. I mean, we do that now.

26 We do that for licensee employees, too,  
27 who we know that they are on vacation for greater than  
28 30 days. We apply the same 30-day period for CBOP.  
29 If they are off on medical leave, if they are off on  
30 disability, we take it even stricter to, I think, what  
31 you are going to be allowing us to do.

32 I think that's been a common practice,  
33 because we've always tried to marry the 30-day CBOP  
34 with the fitness-for-duty test. But I'm not  
35 complaining, but with the 60 days now, we are going to  
36 still have to go back and do a 30-day CBOP on the  
37 person, too.

38 So, you know, even though they're not  
39 going to need --

40 MR. EARNEST Well, you don't have to. You  
41 can get more stringent than what the rule requires.

42 MS. TECHAV: I know. I'm not complaining.  
43 I'm just trying to let you guys  
44 understand how we currently do business.

45 MODERATOR WEST: We appreciate that.  
46 Thank you for the insight.

47 MS. TECHAV: Okay. And something else I  
48 wanted to clarify is when I've been up speaking, I am  
49 on a fitness-for-duty task force, and I don't think

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1 anybody would complain or say that I'm not speaking  
2 for the task force, which is a representative of the  
3 industry.

4 MODERATOR WEST: Okay. Thank you.

5 MS. THIEL: Let me talk a little about her  
6 comment before that last one. I think I heard this  
7 two different ways, back to the 60-day thing, and I  
8 hate to keep bringing it up, but I swear I heard it  
9 two different ways on the staff.

10 MODERATOR WEST: Okay.

11 MS. THIEL: Is that correct?

12 MODERATOR WEST: And you may have.

13 MS. THIEL: Give us one more clarification  
14 on the 60 days. If I have the elevator guy -- poor  
15 guy -- he's gone over 60 days, but he is covered under  
16 my program. He has not been pulled for a random. He  
17 is under CBOP. Does he need a return-to-duty test?

18 MR. MIZUNO: I think my view -- okay? --  
19 is that he does not. He does not. Okay? But I think  
20 the definitive answer is going to come in this written  
21 thing, but my view is that he is covered by whatever  
22 -- whatever way you want to do it and so, therefore --  
23 I mean, the fact that he wasn't -- The fact that he  
24 did not happen to be drawn during that greater than  
25 60-day period for a random test is irrelevant. He was  
26 subject to potential testing.

27 MODERATOR WEST: I think that's the  
28 key, that he was under a program.

29 MS. THIEL: He's under the program. He's  
30 under CBOP.

31 MS. DURBIN; If his supervisor found that  
32 he was of questionable fitness and sent him for a for-  
33 cause test, would he be tested?

34 MS. THIEL: Yes.

35 MS. DURBIN; So he's not absent from the  
36 possibility of being tested.

37 MS. THIEL; Exactly. Okay. But what I  
38 heard earlier -- thank you for that -- was that he's  
39 away. He's away from your site, and I think that was  
40 her point over there was, yeah, but the guy just -- We  
41 can pull him at anytime. But he is away.

42 MODERATOR WEST: I think, again, the point  
43 would be, even if he's away and covered by a program,  
44 that he wouldn't have to be tested under return-to-  
45 duty testing.

46 MS. THIEL: Okay. That was just to  
47 clarify that.

48 MODERATOR WEST: Let's go to your comment,  
49 please.

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1 MS. ADAMS: Dolly Adams rom Exelon. I  
2 just wanted to put my two cents in and say, for the  
3 last five years it's just been my practice to do a  
4 random testing just the way that you have the rule  
5 now, and it's not all that bad.

6 MODERATOR WEST: I see.

7 MS. ADAMS: And you don't get the backlogs  
8 that you are going to imagine that you are going to  
9 get. You are not going to have to drop access as much  
10 as you think you are going to drop. There is a little  
11 more tracking to do, but it works out fine.

12 I use the one-hour notification system.  
13 I very seldom have a problem with that, because all of  
14 my contact people understand what my rule is, and so  
15 I just wanted to mention that it's not bad at all. It  
16 works out fine. It's a great system. I've been using  
17 it for five years, and it does work out fine.

18 The only situation that I ever ran into  
19 where, if I dropped somebody's access -- and I very,  
20 very seldom drop a licensee person; generally, your  
21 contractors, because licensee people you can always  
22 get them somewhere. Even if it's on the back shift or  
23 weekends or whatever, you are able to do that -- is  
24 when I have a fossil person that comes into nuclear  
25 just for an outage, and now they go back home, and  
26 they are still badged. So they are subject to the  
27 random list.

28 That's one of the few times that I'll drop  
29 their access, and when outages come up, they owe that  
30 random test, and that also satisfied their pre-access  
31 test. So they don't get tested twice.

32 MODERATOR WEST: I see.

33 MS. ADAMS: There are ways around it that  
34 they will only get tested once. They will not get  
35 tested twice, if you just know what you're doing with  
36 it. It's just a matter of tracking it.

37 So I just wanted to mention that. I hope  
38 nobody is going to throw anything at me, but it works.  
39 It works out fine. I've been doing it for five years.

40 MODERATOR WEST: That's very helpful. We  
41 appreciate that. We'll take this gentleman's comment,  
42 and then we'll move on to the end of this section with  
43 the remaining questions.

44 MR. CLEVELAND: Randy Cleveland, NMC.  
45 Just a point of clarification. Your expectation with  
46 respect to the return-to-duty testing is not that  
47 licensees track protected area access and, if it goes  
48 beyond 60 days, force a return-to-duty test. Correct?  
49 You're not expecting us to do that?

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1 MODERATOR WEST: I'm sorry. Restate the  
2 question again.

3 MR. CLEVELAND: If you have some -- You're  
4 not expecting us, with respect to the return-to-duty  
5 provisions in determining whether somebody is outside  
6 a random program, to track protected area access.

7 MODERATOR WEST: I think the answer is  
8 that, no, what we are interested in is the fact that  
9 the individual is away from coverage under an  
10 acceptable fitness-for-duty program. That's the  
11 emphasis, and it's greater than 60 days.

12 MR. CLEVELAND: Thank you.

13 MODERATOR WEST: We will go to the next  
14 question. This one has to do with: Would the FFD  
15 program manager qualify as licensee management? Then  
16 relatedly for the second bullet: Do MROs have to  
17 review negative drug screen results?

18 The response we have for the first bullet:  
19 The definition of licensee management, who should be  
20 informed by the MRO of a confirmed positive test  
21 result should be spelled out in the licensee's  
22 policies and procedures. The intent of this  
23 requirement is that an individual with the authority  
24 to assure that an individual who has violated the  
25 licensee's FFD policy is removed immediately.

26 If the FFD program manager can assure that  
27 the person is immediately removed -- that is, 24 hours  
28 a day, seven days a week -- then he or she would  
29 qualify as licensee management.

30 The summary answer to the second bullet  
31 concerning whether the MRO would have to review  
32 negative drug screen results: Certainly, you would  
33 expect the MRO to review the positive results.

34 With respect to the negative results, the  
35 expectation, generally speaking, would be that the MRO  
36 would review those results, not at the level of detail  
37 that you would expect this individual to review the  
38 positive results, but rather it would be expected that  
39 that individual would look at the aggregate of those  
40 results.

41 We may have provided some misleading  
42 information in this area in previous guidance  
43 documents but, clearly, that's the expectation in the  
44 new rule. We can talk about that. Could I just ask  
45 yo to do this. Could I just finish? We only have a  
46 few more questions for this section. Then at that  
47 point we can open it up for additional comments on  
48 questions on this particular section, 26.24.

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1                   The next question concerns: When does a  
2 work status begin? For example, a worker normally  
3 comes to work at 7:00 a.m. but has a doctor's  
4 appointment and doesn't come in until 10:00 a.m. Does  
5 the clock start at 7:00 a.m. or 10:00 a.m.?

6                   Then the second portion of this: Does  
7 off-site include individuals who are on annual leave,  
8 sick leave or administrative leave?

9                   The response to the first one would be  
10 10:00 a.m. The NRC's concern here is that no  
11 individual with a BAC above .04 be in the protected  
12 area.

13                   The answer to the second question is yes.

14                   Next the question is as follows: What  
15 does the NRC consider to be the earliest reasonable  
16 and practical opportunity to test an individual who  
17 returns to site and was previously selected for random  
18 test?

19                   We have certainly spent a fair amount of  
20 time on that one already. So I'll move on to the next  
21 one.

22                   When does the NRC expect the licensee to  
23 conduct a for-cause test on an individual who has a  
24 DUI test? I know we talked a little bit about this,  
25 but the response is as follows: For-cause testing  
26 should be completed as soon as the individual returns  
27 to the site after the license is informed of the DUI  
28 arrest, since a DUI arrest would provide credible  
29 information that the individual had a substance abuse  
30 problem.

31                   In addition, a conviction -- and we've  
32 discussed portions of this as well. A conviction for  
33 DUI would constitute a history of substance abuse, as  
34 defined in 26.3.

35                   Now that completes the advance questions  
36 that we received on 26.24. Would there be any  
37 additional comments or questions at this point on that  
38 section?

39                   MR. SOUTHWORTH: Bob Southworth from PPL.  
40 I just want to make sure I understand you correctly.  
41 Did you say that the MRO should review negative  
42 results?

43                   MODERATOR WEST: That's correct. However,  
44 the clarification I was trying to point out is that we  
45 wouldn't expect the level of time or attention to  
46 negative results to be comparable to what we would  
47 expect with positive results, but the answer clearly  
48 under the new rule is that we would expect the MRO to  
49 review those results. But it would be more in the

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1 fashion of looking at them in the aggregate rather  
2 than going through the level of detail that you would  
3 be looking at or the individual would be looking at on  
4 positive results. Yes?

5 MR. SOUTHWORTH: What type of  
6 documentation do you expect to see for this? Somebody  
7 just asked me. Do you expect to see a signature by  
8 the MRO that he reviewed each one of these? We don't  
9 do this right now, I can tell you that. So this is  
10 new.

11 MODERATOR WEST: Well, that's a good  
12 question. I guess I don't have a specific answer to  
13 that, but I would acknowledge that we probably would  
14 need to give you something that is more of an  
15 operational way of how do we acknowledge that that has  
16 been accomplished. So we can give attention to that,  
17 and thank you for raising it.

18 MR. NOEL: James Noel rom BWXT again. I'd  
19 like to open just one brief and final clarification on  
20 a point that I was asking about earlier in having  
21 separate pools of employees to solve the issue that I  
22 have at my site.

23 In looking at the statements of  
24 consideration for the current proposed rule, it does  
25 say that licensees may maintain separate selection  
26 pools for any class or group of workers, but may not  
27 discriminate within those pools -- in a pool.

28 We would like to explore that possibility  
29 of perhaps creating a pool for that permanent third  
30 shift and pool for that A shift and that B shift, not  
31 discriminating within those pools or the frequency of  
32 selection between those pools.

33 I would like to get your response to that.

34 MODERATOR WEST: I think -- and I  
35 appreciate your acknowledging what is in the  
36 statements of consideration. I don't think it's  
37 probably something we can unravel right here in this  
38 setting.

39 I would acknowledge that we have received,  
40 I would say, over the past several months questions  
41 along these same lines. I think it certainly is worth  
42 the consideration at some generic level so that we can  
43 provide an response addressed to generally what you  
44 are raising here.

45 MR. SOUTHWORTH: Could you provide any  
46 clarification of what NRC means by the statement?

47 MODERATOR WEST: I don't think I have  
48 anything additionally to add, other than what you have  
49 read. I think as long as it would be ensured that one

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1 group of individuals weren't being disproportionately  
2 selected over other individuals, I think that would be  
3 part of the criterion as to whether it would be  
4 acceptable.

5 MR. SOUTHWORTH: That would be our mutual  
6 intent, yes. Thank you.

7 MS. BURKETT: Kathy Burkett at American  
8 Electric Power. Going back to the MRO review of the  
9 negatives, we have an on-site screening laboratory,  
10 and we do not send our negative results to our MRO for  
11 review. Is the expectation that we will do that?

12 MODERATOR WEST: I think the expectation  
13 is -- and if others have any insight on this -- I  
14 think in the past, and I can't cite you the specific  
15 document, I think we probably put out some inaccurate  
16 information in this area. But I think under the new  
17 rule it wouldn't matter whether it's being sent out to  
18 an HHS certified lab or whether you are doing on-site  
19 testing.

20 The expectation would be in the aggregate  
21 -- and I underscore in the aggregate -- we would  
22 expect -- Since the MRO is the key person in the  
23 decision making process as to whether it's a confirmed  
24 positive or not, we would expect some attention to  
25 even the negatives.

26 MS. BURKETT: And are you going to provide  
27 us with some insight as to how you propose we do that  
28 with the MRO, what you would like to see going to him  
29 for review? I mean, is it our analytical data that  
30 shows to him that, yes, this is a negative test result  
31 based on this, this and this?

32 MODERATOR WEST: I think maybe related to  
33 even the previous question of how do we acknowledge  
34 that what we are requiring has been done, we certainly  
35 probably owe you a little bit more clarification in  
36 this area. Certainly.

37 MR. PRIEBE: Hi. Mike Priebe from Palo  
38 Verde. I have a question concerning the random pools.  
39 At Palo Verde we previously used a composite random  
40 generator. Concerns during an audit from our nuclear  
41 assurance department caused us to become more  
42 conservative and go to a simple random generator.

43 It had to do with the language that talked  
44 about population subject to testing would have an  
45 equal probability of being tested. They felt a  
46 composite random generator took that equal part away.  
47 But the new rule shows having approximately equal  
48 probability, and I'm really hoping you are going to

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1 tell me that that means that the composite random  
2 generator would be acceptable under this rule.

3 MODERATOR WEST: I think here again we  
4 certainly haven't thought about this in terms of the  
5 specific examples you've given, but I think the  
6 overarching thing would be that it would have to be  
7 such that one group wasn't being selected more often  
8 than another group. As long as it's achieving that,  
9 I think that would be our criteria.

10 MR. MIZUNO: Or the opposite, actually,  
11 which is that there is a group that is being  
12 significantly under-represented.

13 MODERATOR WEST: Under-represented as  
14 well.

15 MR. PRIEBE: What we are seeing -- I don't  
16 know if the terminology I am using is right. So  
17 excuse me, but everybody starts off in one pool. As  
18 you are selected, you are placed into a second pool.  
19 I'm sorry. As you are selected -- Everybody starts  
20 off in two pools that are selected equally. As you  
21 are selected, you come out of the second pool.

22 So you have -- What this causes, the end  
23 result would be that you would be getting a wider  
24 range of people selected for the same number of tests  
25 in a year versus what we are seeing since we went to  
26 the simple random, which is the same people pop up  
27 over and over again often, just because that's the way  
28 statistics work.

29 So one person may be tested three times in  
30 a year. What we would rather see is three different  
31 people tested, because we feel that's more effective,  
32 or one person twice and another one once perhaps.

33 MODERATOR WEST: Yes. I think to do  
34 justice to your question, we would probably have to  
35 think about these details a little bit more. But I  
36 think the overarching thing would be, certainly, to  
37 ensure that all persons in the pools would have an  
38 equal chance, equal probability of being selected.

39 MR. PREIBE: Yes.

40 MODERATOR WEST: That would be the  
41 criterion.

42 MR. MIZUNO: Garmon, let me just interject  
43 here, though. If I understand what you are proposing  
44 to do, it's a way -- I'm not sure that a situation  
45 where you are throwing -- once they have been tested,  
46 and then they are thrown into another pool for which  
47 they are not subject to testing until the next period  
48 comes out, I know that that is something that was --

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1 MR. PRIEBE: No, I didn't explain that  
2 right. Actually, they start off in both pools. Once  
3 they are selected, they come out of one of them. They  
4 still stay in the other where they are always subject  
5 to be tested again. But the second pool -- it slowly  
6 shrinks. It's the population of people who have not  
7 been tested and, you know, people come out of both  
8 pools.

9 So it becomes you have a double chance to  
10 be selected.

11 MR. MIZUNO: Yes, that would be  
12 acceptable. I mean, I think that -- That was one of  
13 the things that we thought about as a way of avoiding  
14 the problem of assuring that everyone remained subject  
15 to random sample, and yet you still ensure that you  
16 have coverage of every person.

17 MODERATOR WEST: Okay. Since the line is  
18 somewhat longer over here, maybe we'll just use the  
19 fashion of this side and then that side. I think  
20 after we receive all the comments on this section, we  
21 will all be very deserving of a break. So, please.

22 MR. HARRIS: That's why I yielded the  
23 floor. Neil Harris, TXU Electric. I heard you a few  
24 moments ago say that the NRC's expectation was not to  
25 allow anyone within the PA with a BAC greater than  
26 .04. I'm assuming this also still applies to the TSC  
27 and the EOF facilities. Is this correct? For your  
28 emergency personnel?

29 MS. DURBIN: With unescorted access?

30 MR. HARRIS: Correct, with unescorted  
31 access.

32 MODERATOR WEST: I think the answer -- you  
33 want to jump in there, Bruce?

34 MR. EARNEST: Yes. You know, it's still  
35 up to you. For example, if you really need somebody  
36 in there. It's the only guy you've got in there that  
37 can give you advice on how to fix a pump or --

38 MR. HARRIS: You still have supervisory  
39 discretion?

40 MR. EARNEST: You can escort him in there.  
41 The only thing you can't do is give him unescorted  
42 access under any circumstances, if he's over the .04.

43 MR. HARRIS: If I were to have an  
44 individual show up and that individual had been  
45 drinking prior to the declaration, we would have to  
46 have that person in. If that individual had been  
47 drinking, however, when they did arrive they fell  
48 underneath the random selection and they were randomly  
49 selected, and they blew a .02, would they still --

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1 MODERATOR WEST: And you needed the  
2 individual to perform some function?

3 MR. HARRIS: We could still use the  
4 individual? You use supervisory discretion? Is that  
5 correct?

6 MODERATOR WEST: I think the answer really  
7 is more precisely the fact that you could, even under  
8 the current rule, escort that individual.

9 MR. HARRIS: Yes. Yes, you can. I just  
10 wanted to make sure that, since we are adding the .03  
11 and .02 --

12 MR. EARNEST: Yes, but that's again if  
13 he's not immediately tested upon arriving at the site  
14 or when it was notified.

15 MR. HARRIS: All right.

16 MR. ALBERT: Let me make sure that I  
17 understand the sequences here. The individual was  
18 notified to come to the EOF or wherever he or she was  
19 coming. Did you determine then if alcohol or  
20 something had been used?

21 MR. HARRIS: That determination is a  
22 question asked: Are you fit for duty? If that  
23 individual says yes --

24 MR. ALBERT: Then you made a decision that  
25 you needed an individual to come in anyway. right?  
26 Is that correct?

27 MR. HARRIS: That's correct.

28 MR. ALBERT: Then you are saying, after  
29 the individual gets there, he or she is selected for  
30 random testing and blows positive or whatever?

31 MR. HARRIS: Right.

32 MR. ALBERT; Okay. So you made the  
33 management decision on the front end. Right? You  
34 escorted the individual in?

35 MR. HARRIS: No, because that individual  
36 may not have told me how much that the person has  
37 drank. You know, it's up to that individual to know  
38 whether or not -- You know, we are all professionals.  
39 We've all been in this game for a long time. We know  
40 whether or not we are fit for duty or not.

41 If I've had one beer versus three beers,  
42 I probably won't even mention -- shouldn't say I. The  
43 individual wouldn't mention that they had had one  
44 beer.

45 MODERATOR WEST: I think the point is, if  
46 I'm correct, you don't know until you have actually  
47 performed the test.

48 MR. HARRIS: That's right. You don't know  
49 until you actually perform the test.

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1 MODERATOR WEST: Yes. And then at that  
2 point, you have certain decisions to make as to  
3 whether you need the individual --

4 MR. HARRIS: Well, we could still use  
5 supervisory discretion in this case.

6 MODERATOR WEST: Well, if I understand  
7 your question correctly, I think part of it has to do  
8 with what the test results are. Certainly, if the  
9 threshold of whatever the cutoff level has been  
10 exceeded, whether it's by the .02 or the .03 or the  
11 .04, you would still have the option of escorting that  
12 person, if you needed their advice to perform a job.

13 MR. HARRIS: Thank you.

14 MR. ALBERT: But still, how would you  
15 treat the individual, though, now that the individual  
16 tested positive, even though you asked him on the  
17 front end are you fit for duty. The individual said  
18 yes. At that point, would you still consider that a  
19 positive test under the random program? I just want  
20 to know how you are going to manage this. You would do  
21 that?

22 MR. HARRIS: Yes. That would be a  
23 positive. But that doesn't mean that they would be  
24 excluded from performing their activity.

25 MR. ALBERT: No, sir. I mean you can  
26 still escort him. I just wanted to know how you were  
27 going to treat it.

28 MODERATOR WEST: Thank you. Yes, please?

29 MR. BOISMENU: Brett Boismenu, Nine Mile  
30 Point Nuclear. I have three questions, basically.  
31 I'm looking for clarity here, and I guess the most  
32 important to me is your requirement for review of on-  
33 site testing.

34 MODERATOR WEST: For negatives?

35 MR. BOISMENU: For negatives.

36 MODERATOR WEST: Yes.

37 MR. BOISMENU: The whole benefit of doing  
38 on-site testing is to have the immediate results. We  
39 only have an MRO one day a week. Are we going to have  
40 to somehow FAX all the results, the 150 per day, to  
41 the MRO and have them review them before we allow  
42 access?

43 MODERATOR WEST: I'd be the first to  
44 admit, I don't know the specifics of the details of  
45 how you implement it. I would also add I'm making an  
46 assumption here relative to on-site testing. I think  
47 it's correct, but we'll look at it. We'll look at it  
48 further. If I'm incorrect, then certainly in the

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1 NUREG document -- and I think Loren is shaking his  
2 head. So maybe I'm off-base on that one.

3 MR. BUSH: Let me --

4 MR. BOISMENU: That's not the on-site one.

5 MODERATOR WEST: So I think that answers  
6 your question. Thank you.

7 MR. EARNEST: That could be a week or two  
8 down the line.

9 MR. BOISMENU: So basically, you're saying  
10 it's have the results reviewed, but not at that  
11 immediate time? Not at all?

12 MS. DURBIN: It's only HHS testing  
13 facility.

14 MODERATOR WEST: I think that's really the  
15 clarification here. I misspoke when I said it would  
16 be applicable to on-site.

17 MR. BUSH: We've made an assumption that  
18 the on-site testing program is under the licensee's  
19 quality control measures, they get frequently audited,  
20 etcetera, etcetera, etcetera. We are hoping that the  
21 negative results are looked at by somebody in the  
22 program somewhere along the line.

23 So there's no need for the MRO to review  
24 those particular results unless the licensee decides  
25 that the MRO is the person that's going to be one of  
26 the quality people involved. But as far as the  
27 regulatory requirement, no.

28 MODERATOR WEST: I think the key thing  
29 here -- I did, in fact, misspeak -- is that it's not  
30 required. You have some additional questions. That's  
31 right. Go right ahead.

32 MR. BOISMENU: With the requirement, if  
33 somebody is selected randomly, they will be tested  
34 upon return. With some of our plants in the proximity  
35 of our plants, we can have people badged at two  
36 plants. Is there any exemption if somebody is badged  
37 at another plant covered under another program and  
38 they are selected? Can we write that off or do they  
39 need to be tested?

40 MODERATOR WEST: I think the answer is  
41 that they need to be tested. I'm assuming here you  
42 are talking about an individual's badge, which is not  
43 uncommon, at Plant A and Plant B.

44 MR. BOISMENU: Right.

45 MODERATOR WEST: But it would seem to me  
46 that, if they are pulled for the random at Plant A,  
47 they would have to be tested there at Plant A.

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1 MR. BOISMENU: Okay, thank you. One more.  
2 I keep hearing the return-to-duty testing only applies  
3 to licensees.

4 MODERATOR WEST: Personnel that are  
5 employed by the licensee. Correct.

6 MR. BOISMENU: So, therefore, it would not  
7 -- We would continue to do it with the elevator man.  
8 He would be a qual, a pre-access test if his badge was  
9 terminated. It wouldn't be a return-to-duty test.

10 MODERATOR WEST: That's right. The  
11 assumption here, too, with the way that we are trying  
12 to sharpen -- although I'm not 100 percent confident  
13 we've done this, but in our attempt to sharpen the  
14 distinction for return-to-duty testing, the assumption  
15 is that (a) the individual is in the employee of the  
16 licensee and (b) at least the scenario that their  
17 access hasn't been pulled, unescorted access hasn't  
18 been pulled.

19 MR. ALBERT: Just one more comment I'd  
20 like to add. When you talk about whether it only  
21 applies to licensee, I think long term contractors  
22 would fit into that category as well, people who work  
23 at the site all the time but they are just not  
24 licensee employees. We needed to make that  
25 distinction.

26 MODERATOR WEST: Thank you, Ron. Could we  
27 go over here, please.

28 MS. HAYES: That was my question, since  
29 most long term employees are contractors, were they  
30 covered, because what about denials? That would  
31 mainly be contractors and not licensee employees. So  
32 you're saying long term contractors are licensee  
33 employees?

34 MR. ALBERT: No, I didn't imply that they  
35 were licensee employees, but he was asking the  
36 question if return-to-duty applied only to licensee  
37 employees. I was telling him that long term  
38 contractors would fall into that category as well,  
39 because they are at the site all the time.

40 MODERATOR WEST: Thank you, Ron.

41 MS. HAYES: My question is -- This is Lori  
42 Hayes from Progress Energy -- that if an individual --  
43 If I read that slide right -- has a DUI arrest that we  
44 are obligated as a licensee to give that person a for-  
45 cause test when they come back.

46 MODERATOR WEST: Correct.

47 MS. HAYES: I guess my question is what is  
48 the purpose of that?

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1 MR. ALBERT: What benefit do we gain by  
2 doing that?

3 MS. HAYES: Yes. What benefit do you gain  
4 by doing that, because the alcohol, obviously, would  
5 not be in their system nor would the drug, if it was  
6 perhaps a cocaine arrest. So what is the purpose of  
7 that?

8 MS. THIEL: And a year later when they are  
9 convicted, do we have to for-cause test them again?

10 MODERATOR WEST: I think those are  
11 reasonable questions. I think the general answer is  
12 that -- and I recognize the delta or the time between  
13 when it occurred versus when you are going to  
14 actually do the testing. I think the quick answer is  
15 that the way the rule is currently written, it would  
16 fit in.

17 Maybe at some level you would at least  
18 rule out -- Although there's a delay in time, you  
19 would rule out the possibility through the testing of  
20 whether it was an issue or not.

21 MR. MIZUNO: Let me just throw in  
22 something here, that I think there are two different  
23 issues. I guess the first question I heard was a sort  
24 of a rhetorical or a philosophical one about what is  
25 the purpose of doing a test where there's a  
26 substantial time period that may occur after, for  
27 example, the arrest, which I personally don't think  
28 should be a basis for testing. But anyway, assuming  
29 that is the case, the point is that you have an  
30 incident which the Commission has determined  
31 represents evidence of that person's susceptibility,  
32 if you want to call it, to use of an illegal drug or  
33 misuse of a legal drug. Okay?

34 The question then becomes, which the  
35 Commission determined falls -- puts that person in a  
36 different category and says, based upon that indicia,  
37 we believe that we need to have an additional measure  
38 of assurance that when he comes on site that he is  
39 going to be fit for duty.

40 So unlike a person who has no indicia of  
41 any illegal drug use or misuse of a legal drug and is  
42 simply subject to random testing and behavior  
43 observation, here this person has crossed a threshold,  
44 as it were, and now the Commission has determined that  
45 special attention needs to be given to that person.

46 So the point is not that, obviously, you  
47 are going to see whether he's still subject -- whether  
48 he's fit for duty because of that particular incident.  
49 No, it is the question of whether he is fit for duty,

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1 because he is susceptible to repeated -- I mean that  
2 he is potentially subject to further use or misuse of  
3 the drug such that when he comes on site he actually  
4 has a higher chance of being unfit for duty. Okay?  
5 That ' s t h e f i r s t t h i n g .  
6

7 MS. HAYES: But now as a licensee employee  
8 I'm required to report arrests. I know now when I  
9 reported arrest that (1) I'm going to be classified as  
10 having a history of substance abuse; (2) I am going to  
11 get a for-cause test. Do you think I'm going to  
12 report that arrest?

13 MR. MIZUNO: You have to remember that --  
14 I mean, you are asking me a question about whether --

15 MS. HAYES: I mean, this is real.

16 MR. MIZUNO: -- someone is or is not going  
17 to do something. I guess you could ask that about  
18 everything. I mean, when he fills out his employment  
19 application, is he going to have an incentive to  
20 report?

21 I think anytime when someone does  
22 something that could subject him or her to potentially  
23 adverse consequences, there is clearly a disincentive  
24 to do that. But on the other hand, I think you have  
25 to remember that fitness-for-duty was in part not only  
26 to address the immediate "I am totally drunk and I  
27 can't deal with it" but also the trustworthiness  
28 aspect. Okay?

29 So, therefore, your inability to  
30 truthfully set forth information with respect to your  
31 background that would allow the licensee to be able to  
32 perform its function in screening you, to me or to the  
33 Commission, is something that is very important and  
34 should result in a -- you know.

35 So I guess to answer your question, yes,  
36 there is a disincentive. There is no incentive for an  
37 individual to report adverse information, but the  
38 Commission, I think, took that into account and  
39 nonetheless required that there be that kind of  
40 reporting, and there is no way around that unless we  
41 said there shall be no self-reporting by the  
42 individual or no requirement to provide information to  
43 a licensee. Then the burden falls solely upon the  
44 licensee or the contractor to ferret out that  
45 information.

46 MODERATOR WEST: Thank you, Geary.

47 MR. DiPIETRO: Could I jump in that for-  
48 cause test for one second?

49 MODERATOR WEST: Please.

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1 MR. DiPIETRO: If a guy reports a DUI and  
2 he comes in, we are going to for-cause test him. What  
3 would the appropriate for-cause test, an alcohol and  
4 a drug test? And if that's the case, and it says  
5 when you are doing for-cause testing, the individual's  
6 unescorted access is to be suspended. So, therefore,  
7 you've got an employee that's not going to be  
8 available to work until you can get the results of the  
9 test back, which --

10 MODERATOR WEST: And so you can have some  
11 assurance that the person is fit for duty and can be  
12 returned for shift, to a medical and management  
13 determination?

14 MR. DiPIETRO: Right. I mean, the current  
15 -- I'll just give some related experiences here.

16 MR. MIZUNO: I guess the first question I  
17 heard was -- There's two. You're going to probably  
18 have to repeat the second one, but I guess the first  
19 one was if the person was DUI, arrested for DUI, are  
20 you going to have to test him for drugs.

21 Looking at the definition of for-cause  
22 testing, I don't think so. I think that -- Okay, well  
23 -- In that case --

24 MODERATOR WEST: I'll take that one. I  
25 think you would, in fact, have to test him both for  
26 alcohol and drugs. The reason I think that would be  
27 the case: Clearly, the alcohol is driving -- no pun  
28 intended -- the DUI. However, it probably doesn't get  
29 any better as an explanation. There's some level of  
30 assurance.

31 MR. MIZUNO: I guess I have to disagree.  
32 You know why? Because the language of the rule --  
33 See, you are seeing this back and forth here, but if  
34 you read the rule, the language of the rule, under  
35 for-cause testing, it says the individual's unescorted  
36 access must be suspended until the individual is  
37 pronounced fit for duty, except for those instances  
38 where an individual tests negative in a for-cause  
39 test.

40 If the test is based on suspected use of  
41 alcohol and breath analysis is negative, to me, there  
42 are certainly two different ways you can interpret  
43 that, but to me --

44 MODERATOR WEST: That's true.

45 MR. MIZUNO: -- the logical reason is that  
46 the test must track the basis for having a for-cause  
47 test. Now maybe the staff has a different perspective  
48 on that, and I'd really have to defer to them.

49 MS. ROOKS: I have a comment with that.

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1 MR. EARNEST: Hold a second. Now in a lot  
2 of states and a lot of jurisdictions, folks, DUI means  
3 driving under the influence. It doesn't tell you  
4 anything. The guy comes in there and tells you, hey,  
5 I got busted for DUI. You better not assume it was  
6 just for alcohol. It could be a mixture.

7 MODERATOR WEST: I think it's clear that  
8 we have to as a staff --

9 MR. EARNEST: You're going to have to make  
10 that determination whether it's appropriate.

11 MS. ROOKS: I have a comment of a  
12 situation that we had that falls right into this  
13 category. I'm Billie Rooks with Southern Nuclear,  
14 Vogel Hatch & Farley.

15 We had a guy that reported a DUI, and it  
16 was for alcohol, by the way. He reported what it was  
17 for. We have a procedure already in place where we do  
18 for-cause testing for any reported DUI on our  
19 employees and subsequent clinical evaluation to see if  
20 there's a problem.

21 This guy reported the DUI five days after  
22 the DUI on his next reported shift to work. He was  
23 positive in that for-cause test for cocaine, not  
24 alcohol. Of course, it was five days later.

25 So I think that shows a clear indication  
26 that the for-cause test is a good tool to use, not  
27 just because he had a DUI, which could be other  
28 substances other than alcohol in most states, but it  
29 clearly --

30 MR. MIZUNO: Yes, but you could have the  
31 other situation where the guy was busted for cocaine  
32 and then he gets tested for alcohol as part of that.  
33 I mean, again we have to discuss, but I would say that  
34 there would be some Constitutional concern for the  
35 fact that you are testing him on a for-cause testing  
36 basis where again the for-cause basis differs from the  
37 test that you are administering. Okay?

38 Remember, we have -- As an agency, we have  
39 to defend the requirement for the invasive procedure  
40 or for what we are intending to do in the testing, and  
41 we have to have a reasonable basis for it. Okay?

42 I'm not sure that we are at the point, and  
43 the statistics are at the point, where we can say, if  
44 you are an alcohol substance abuser, then that means  
45 you are also likely to abuse other drugs or just the  
46 reverse. If you are a confirmed marijuana user, it is  
47 also highly likely that you are going to be abusing  
48 alcohol.

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1 I'm not aware of those kinds of  
2 statistics, and that's why from my perspective I would  
3 think that we would want to confine ourselves to  
4 saying, if the for-cause test was caused by a specific  
5 kind of incident, then the for-cause test has to  
6 follow that.

7 Now the gentleman, Bruce, said that DUI  
8 might not necessarily tell you whether it's drug or  
9 alcohol. In that case, I would agree. You probably  
10 do have to test him, because you don't know what is  
11 the basis for the DUI arrest.

12 MODERATOR WEST: Thank you, Geary. Lori,  
13 do you want to finish?

14 MS. HAYES: Yes. The second part of my  
15 question was that, if we are using a HHS lab and you  
16 receive your negatives, does the MRO have to review  
17 those negatives prior to you allowing access to the  
18 facility? Is that a provision or is that just an  
19 afterwards that they need to sometime along the way  
20 look at the negatives and make sure everything is in  
21 line?

22 MODERATOR WEST: To be honest with you, we  
23 probably haven't thought about it down to that level  
24 of detail. I think the quick answer is that,  
25 certainly, the MRO has to do it, and your point is a  
26 good one. We'll have to sort out at what point that  
27 has to be done.

28 More importantly, if I hear your question  
29 correctly, what implications does that have for other  
30 aspects of whether you are going to deny the person  
31 access or returning to duty or so on?

32 MS. HAYES: Well, that would add a  
33 significant delay; whereas, now negatives are looked  
34 at by our staff and, of course, they come from an HHS  
35 laboratory, which we audit and we trust. So at that  
36 point --

37 MODERATOR WEST: Well, clearly -- and this  
38 was, I believe, mentioned in passing -- you are asking  
39 for a general answer, and we'll have to provide you  
40 that. But, certainly, with respect to a for-cause  
41 test, the current language of the rule wouldn't  
42 require holding -- if it's negative, wouldn't require  
43 precluding the individual from returning to shift, if  
44 it's a negative. That's specific to the for-cause.

45 MS. HAYES: Okay, thank you.

46 MODERATOR WEST: But we owe you a general  
47 answer.

48 MR. ALBERT: Garmon, just let me add this.  
49 For your question, Lori, I don't know that our intent

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1 is never to look at the individual. I mean, they had  
2 a negative test, but I think the intent is to make  
3 sure that the laboratory has done things that it  
4 should have done.

5 The MRO is in a position to look at that.  
6 But we'll get back with you on another answer, but I  
7 don't think it is going to impede --

8 MS. HAYES: More of a quality control  
9 thing.

10 MR. ALBERT: Right.

11 MS. TECHAV: And I think the MRO Handbook  
12 allows that.

13 I wanted to talk about fitness-for-duty  
14 pools. With the mergers of all these utilities that  
15 are happening, there's a concern or a need to merge  
16 pools into -- Well, we currently were old COMED. We  
17 have random testing at each site, and we have their  
18 own pools. Then we also have what we call a seventh  
19 site for corporate people. So we don't have people  
20 that are not directly reporting to a site in all these  
21 different pools when they have access at all those  
22 different sites.

23 Now that we've merged with, you know,  
24 Clinton Power, Limerick, Peach Bottom, TMI and Oyster  
25 Creek, we want to go to one pool for all of our  
26 licensees and one pool for all of our contractors.

27 Now in the rule it says that random  
28 testing must be conducted at an annual rate equal to  
29 at least 50 percent of the workforce. Now we would  
30 consider all those people in that pool the workforce.  
31 Then we would report it out separately in that either  
32 six-month or annual report, but we want to know  
33 whether or not we need to meet the 50 percent at each  
34 of those individual sites or of the total pool  
35 population.

36 MODERATOR WEST: I don't think I could  
37 give you a quick answer on that.

38 MS. TECHAV: Of course not.

39 MODERATOR WEST: We would consider that.  
40 Do you want to respond to it, Ron?

41 MR. ALBERT: All I want to say is we  
42 certainly have to look at that, because when the rule  
43 was written, we didn't expect all these  
44 conglomerations to exist. So we certainly got to go  
45 back and take a look at some things, just as a  
46 question of practicality and how you do business.

47 MS. TECHAV: Yes, because otherwise it's  
48 going to be administratively very difficult to have  
49 people in all these different pools all over the place

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1 and multiple pools and when they change locations and  
2 where their permanent work location reports to.

3 I mean, it's difficult right now to  
4 administer that just within our old COMED, but with an  
5 addition to all these other places. So if you can  
6 take that consideration, it would be appreciated.

7 MODERATOR WEST: I might add, too, that we  
8 are certainly, I would say over the last year -- Your  
9 point is well taken, not only with the aspect of pools  
10 but also in terms of responsibilities of personnel.  
11 It's probably a set of questions that we've  
12 accumulated in that area that we could also include in  
13 this NUREG document.

14 MS. TECHAV: Okay, thanks.

15 MODERATOR WEST: Certainly.

16 MS. GULLIFORD: Maureen Gulliford with  
17 First Energy Nuclear Operating. If I could just jump  
18 back to for-cause testing for a minute for a  
19 clarification.

20 MODERATOR WEST: Sure.

21 MS. GULLIFORD: Historically, whenever a  
22 for-cause test is completed, both breath and urine are  
23 collected. I thought I heard at the table that, if it  
24 was an identification of an alcohol issue, only  
25 alcohol would have to be conducted.

26 MODERATOR WEST: I think you did hear  
27 that, but I think you also hear that we have somewhat  
28 of a divergence of opinion.

29 MS. GULLIFORD: I just wanted really  
30 wanted to direct you to Appendix A where it indicates  
31 that we will do both, and that has not been changed.

32 MODERATOR WEST: I think this is probably  
33 -- and I'm aware of the Appendix A, but I think the  
34 long and the short of this is that we've given a  
35 temporary answer, and I think the point that Geary was  
36 making is that there are probably some legal  
37 implications here that we need to also consider, in  
38 addition to what we've just given you as a quick  
39 answer, and we'll do that.

40 MS. GULLIFORD: Okay. So -- we will  
41 suspend the access and wait for a negative both breath  
42 and drug sample?

43 MODERATOR WEST: I think that's the quick  
44 answer, yes, and we will give you further on that.

45 MS. LANOUILLE: Susan Lanouette from North  
46 Atlantic Energy.

47 MODERATOR WEST: I'm sorry. That's a good  
48 point. Yes.

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1 MR. MIZUNO: Garmon, can you make the  
2 clarification?

3 MODERATOR WEST: Yes. It's the two hours  
4 versus the eight hours. You would have two hours for  
5 the alcohol and then eight hours for the drugs. So  
6 that would be a factor as well. But beyond that, I  
7 still think Geary's point on some legal implications  
8 on the answer that we have given you is something we  
9 have to give some attention to. Please? Oh, I'm  
10 sorry, you have something?

11 MS. DURBIN: Well, I just heard something  
12 that I wanted to clarify. The reason for the two  
13 hours and the eight hours is not so the person can go  
14 back to work for eight hours before they have their  
15 drug test. It's to give you a chance to get them to  
16 a drug testing facility.

17 You should have breath analysis devices  
18 on-site. So that can be done very quickly, and you  
19 want to do it quickly. The eight hours is flexibility  
20 so that you can find a place to get them tested. It's  
21 not -- There is no assumption that they would be going  
22 back to work until that occurs.

23 MODERATOR WEST: Thank you for that  
24 clarification. Please?

25 MS. LANOUILLE: Susan Lanouette from North  
26 Atlantic Energy. I actually have about three  
27 questions here.

28 Right now we have designees from the MRO  
29 that verifies our results when they come in, and if  
30 it's a positive, they send it on to the MRO. If it's  
31 a negative, they send it on to us. Is that still  
32 allowed?

33 MODERATOR WEST: I think this type of  
34 question has come up before, and correct me if I'm  
35 wrong, Geary. There is some discretion that we feel  
36 that the licensee could have relative to how they  
37 would tailor their plant-specific program.

38 I think the key thing would be that, if  
39 it's going to deviate from some of the specifics of  
40 what's called for in the rule or in cases more  
41 generally when it usually comes up, it's more cleanly  
42 in terms of going beyond the rule. Then we would  
43 expect that they would be not just some sort of ad hoc  
44 way of doing that, but rather it would be tied in and  
45 be explicit in your policies and procedures on your  
46 program.

47 MS. LANOUILLE: Okay. So as long as it's  
48 in my procedure, then it's okay?

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1 MODERATOR WEST: I think the answer to the  
2 question of could the negatives go -- Part of this,  
3 too, also ties to how the MRO functions at a plant,  
4 and there are some considerations in the new rule  
5 where the licensees do have discretion in this area.  
6 But ultimately, I would still maintain that the MRO is  
7 going to have to be in the loop with respect to  
8 looking at the negative results regarding -- in the  
9 aggregate. But that's coming from the HHS lab. But  
10 again, in terms of whether you could allow this to  
11 happen, it would seem to me it would certainly have to  
12 be something that you would have to call out in your  
13 policies and procedures.

14 Do you have anything to add on that?

15 MR. ALBERT: Yes. Let me make sure I  
16 understand what you are saying. What exactly are you  
17 doing? What's happening with your test results?

18 MS. LANOUILLE: Our test results come into  
19 an MRO office, which the medical office has access to,  
20 to get those results.

21 MR. ALBERT: When you say medical office,  
22 whose medical office?

23 MS. LANOUILLE: Our medical office next-  
24 door. Our medical and fitness-for-duty is separate.

25 MR. ALBERT: So your MRO is a company  
26 employee?

27 MS. LANOUILLE: No. He's a contractor.  
28 He is the medical doctor, and he is the MRO. He is  
29 contracted by both.

30 MR. ALBERT: Okay. I'm with you so far.  
31 go on.

32 MS. LANOUILLE: So the MRO has designated  
33 one of the top senior medical nurses to review those  
34 results. If they are negative, they send them on to  
35 us. If they are positive, they send them on to the  
36 MRO. Is that still allowed?

37 MS. DURBIN: We responded to a question  
38 similar to this in the comment response document. I  
39 don't know that the answer will be the same, but it  
40 does give a little bit more detail, if it would be  
41 worth reading it.

42 The MRO has always had access to all  
43 testing results. HHS guidelines specify that all  
44 results be reviewed at a general level by the MRO.  
45 Prior to sending the results to the licensee, it is  
46 expected that the negative test results will be  
47 reviewed as a group by the MRO who may note any  
48 anomalies, false negatives based on blind performance

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1 tests, low specific gravity or creatinine results  
2 which indicate a need for reanalysis, etcetera.

3 Positive test results, in contrast,  
4 require careful individual review. Previously, the  
5 rule and the NRC's response to questions regarding MRO  
6 review of negative test results, such as the response  
7 under 5.8 of NUREG 1385, have inappropriately implied  
8 that the MRO makes no review of negative test results.

9 In fact, HHS guidelines and the NRC's FFD  
10 rule require that all test results be sent to the MRO  
11 for review -- now that's sent to the MRO for review.  
12 The in-depth specific and individual review of  
13 findings required for all positive results is not,  
14 however, expected for all negative results.

15 That's the full answer as it was in the  
16 comment response document. Now I don't know that that  
17 will be the final full answer, but it does give you a  
18 little bit more of why there's a confusion on this  
19 issue, because you were given different information in  
20 the past.

21 MODERATOR WEST: Does that help?

22 MS. LANOUILLE: Yes, but -- Yes and no.  
23 Could I get a copy of that?

24 MODERATOR WEST: What she read from is in  
25 the statements of considerations for the new rule.

26 MS. DURBIN: People can get a copy of it  
27 soon.

28 MODERATOR WEST: Yes. Well, that's even  
29 available now. The SECY 00-0159 is available on the  
30 external web. By way of that, you will find the SECY  
31 is comprised of the Commission paper followed by (a)  
32 through (f) attachments, if you will.

33 MS. LANOUILLE: I have all that. I just  
34 haven't gone through the whole thing.

35 MODERATOR WEST: But what you can do  
36 there, the way I approach this is that if you have all  
37 those pieces in one file, you can do a word search on  
38 this. Then you won't have to go through each  
39 attachment. It will just hit the particular key words  
40 that you would specify, and it would get you to that  
41 particular information.

42 MR. ALBERT: Just to give you -- Right on  
43 the surface, I don't see a problem with what you are  
44 doing thus far, just so you can walk away at ease, but  
45 we will certainly take a look at it.

46 MS. LANOUILLE: Thank you.

47 MODERATOR WEST: But again I would add, we  
48 have consistently -- more often in terms of going  
49 beyond the requirements, we have emphasized that it

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1 would seem appropriate to have how you are operating  
2 at a plant-specific level rather than some sort of ad  
3 hoc fashion, if you will, but to have it tied into  
4 your policies and procedures -- not really just to do  
5 that, but then I guess the expectation would certainly  
6 be that it would also carry over into your training,  
7 your awareness training and so on.

8 MS. LANOUILLE: Okay. My other question  
9 is: If you are doing a for-cause test on an DUI, am  
10 I also sending that individual on to EAP?

11 MODERATOR WEST: I would think so, yes.

12 MS. LANOUILLE: I have one more question.  
13 On your extrapolation of alcohol, why have you lowered  
14 your limit from .015, which we have in the NUREG 1385,  
15 I believe -- from .015 as a conservative to a .01,  
16 which is -- you're giving that individual ample  
17 opportunity?

18 MODERATOR WEST: Do you have any insights  
19 on that, Nancy?

20 MS. DURBIN: I'm not sure.

21 MODERATOR WEST: I don't recall the  
22 specific reference in 1385. We could take a look at  
23 that, if you like.

24 MS. LANOUILLE: In the NUREG it does have  
25 a conservative level of a .015. I don't have a copy  
26 of it right here with me.

27 MODERATOR WEST: With respect to time that  
28 the individual has been on shift?

29 MS. LANOUILLE: No. It's basically --  
30 Right now what we do at North Atlantic is an  
31 individual that shows up to be positive, what we call  
32 a positive, at .025 we go back to the time they came  
33 into work. If they were over a .04 when they came to  
34 work, using the .015 they are positive.

35 MODERATOR WEST: You are saying it's more  
36 conservative than the .02?

37 MS. LANOUILLE: Than a .01.

38 MODERATOR WEST: I don't have a good  
39 answer to that except that the .02 and the .03 with  
40 respect to the .04 -- that scheme, if you will,  
41 relative to the time the individual has been on his  
42 shift was felt to be the appropriate breaks with  
43 respect to trying to -- without having to do an  
44 extrapolation, with respect to trying to identify  
45 someone that did, in fact, come on shift at something  
46 that's going to be fairly close to the .04. But I  
47 don't have a precise answer to that.

48 MS. DURBIN: I can also tell you that we  
49 intentionally made it conservative. I mean, it is a

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1 more conservative approach than you are taking. We  
2 wanted to get away from extrapolation, and we wanted  
3 a rule that nobody could say, well, because of my  
4 metabolism that's an unfair -- you know, this is a  
5 very conservative.

6 Of course, you can have standards that are  
7 more reverse.

8 MS. LANOUILLE: I will have to admit,  
9 though, that we did go back and figure out how many  
10 would have slipped through on your conservative, and  
11 it would have been very minor.

12 MODERATOR WEST: Thank you for that. It's  
13 good insight. Yes?

14 MS. THIEL: Yes. I'd like to go back to  
15 for-cause and just bring up an area in the rule that  
16 does say that, if the for-cause was based -- suspected  
17 on use of alcohol and breath analysis is negative, the  
18 person can return to duty after management  
19 determination pending the results of the urinalysis.

20 MODERATOR WEST: That's right. I might  
21 add, that wasn't always the case, the way it's  
22 currently worded. But certainly, we moved in that  
23 current direction in terms of the wording that you  
24 just read, figuring that the thinking was that a  
25 management determination was good enough so that the  
26 individual could, in fact, continue to work until you  
27 get the results from the urinalysis. Thank you.

28 MR. SEARS: Garmon, Russell Sears with  
29 Energy Corporation. I had a question. I listened to  
30 Loren's logic a little bit earlier about why an on-  
31 site lab would not need an MRO review of results where  
32 an off-site lab would, if you are using an HHS lab.

33 Having had both of those scenarios at the  
34 four different sites that we have, I can tell you that  
35 an off-site laboratory gets a much more extensive  
36 review on that laboratory result through a lab  
37 supervisor, QC review and a certifying scientist  
38 before it comes to the licensee for review.

39 They are also under the HHS program where  
40 they are inspected. They are probably under CAP.  
41 They are under other programs where they are inspected  
42 even more frequently than our licensee program is.

43 So applying the logic that a licensee's  
44 program is being audited, therefore it's more reliable  
45 than an off-site HHS laboratory doesn't seem to fit as  
46 justification for adding an MRO review in there.

47 MODERATOR WEST: Thank you for your  
48 comment.

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1 MR. SEARS: The other part: The rule now  
2 allows that for negative test results that, once they  
3 are put into a summary form for tracking purposes,  
4 they can be immediately destroyed. As long as the MRO  
5 review of any test result, whether it's on-site or  
6 off-site, provided is in a QC mode, and that's going  
7 to have very little impact. But I believe maybe it  
8 was Kathy Burkett or somebody asked the question, how  
9 are we to track that information? What would you  
10 expect to see?

11 The logical thing to do would be to  
12 annotate somehow on that negative test result that  
13 that review had taken place. That negative test  
14 result gets that review, and then we turn around the  
15 next day and destroy that document. We are going to  
16 be in a Catch 22 with inspectors and auditors in  
17 trying to demonstrate that.

18 I can sit there all day long and put it in  
19 a database with an MRO box checked that the review  
20 took place. That's really not much added value to the  
21 program.

22 MODERATOR WEST: Thank you.

23 MR. CASEY: Ron Casey, TVA. One more time  
24 back to the DUI.

25 MODERATOR WEST: Sure.

26 MR. CASEY: DUIs and domestic violence  
27 things are the only thing we get reported from our  
28 company employees. An individual gets arrested for  
29 DUI on a Friday. He reports it Monday morning. I  
30 suspend his clearance. I for-cause drug and alcohol  
31 test him. But can I take advantage of this section  
32 that says, well, if the suspect of alcohol is  
33 negative, then he can be returned to duty based on a  
34 management determination solely, or must I kick in the  
35 physician determination of fitness; because now I have  
36 a credible allegation under your definition of  
37 substance abuse?

38 So am I having to say it and suspend his  
39 access, test him, wait for the results to come back,  
40 and send him to the Medical Review Officer for final  
41 clearance before -- assuming all of those are okay --  
42 before he can come back to work?

43 MODERATOR WEST: I think the answer is  
44 this. Certainly, there is a portion of the new rule  
45 that would speak to if you do, in fact, have a  
46 negative based on the alcohol results.

47 That, in and of itself, wouldn't preclude  
48 you from sending the individual back to work.  
49 However, I would also add further that there are other

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1 aspects of even the current rule, not the least of  
2 which is (a) having some concerns about the  
3 individual's fitness-for-duty or (b) going beyond  
4 what the requirements are saying that would give you  
5 the leeway if you have some question about the  
6 individual's fitness to, in fact, go beyond just  
7 simply sending him back to work, instead keeping the  
8 individual off shift and making some medical and  
9 management determination, if you chose to.

10 MR. CASEY: See, the way I was sort of  
11 looking at this, if you smell alcohol but you have no  
12 other indications, you for-cause. You know, it's  
13 negative. Management can say seems fit. You move on.  
14 But if you have the report of DUI -- I mean, that  
15 could be it.

16 MODERATOR WEST: And that's my point. The  
17 specific wording relative to the negative and allowing  
18 the individual to go back to work was crafted simply  
19 in terms of the issue of alcohol and resolving that.  
20 However -- and the feeling was that the management  
21 determination was good enough for that.

22 Then aside from that you may have other  
23 concerns about the individual's fitness, and I think  
24 that's what you have introduced in your question.  
25 There aspects of the rule that would allow you to  
26 address that.

27 We'll take one more question, and then  
28 we'll take a break. One more opportunity. You may  
29 have more than one question. I'm not trying to  
30 restrict you to just one.

31 MR. SHULTS: Thanks, Garmon. As you know  
32 me, I do have more than one. I actually don't have a  
33 question. I have a comment, some observations.

34 MODERATOR WEST: Please.

35 MR. SHULTS: My name is Ted Shults. I'm  
36 the Chairman of the American Association of Medical  
37 Review Officers, and I've been reluctant to come in,  
38 because I don't really have a dog in this fight. But  
39 I do have a number of observations and concerns.

40 From looking at the rule and being  
41 involved in auditing these programs over the last ten  
42 years and training most of the MROs, I thought there  
43 are a couple of comments I could make that you may  
44 want to consider in your assessment of all of this.

45 One of the fundamental issues that I see  
46 as very different between NRC programs and DOT  
47 programs is the role of the MRO. A lot of that goes  
48 back to when these programs began.

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1           Actually, the history in the utility  
2 industry is much longer than it is with the DOT, and  
3 many of your companies have been doing drug testing  
4 before the rule was even put in place and before we  
5 had a technical requirement for an MRO.

6           So if you look at the history, if you  
7 visit a fitness-for-duty program and look at a DOT  
8 program, those of you that have both programs, there's  
9 a very different flavor. The question that was very  
10 telling that was submitted ahead of time was the  
11 question: Is the fitness-for-duty coordinator a  
12 member of management -- a licensee management?

13           The significance of that, to me, was the  
14 idea behind having all the results going to the MRO  
15 was not to have the medical review officer act as  
16 quality assurance department or supervisory  
17 toxicologist or even medical oversight of the  
18 laboratory results, but rather to mask those results  
19 from management. That's essentially what the role  
20 was, and to some degree it's ceremonial.

21           So I think a lot of the concerns that you  
22 heard here were based upon the idea, since they are  
23 not bringing anything to the table in terms of  
24 technology, is there additional roles and  
25 responsibilities?

26           Clearly, as the utilities and the fitness-  
27 for-duty programs began to realize that the MRO was a  
28 value added component, I have seen the trend to  
29 bringing the MRO in-house and having all the results  
30 go to the MRO to fulfill that type of requirement. It  
31 will be challenging, through, for the on-site issues.

32           The other interesting observation from  
33 DOT's program is that the area with this reporting  
34 about DUI/DWI, I think, stems from the FAA's  
35 experience. A number of years ago the FAA has had a  
36 high profile case where pilots were flying into  
37 Minnesota and were basically determined to be  
38 intoxicated.

39           It was a dangerous situation. They  
40 cheated death, to some degree, and the FAA then  
41 responded in a number of ways, but one of the things  
42 that they did was they said now, if you have a pilot  
43 that is convicted, that you are going to do an  
44 assessment.

45           The issue there is what is the most  
46 appropriate assessment to do? We've had a question  
47 should we just do the alcohol, should we just do the  
48 drugs? I'd like to just contribute the idea that 50  
49 percent of the individuals who are diagnosed with a

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1 substance abuse problem for illegal drug or  
2 prescription drug also are diagnosed as having an  
3 alcohol problem.

4 So I think that, if you look at it in the  
5 broader context, both are justifiable. But the other  
6 part of it, which I think is a legitimate concern, is  
7 what is the value -- Since alcohol abuse and drug  
8 abuse is sometimes episodic, what is the value of  
9 having a scheduled, pre-appointed alcohol test, and  
10 would it also not be worthwhile considering doing  
11 really an assessment of substance abuse assessment,  
12 because really the answer we have.

13 If we look at it that way, we're not even  
14 doing a search. So we can sidestep all of the legal  
15 issues about what's the probable cause for the type of  
16 search that we are doing, although I would say that  
17 it's probably justifiable to do the drug and alcohol  
18 piece.

19 The challenge, I think, that we are going  
20 to have here from the MRO's perspective, in addition  
21 to how are we going to handle the data flow and all of  
22 this, is also going to be the establishment of  
23 standards and practices.

24 We've talked a lot this morning about the  
25 issue of what is a history of substance abuse, and the  
26 question that came up that was provocative to me is  
27 what percentage of individuals have a substance abuse  
28 history.

29 Well, from a theological perspective, we  
30 all do. Just some of us have been caught. Again, I  
31 don't want to be trite about that, but the truth of it  
32 is that, you know, DUI/DWI is indicative of perhaps a  
33 drinking problem, and the general rule is that two  
34 certainly is, and half the addictionologists think  
35 that one is.

36 The issue is that, to a large degree,  
37 that's just been luck, bad luck. I mean, many of us  
38 have driven a car that we shouldn't have driven or  
39 have abused a substance, whether it's a drug. The  
40 Chief Justice of the United States has got a history  
41 of substance abuse. He developed a back injury and  
42 was treated for it, and it was in the news.

43 So we have -- So the issue then is how do  
44 we define that, and how do physicians who have a  
45 variety of different perspectives on this establish  
46 standards of practice? The challenge that I think the  
47 MRO community has, not only with this program but also  
48 the DOT and the DHHS program, is establishing those  
49 clinical parameters or standards of practice so we

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1 don't have one seeing it one way and one seeing it  
2 another.

3 Again, you have plenty of examples in the  
4 existing program where utilities interpret these black  
5 and white provisions with their relevant ambiguity in  
6 dramatically different ways.

7 So again, I just wanted to just point out  
8 that I think we have -- A lot of the difficulty will  
9 be in the nuts and bolts of all of this.

10 Of course, the other observation I have --  
11 although I'm involved very much in this industry, I'm  
12 not part of the industry, but I will tell you what I  
13 have seen over a ten-year period.

14 Ten years ago when Loren was having these  
15 meetings, the issue was holding back the utilities in  
16 terms of what the scope of testing was. Now because  
17 of the fundamental change in the economic and  
18 regulatory industry, all of the folks in here were  
19 very much, I know, advocates of having a drug-free  
20 workplace and a fitness-for-duty program are  
21 constantly under pressure to minimize the time out for  
22 individuals.

23 Again, I'm preaching to the choir here,  
24 but again just from my observation, the fundamental  
25 paradigm has changed where the pressure is do the  
26 minimum. Do the minimum amount of work in this area,  
27 and that is going to be the challenge, I think, for  
28 both the staff as well as the industry.

29 Again, the MROs -- all I think they need  
30 to have is pretty much a clearly defined role and  
31 responsibility to sort of minimize the divergence,  
32 because part of what we really want to do is keep them  
33 out of trouble as well.

34 With that, I'll say thank you.

35 MODERATOR WEST: Well, thank you, Ted. We  
36 appreciate those comments.

37 MR. ENKEBOLL: I'd like to make one  
38 observation based on what you said.

39 MODERATOR WEST: Certainly.

40 MR. ENKEBOLL: Rich Enkeboll, NEI. I do  
41 not believe that there is anybody slacking off,  
42 thinking we want to do the minimum in fitness-for-  
43 duty. Everybody here wants to do what's appropriate,  
44 what's necessary.

45 The problem is they are telling you that  
46 several things that you are asking for do not add any  
47 value, and you shouldn't just do it because it seems  
48 like a good idea. If it doesn't add value, if it's

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1 not safety significant, then we don't want to do it.  
2 But doing it right is what everybody here wants to do.

3 MODERATOR WEST: Thank you for that  
4 clarification.

5 At this point, we'll take a break, and  
6 let's reconvene at a quarter to four.

7 (Whereupon, the foregoing matter went off  
8 the record at 3:23 p.m. and went back on the record at  
9 3:48 p.m.)

10 MODERATOR WEST: We just have a little bit  
11 to cover in the section 26.25 in a moment, and from  
12 looking over my slides we have a fair amount in the  
13 section of 26.27. I'm not totally confident we will  
14 get through all of that today, but we'll cover as much  
15 as we can of 27.27 and then pick up with the remaining  
16 portions on tomorrow, and I'll talk a little bit more  
17 at the end of the day about tomorrow's schedule,  
18 although it's fairly straightforward in terms of what  
19 you see in the agenda.

20 (Slide change)

21 In 27.25 you will note the two bullets --  
22 Even though it's saying that EAPs now must be designed  
23 to achieve early intervention, it's not to -- It's a  
24 little misleading in the sense that, certainly,  
25 efforts are currently underway in that area for sure.

26 It also points out EAPs must also provide  
27 for confidential assistance except in this instance  
28 that's noted, conditions where there's some concern  
29 about the hazard to the individual or others.

30 The only point here is that, with respect  
31 to a change in the rule, concerns the fact that we  
32 have gone from a "shall" in the current rule to a  
33 "must," and I might note that some programs have -- in  
34 terms of the early intervention aspects of what we  
35 have there, some programs have made self-referrals as  
36 somewhat of a first strike and, therefore, discouraged  
37 early referrals and intervention.

38 The attempt here is just to perhaps  
39 emphasize the obvious which has always been in the  
40 rule, that the earlier the intervention or  
41 identification of someone that has a problem with the  
42 misuse of drugs and alcohol is certainly desirable.

43 We didn't get any advance questions in  
44 this area, and I guess before -- just before shifting  
45 into 27.27, if there are any additional thoughts in  
46 this area, we could get into that now. Please?

47 MR. MORIARTY: John Moriarty, Vermont  
48 Yankee. Just a quick question. Earlier some  
49 discussion about employees, individuals, persons, long

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1 term/short term contractors. When you say employees  
2 under EAP, the definition remains the same, all  
3 persons subject to the program or are we--

4 MODERATOR WEST: Yes. I think that would  
5 be the case, all persons that are subject to the  
6 program.

7 MR. MORIARTY: Has access to an EAP  
8 program.

9 MR. ALBERT: Let me understand your  
10 question, John. Are you saying then at your site, if  
11 a contractor tests positive, that you are required to  
12 put that individual in an EAP? Is that your question?

13 MR. MORIARTY: No. In a broader sense.

14 MODERATOR WEST: I thought your question  
15 concerned -- Earlier we were talking about how do we  
16 define employee personnel. It seemed to me the  
17 response at that time had included long term  
18 contractors as well. So that's what I was trying to  
19 refer back to. But do you have some other aspect with  
20 respect to the EAP program that you're trying to get  
21 at that maybe I've missed?

22 MR. MORIARTY: For purposes of the meaning  
23 of employee under EAP, it is everybody that is subject  
24 to the program?

25 MODERATOR WEST: Anyone that's subject to  
26 the program, and that certainly would include employee  
27 personnel, and then you would have individuals that --

28 MR. MORIARTY; Short term or long term  
29 contractors, licensee employees all have equal access  
30 to an EAP program, to self-refer or for mandatory  
31 referral?

32 MODERATOR WEST: I guess in some instances  
33 with contractor personnel, you would have the case  
34 where you are accepting another program. So I guess  
35 part of accepting another program could include a  
36 program that has its own EAP component. So that would  
37 be one thought that I would have.

38 MR. MORIARTY: It was just a question of  
39 availability, that everyone that comes onto the  
40 umbrella of the program can refer themselves or  
41 mandatorily referred to an EAP provider, either under  
42 your own program or the --

43 MODERATOR WEST: Or some other program,  
44 yes. I think the answer to that would be yes, and we  
45 would certainly expect them to be in some program,  
46 whether it's the licensee's program or their own  
47 program that the licensee is accepting. Yes.

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1 MR. ALBERT: Okay, John. Come back up to  
2 the mike. Don't leave yet. Let me understand. Let  
3 me make sure that we're on the same page here.

4 So you're saying then that for your  
5 particular site that you may accept a contractor's EAP  
6 program for someone who may have tested positive by  
7 your program? I just want to understand the practical  
8 application of what you are asking.

9 MR. MORIARTY: So long as there is an EAP  
10 program available, for whatever the situation, if it's  
11 a tested positive or whatever, so long as it's  
12 properly audited, if the site chooses to accept a  
13 contractor's EAP program, that's fine. But I just  
14 wanted to be sure there was no doubt that everybody  
15 that has access that is subject to a program of  
16 fitness-for-duty includes access to an EAP program.

17 MODERATOR WEST: I guess another aspect of  
18 your question also is does it have to be the  
19 licensee's program versus the contractor's program.

20 MR. MORIARTY: No. I would assume that it  
21 could be either, so long as the licensee accepted the  
22 contractor's program, appropriately audited program.

23 MODERATOR WEST: I think that's correct.

24 PARTICIPANT: You're saying a program for  
25 employees and contractors, whether it's through our  
26 own licensee program or whether it's accepted  
27 contractor's?

28 MR. MORIARTY: That's my question.

29 MODERATOR WEST: I think the question is  
30 would we expect in instances where there is a need for  
31 an individual to be in an EAP program for the  
32 individual to be in one or the other, a licensee's  
33 program or a contractor's program.

34 I think the answer is, if there is a need  
35 for an individual to be in an EAP program, we would  
36 expect them to be in one or the other. We would  
37 expect them to be in a program, and I think this  
38 gentleman has -- if I understood his question  
39 correctly, and his comment -- if the licensee has  
40 accepted another program and it's properly audited and  
41 so forth, it would be acceptable for the individual to  
42 be in a program, and if it's an acceptable program to  
43 the licensee, it's an acceptable program.

44 MR. MORIARTY: But in any event, there  
45 needs to be an EAP program, one way or the other,  
46 available to everyone.

47 MODERATOR WEST: I guess part of that has  
48 to do with even for contractors. Clearly, for the

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1 licensees. Ron, do you have any insights on  
2 contractors?

3 MR. ALBERT: Okay. I just want to make  
4 sure I'm on the same page with you, John. I don't  
5 think the rule is requiring you to ensure that even  
6 your contractors have EAP programs or everybody has an  
7 EAP program. That's your choice as a licensee.

8 Certainly, you've got to have one for your  
9 people, but if you choose not to have one for your  
10 contractors and they test positive and you take some  
11 other measures, that's your prerogative to do that, if  
12 that's the confusion or if there's any confusion. I  
13 don't think there is any.

14 MODERATOR WEST: Thank you for that  
15 clarification.

16 MR. MORIARTY: We interpreted the rule  
17 that an EAP program has to be -- does offer assessment  
18 and short term counseling, referral services,  
19 etcetera, to everybody that came under the scope of  
20 the rule.

21 MR. ALBERT: Okay.

22 MODERATOR WEST: And your point is that?

23 MR. MORIARTY: That's my question to you  
24 guys, because if that's not the case, we'll go back  
25 and --

26 MR. ALBERT: Well, my short answer to you  
27 is this, that certainly you have to have it for  
28 licensee employees, people who work directly for the  
29 company. We are not telling you that it's required  
30 for contractor people. That's the short answer.

31 MS. DURBIN: The longer answer would be  
32 provided at another time.

33 MODERATOR WEST: And we'll look into it a  
34 little bit further. We can go with the short answer,  
35 and we'll look into it a little bit further. Thank  
36 you.

37 MS. ROOKS: Billie Rooks, Souther Nuclear.  
38 We have a concern, and maybe we are the only ones that  
39 has this concern, about how you can effectively manage  
40 and have an EAP program and still maintain  
41 confidentiality for that employee for self-referrals  
42 or problems that could affect their fitness-for-duty  
43 when they are -- in effect, the vendor has to report  
44 those or should report those to the licensee if they  
45 have a problem that could affect their fitness-for-  
46 duty .

47 For instance, if you have someone that is  
48 admitted with bipolar disorder -- you all ever heard  
49 that? -- to the EAP program, and this could definitely

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1 adversely affect their fitness-for-duty, and they  
2 report it to us, the vendor or either the person.  
3 Actually, it comes from the people themselves. The  
4 employees will report it.

5 Then so we have a concern about the  
6 confidentiality and how we can effectively manage a  
7 program like that to meet the requirements of the  
8 rule. Do you have an answer for that?

9 MODERATOR WEST: So your point is that --

10 MS. ROOKS: Confidentiality is crucial,  
11 and we agree. We certainly want to follow that. We  
12 inform our employees. I don't know how other  
13 licensees do this, but we have an EAP program, and you  
14 try to ensure them it's confidential. But on the  
15 other hand, you have to give them this little caveat  
16 that it's confidential except if your fitness-for-  
17 duty is affected.

18 So in effect, it really isn't  
19 confidential.

20 MODERATOR WEST: Would that  
21 confidentiality be with respect to this second bullet  
22 here where you have some concerns about the  
23 individual's --

24 MS. ROOKS: Or fitness-for-duty  
25 reliability, trustworthiness. You know, almost any  
26 kind of mental health condition can affect their  
27 reliability and trustworthiness.

28 MODERATOR WEST: Nancy, do you have any  
29 thoughts on that?

30 MS. DURBIN: Only that the exception is  
31 not if the person has a general fitness-for-duty  
32 issue, but only if that fitness-for-duty issue  
33 constitutes a hazard to himself or herself or others  
34 that the EAP personnel are supposed to inform you. So  
35 that's a fairly high standard, if there's an immediate  
36 hazard. That's something your EAP people will need to  
37 be trained in with regard to personnel who are working  
38 in nuclear power plants, what kinds of issues would  
39 create those kinds of problems.

40 One of the other issues, of course, is  
41 whether or not that fitness-for-duty issue would be a  
42 violation, and in that case it would not. So there  
43 wouldn't be any sanctions involved either. I think  
44 that's probably pretty clear to everyone. But it's  
45 not simply that they might be unreliable or  
46 untrustworthy or, you know, may not meet the highest  
47 standards. It's that they constitute some kind of a  
48 hazard to himself or herself or others.

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1                   That would be in the context of working in  
2 the protected area of a nuclear power plant. Does  
3 that help?

4                   MODERATOR WEST: And I think that's the  
5 point that we are trying to make with the --

6                   MS. ROOKS: Just where do you draw the  
7 line, I think, is probably the main thing; because  
8 that's a very gray area, to me.

9                   MS. DURBIN: It's going to be.

10                  MS. ROOKS: And to our group. Thank you.

11                  MODERATOR WEST: Thank you.

12                  MR. DiPIETRO: Just one comment on the  
13 contractor of EAPs in 1385, Section 6 under  
14 Contractor/Vendor Programs 6.4. Do  
15 contractor/vendors, even small ones such as grass  
16 cutter and building cleaners, have to have an employee  
17 assistance program?

18                  It says the contractor must have an EAP  
19 only if the licensee has reviewed and accepted the  
20 contractor's program under the provisions of 10 CFR  
21 26.23, which is if you accept the whole fitness-for-  
22 duty program. If the licensee does not accept the  
23 contractor's program or the contractor does not have  
24 a program, the contractor will come under the  
25 licensee's FFD program.

26                  If the contractor is being covered by the  
27 licensee program, the licensee is not required to  
28 provide the contractor with an EAP. So I think it's  
29 answered.

30                  MODERATOR WEST: Thank you. That's very  
31 helpful. Appreciate that.

32                  (Slide change)

33                  MODERATOR WEST: Now we'll move on to  
34 Section 26.27, and you will -- My colleagues are  
35 conferring here a little bit, but we can go to the  
36 next slide. Thank you.

37                  You'll notice here that there are some  
38 changes in this section that we alluded to earlier,  
39 and I guess it's certainly no surprise to you that we  
40 have some changes in this area.

41                  So that we have changes to clarify and to  
42 increase consistency. Clearly, the alcohol violations  
43 now result in the same sanctions as drug violations,  
44 which certainly wasn't the case with the current rule.

45                  We have, throughout this rulemaking  
46 effort, we have increased the focus on subversion, and  
47 applicants now must have sanctions imposed with regard  
48 to record violation.

49                  (Slide change)

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1 MODERATOR WEST: On the next slide there  
2 are requirements for a written statement by an  
3 individual, and these statements are more specific,  
4 and they are also broader, and we try to give you some  
5 characterization of which statements are more  
6 specific. Certainly, covering the last five years and  
7 the broader aspects of the second bullet on the sale  
8 or possession of illegal drugs, and certainly we've  
9 given some attention to related areas here, or  
10 employment action taken for alcohol or drug abuse.  
11 That's certainly much broader.

12 On the third item, there hasn't been any  
13 change in that area. Then lastly, there also hasn't  
14 been any change with regard to removing an individual  
15 with respect to an FFD violation.

16 (Slide change)

17 MODERATOR WEST: On the next slide there  
18 is more specificity with regard to consequences of a  
19 history of substance abuse, and we've clearly spent a  
20 fair amount of time on that.

21 If a concern arises regarding the  
22 individual's history, there must be a management or  
23 medical determination of fitness. That's not new.  
24 And an appropriate follow-up program -- that's not  
25 new.

26 The new aspects would include meeting the  
27 restrictions of 26.24(a) with regard to return-to-duty  
28 testing, determination of fitness, and proof of  
29 abstinence.

30 (Slide change)

31 MODERATOR WEST: Now as I mentioned, there  
32 is more specificity in this particular area, and you  
33 may notice a theme throughout the rule with regard to  
34 granting of access. There are a number of places  
35 where the requirements have been relaxed, accepting  
36 other programs, to some degree, accepting any pre-  
37 access test that was negative in the last 60 days,  
38 allowing individuals to have access prior to the  
39 results of their pre-access test under certain  
40 conditions. This latter area is certainly accompanied  
41 by more restrictions on access or more attention in  
42 that area with regard to anyone with a history of  
43 substance abuse.

44 (Slide change)

45 MODERATOR WEST: You note with the next  
46 slide the highlighted section, the bolded language  
47 with respect to failure of the individual to list  
48 reasons for removal or revocation of unescorted access  
49 or failure to authorize the release of information is

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1 sufficient to deny unescorted access. So that bolded  
2 portion has been added.

3 (Slide change)

4 MODERATOR WEST: Next specifically under  
5 Access authorization, we have completing the suitable  
6 inquiry to check accuracy of a statement must cover a  
7 period of five years and, if there is no previous  
8 violation of a fitness-for-duty policy, temporary  
9 access is okay with those considerations that are  
10 noted there.

11 First, we would expect the completion of  
12 the one-year verification of the accuracy of the  
13 individual's statement and, second, the initiation of  
14 the five-year suitable inquiry and the provision of a  
15 test specimen. If there is, in fact, a history of a  
16 violation of the FFD policy, temporary access cannot  
17 be granted.

18 (Slide change)

19 MODERATOR WEST: And as we have certainly  
20 discussed, individuals with a history of substance  
21 abuse -- this would now include consideration of a  
22 DUI. Yes?

23 MR. HARRIS: Would you like me to wait  
24 until the end?

25 MODERATOR WEST: I think in this section,  
26 since we have probably more than we can probably even  
27 cover by the end of the day, it would be appropriate  
28 for you to talk.

29 MR. HARRIS: Thank you. Neil Harris, TXU  
30 Electric. In Item 3 it says the licensee shall  
31 complete a suitable inquiry on the best efforts basis  
32 to verify the accuracy of the individual's written  
33 statement made under paragraphs (a)(1) through (a)(2)  
34 of this section. This suitability inquiry should  
35 cover at least the past five years, but in no case  
36 less than the past three years.

37 Where do we come in with this caveat for  
38 the past three years? Why do we speak throughout this  
39 document of the five-year history on individuals, and  
40 now we introduce a three-year caveat?

41 MODERATOR WEST: That's a good question.  
42 I'm not sure I'm going to be able to give you a good  
43 answer.

44 MS. DURBIN: I can say a couple of things.  
45 One is that this has always been in the rule, this  
46 kind of convoluted language, and in the first  
47 implementation document I believe there is a  
48 discussion.

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1 I finally found someone who explained it  
2 clearly, and you are supposed to definitely do three  
3 years, and a best efforts for five years. So it kind  
4 of is supposed to say, you know, you're supposed to do  
5 five years on a best efforts, but in no case can you  
6 not finish the three-year thing.

7 That was how it was interpreted in the one  
8 document I found that addressed it in a way that  
9 seemed clear.

10 MR. HARRIS: Do we not feel that it's in  
11 opposition 180 out from having individuals, though,  
12 having to fill out historical information for five  
13 years, as well as other things that apply on a five-  
14 year basis in this document?

15 You know, it seems like this would have  
16 been a great opportunity to eliminate these caveats  
17 and these "I've got this explained in another  
18 document" type of thing.

19 MODERATOR WEST: Okay. Thank you for your  
20 comment. Please, do you have a comment or a question  
21 or whatever?

22 MR. BURRELL: Yes, Garmon. On Item 2 in  
23 26.27(2) you use the word duration now. Statement  
24 made under paragraph (a)(1) of the section must  
25 include the individual's declaration as to the  
26 specific type, duration and resolution of any such  
27 matter.

28 What's the expectation for duration? What  
29 does that mean?

30 MODERATOR WEST: I think we would probably  
31 have to take that as a item to provide you further  
32 clarification.

33 MR. BURRELL: What gives me some concern  
34 is as it might relate to (A). Again, we have that  
35 legal or employment action taken against him issue,  
36 and what's the duration of that legal or employment  
37 action. The connotation there is somewhat concerning.

38 MODERATOR WEST: But I hear your comment  
39 under 26.27(A)(2).

40 MR. BURRELL: On down to Item number (4).  
41 If we could go back to slide 59, please. We used some  
42 new words there which raises a concern, and I notice  
43 the first bullet under the bold language there says  
44 "must have a management or medical determination of  
45 fitness," not new. The words "raises a concern" are  
46 new indeed. And what might that be? How can we  
47 quantify that, because I can assure you from a QA  
48 perspective, we're going to be expected to quantify  
49 that?

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1 MODERATOR WEST: I don't think that's  
2 necessarily different than other current language in  
3 the rule that would speak to if you have some question  
4 about an individual's fitness-for-duty that you are  
5 obliged to clear up that question and to take the  
6 individual off shift and to clear up that question  
7 before you would return them to shift.

8 MS. DURBIN: I actually have my theory  
9 about what the answer might be, if I can. Originally,  
10 the language was referring to the record of a  
11 violation of fitness-for-duty policy only, which is  
12 what you would have given in your written statement.

13 Now you are giving not only that statement  
14 but also if you have some kind of history of substance  
15 abuse. So that it's broader. But putting this  
16 language in, which raises a concern about the person's  
17 history, it gives you flexibility to decide whether  
18 the information about their history is of enough  
19 concern that you should do a medical and management  
20 determination of fitness.

21 This is my --

22 MR. BURRELL: That was, quite candidly, my  
23 fear, because when that happens, we are driven back to  
24 the legal or employment action taken against them, and  
25 the descending, if you will, or escalating  
26 determinations of the impact of the various  
27 definitions that go to this issue.

28 MS. DURBIN; Right.

29 MR. BURRELL: So we end up with the  
30 requirement, quite possibly, in many cases for a  
31 medical determination if something raises a concern.  
32 So if it raises a concern, it's now out of my hands as  
33 an access manager, out of the hands that would be  
34 applicable both between mine and the psychologist's,  
35 and now driven directly to a medical determination  
36 that didn't have to be done in the past.

37 I could work alone in this respect or I  
38 could work in concert with a psychologist in this  
39 respect. Now that option doesn't exist or might not  
40 exist if there's something that raises a concern and  
41 we cascade back through these various definitions.

42 MS. DURBIN: If the language about raising  
43 a concern was not in there, you would have to do a  
44 medical and management determination of fitness about  
45 everything that was listed in Section (A). I mean  
46 what this is doing is giving --

47 MR. BURRELL: Again, Section (A) has that  
48 new language in it as well.

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1 MS. DURBIN: Right. Section (A) has new  
2 language in it. This new language is intended to  
3 allow some flexibility in determining whether that new  
4 information is giving you a concern or not, and  
5 licensees will need to make a decision about if -- If  
6 I had a DUI four years ago, do I think that raises  
7 enough of a concern that I'm going to do a medical and  
8 management determination of fitness?

9 There can be a policy about whether that  
10 -- As I said, I'm going out on a limb here, but that  
11 language, I believe, was added in order to reduce the  
12 impact of the additional information, to give you the  
13 benefit of the additional information without creating  
14 an immediate medical and management determination of  
15 fitness in all cases.

16 MODERATOR WEST: I think your question --

17 MS. DURBIN: I am on a limb.

18 MODERATOR WEST: -- and concern in this  
19 area -- it may well be that what this was intended to  
20 do, you are not necessarily viewing it in terms of  
21 being more flexibility but rather -- correct me if I'm  
22 wrong -- but rather raising the standard with respect  
23 to medical or management determination.

24 MR. BURRELL: Quite likely.

25 MODERATOR WEST: And I think, assuming  
26 that we are accurate on how we are discussing this,  
27 namely that it is introduced to give more flexibility,  
28 I think this is something we can certainly address in  
29 a clarification type statement.

30 MR. BURRELL: Okay, thank you.

31 MS. MATULA: On the same note of that in  
32 the same paragraph, my concern also states "must be  
33 based on the management and medical determination of  
34 fitness-for-duty and the establishment of an  
35 appropriate follow-up testing program."

36 I guess that wording "and" with no  
37 flexibility -- If it raises a concern and you have it,  
38 "and" you are going to have a follow-up. It kind of  
39 gets you to the point that there is no -- you don't  
40 have to have a follow-up.

41 MS. DURBIN: Well, an appropriate follow-  
42 up program might be meeting with the AP one more time  
43 next week. I mean, it's --

44 MS. MATULA: Not follow-up as in defined  
45 as follow-up in --

46 MODERATOR WEST: Testing.

47 MS. MATULA: -- in testing

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1 MS. DURBIN: Right. The follow-up testing  
2 is required specifically if it was a violation, but  
3 those are not --

4 MS. MATULA: So the word follow-up here is  
5 just following it up.

6 MS. DURBIN: Right.

7 MODERATOR WEST: Well, that's not true.

8 MR. BRAZIL: Lisa, to look at what you put  
9 in in bold "and the establishment of an appropriate  
10 follow-up testing program as specified in  
11 26.24((A)(4)" which is specifically follow-up testing,  
12 not less than once every 30 days for four months.

13 MODERATOR WEST: Is it clear, though, that  
14 the language with respect to it -- and it clearly is  
15 follow-up testing program. Is it clear that that  
16 hasn't been added? I mean, that's in the current  
17 rule. There's nothing new about that.

18 MS. MATULA: It is in it, that you have to  
19 do that.

20 MODERATOR WEST: That's in bold.

21 MR. ALBERT: All right, let me ask you a  
22 question. What you are saying then, if you did the  
23 evaluation and there was nothing that you determined  
24 that you needed to follow up on, your question to us:  
25 Do you still need to do follow-up testing, that you  
26 don't have any flexibility?

27 MS. MATULA: Correct. Yes. If I send him  
28 to the medical review officer and he does all his  
29 tests, clinical and exam, and he comes back and says  
30 this person does not have a problem, why do I have to  
31 have follow-up testing, which is what I think this is  
32 telling me?

33 MR. ALBERT: Then appropriate follow-up  
34 would be none.

35 MS. MATULA: Follow-up testing, none.

36 MR. ALBERT: Would be none.

37 MS. MATULA: Okay.

38 MODERATOR WEST: Thank you, Ron.

39 MS. MATULA: Accepted.

40 MR. BRAZIL: Scott Brazil again. I hate to  
41 be redundant, but I want to -- Nancy said she was  
42 going on a limb, and I think what you said, Garmon, in  
43 response to that was the same.

44 My issue with paragraph (4) here was  
45 whether or not, as a licensee, I would have the  
46 flexibility to determine whether any of the  
47 information that I gather in Alpha (1), (2) or (3)  
48 raises a concern.

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1           If that's left to the licensee to  
2 determine, if I have, say, a matrix and say is that  
3 one DUI within the last five years, that's not a  
4 concern. He's had two within the last five. That's  
5 not a concern. He's had three within the last month.  
6 That's a concern.

7           If I determine it's a concern, then I have  
8 to do the remaining part of this, which is a  
9 management/medical determination of fitness and -- not  
10 or -- and establishment of an appropriate follow-up  
11 testing program.

12           MODERATOR WEST: If you reach that  
13 threshold, and if you are correct about the new  
14 language at the beginning of Section 4, allowing more  
15 flexibility rather than raising the standard.

16           MR. BRAZIL: But I just want to make sure  
17 I understand. The licensee is going to have the  
18 flexibility to determine whether or not that  
19 information raises a concern?

20           MODERATOR WEST: I think that answer is  
21 correct, and we'll have to corroborate that. But I  
22 think the initial answer is yes.

23           MS. DURBIN: Yes. And I think -- and we  
24 will have to look at this carefully, but I think if  
25 you go to the language in follow-up testing, it's the  
26 30-day -- you know, the once every 30 days for three  
27 years and things -- is specified for people who have  
28 violated the rule. Other kinds of appropriate follow-  
29 up testing can be also included there, I believe.

30           So we need to go through this carefully  
31 and go through the rule, but the idea is not that  
32 someone had three DUIs and you're going to have to put  
33 them in this very rigorous follow-up program. The  
34 idea is you get them in an appropriate follow-up  
35 program.

36           MR. BRAZIL: You are correct, because  
37 under (4)(i) and (ii) there, there are the two where  
38 you would definitely put them in the 30-days and 90  
39 days for the three years. Thanks.

40           MODERATOR WEST: Thank you. Please.

41           MR. SEARS: Garmon, Russell Sears,  
42 Entergy. A question about the provision that overlaps  
43 into 73.56. If the individual has been previously  
44 removed for violating the licensee fitness-for-duty  
45 policy, temporary access provisions are not applicable  
46 and cannot be utilized.

47           Under the scenario of bringing somebody  
48 back in that situation, the background investigation,  
49 the initial drug test, medical review and management

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1 determination will all be completed long before  
2 fingerprints are available and, even if we get the new  
3 rule and we have fast turnaround on that, if there's  
4 military involved, MPRC response is going to be  
5 lagging far behind that.

6 Is there any indication from the NRC's  
7 perspective whether or not we are going to have relief  
8 in those areas or we're going to have to wait for  
9 those provisions to be fulfilled to grant temporary  
10 access?

11 MODERATOR WEST: To be honest with you, we  
12 haven't really addressed that specifically.

13 MR. SEARS: Not addressing those would  
14 effectively ban those people from being considered for  
15 access, and I don't know that that's the intent.

16 MODERATOR WEST: Thank you for raising  
17 that. Brad, did you want to add anything?

18 MR. BAXTER: On the question of the, I  
19 guess, relief for the electronic fingerprints and the  
20 fast turnaround period, right now we are in a holding  
21 pattern with the FBI and their Office of General  
22 Counsel.

23 So the NRC's perspective, we are ready to  
24 go, and the FBI's OGC and the NRC OGC - it's currently  
25 fighting the battle of a third party entity. So right  
26 now those who attended the FBI fingerprint, I guess,  
27 meeting that PADS held down in Crystal City -- we're  
28 still waiting for the 45-day response from FBI's  
29 General counsel. So right now we're just in a holding  
30 pattern to get that fast turnaround.

31 I think that would help alleviate some of  
32 this discrepancy of derogatory information.

33 MODERATOR WEST: So that probably doesn't  
34 nail the question, but at least it gives you some  
35 sense of where we are at with respect to addressing  
36 it, in some of these other areas at least.

37 MR. BURRELL; Garmon, I don't want to be  
38 premature here. We did 26.27(C)(6) -- have we gotten  
39 there yet?

40 MODERATOR WEST: Let me take a look. No.

41 MR. BURRELL: Then I'm premature.

42 MR. DiPIETRO: I have a comment on this  
43 last comment that Russell made. If an individual is  
44 holding unescorted access and then they violate a  
45 fitness-for-duty policy, in the rules that we have  
46 under the access we could bring them back under a  
47 reinstatement or an update and not have to do a whole  
48 temporary clearance process on them again, depending

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1 on the time frame and how long they don't hold  
2 unescorted access.

3 So it's kind of contradictory to what some  
4 of the provisions in the access rule, and maybe that  
5 needs to be taken into consideration.

6 MODERATOR WEST: Okay, thank you.

7 MS. TECHAV: I had a question or maybe  
8 just a clarification. In 26.27(C)(3) it says that the  
9 licensee shall complete a suitable inquiry on a best  
10 effort basis to verify the accuracy of the  
11 individual's statement made under the paragraphs  
12 included.

13 The definition before "suitable inquiry"  
14 said that it had to go to the employer. There is no  
15 definition for suitable inquiry anymore. I was  
16 wondering what the intent of that is. Does it still  
17 need to go to the employer or just to the licensees?

18 MODERATOR WEST: Do you have any thoughts  
19 on that, Nancy?

20 MS. DURBIN: I think yo need to do the  
21 suitable inquiry for all previous employers. Is that  
22 what you are asking?

23 MS. TECHAV: No.

24 MODERATOR WEST: You're concerned with  
25 where the report has to go?

26 MS. TECHAV: I'm wondering who we have to  
27 do the suitable inquiry to, because the definition  
28 before was in the fitness-for-duty rule, said that it  
29 had to go to the employer. The definition is now  
30 gone. It's not there anymore. It doesn't define what  
31 a suitable inquiry is anymore.

32 MS. DURBIN: Okay.

33 MS. TECHAV: In the access rule or the  
34 fitness-for-duty rule. So we're wondering, do we do  
35 it on a best effort? Do we go to references? Can we  
36 go to the licensees or do we have to go to the  
37 employer still?

38 MS. DURBIN: Okay. This is one that we  
39 will have to address. I think we took it out because  
40 we thought it was an access authorization, and we  
41 wanted to be consistent. It seemed like we'll let  
42 them define it.

43 So this is one where we'll have to give  
44 you an answer I would guess.

45 MS. TECHAV: Okay, thank you.

46 MS. DURBIN: I wouldn't guess it changed.

47 MODERATOR WEST: Thank you for raising  
48 that. Appreciate it. Yes, sir?

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1 MR. CASEY: Ron Casey, TVA, again. To  
2 follow up just a little bit on that, because you did  
3 add this (A), in the past five years used, sold,  
4 possessed any illegal drugs, had a legal action or  
5 employment action. But these are a lot of -- Some of  
6 these you're not going to get from employers, former  
7 employers.

8 Under the current rule where you ask the  
9 four questions, they can typically either answer you  
10 or say they are not going to answer you, but here, you  
11 know, a lot of employers are not going to know if  
12 you've ever used drugs before or had a legal action  
13 specifically, if you worked at McDonald's or someplace  
14 like that.

15 So I think that's what -- following up a  
16 little bit on, you know, was the intent to go to the  
17 employer or to do something else and try to verify the  
18 accuracy of the written statements from the  
19 individuals.

20 MODERATOR WEST: I understand, and we'll  
21 certainly clarify that. Thank you again.

22 MR. PIRTLE: Just one quick comment, if I  
23 may. I think a lot of problems in the past have been,  
24 when you were kind of driven to employers, too often  
25 you got the response that it is our policy to only say  
26 that Gary Pirtle worked here from this day to that  
27 day, and he held the position of chief janitor when he  
28 left, and wouldn't tell you anymore.

29 Our rules were not binding on those  
30 employers to tell you more information. However, our  
31 rules are binding on licensees or holders of NRC  
32 license to respond to specific questions that are  
33 addressed by the access authorization rule.

34 You will probably get a lot more  
35 information that is useful to you in making your  
36 access authorization and fitness-for-duty decisions.  
37 Although the decision hasn't been final, I think we in  
38 the regions would encourage in clarifying documents  
39 that it either be both, the employers or licensees,  
40 but that will have to be addressed at a later time.

41 Too often we've looked at access  
42 authorization files and kind of seen disclaimers from  
43 employers, and little more can be done except to  
44 follow up with a FAX so they could tell you by FAX  
45 what they told you by phone. But, hopefully, it will  
46 be worked out.

47 (Slide change)

48 MODERATOR WEST: Okay. On the next slide,  
49 62, we've certainly talked about some aspects of this

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1 previously. I'll try to just focus on the portions  
2 that we haven't given a lot of attention to, and  
3 that's principally the portion that has to do with the  
4 72 hours.

5           Regarding that, when the person returns,  
6 the licensee must now do a return-to-duty testing in  
7 this context related to getting away from 60 days and  
8 so on, but not necessarily wait for the results of  
9 that test, and must initiate a suitable inquiry  
10 regarding activities during the period of the absence  
11 within 72 hours of granting access.

12           So I think that's essentially the portion  
13 we haven't discussed. Next --

14           MR. BURRELL: Garmon, I guess I would like  
15 to go back to (C)(6) now, as we've jumped to (C)(7).

16           MODERATOR WEST: Sure.

17           MR. BURRELL: (C)(6) deals with temporary  
18 access or temporary unescorted access pursuant to  
19 73.56 is to be granted, so forth and so on. Then (i)  
20 now requires the initiation of suitable inquiry for  
21 the balance of the past five years.

22           Your expectation would be what there  
23 regarding the word initiate? I read this as though we  
24 are going to be expected now to have in process all  
25 the data from all the employers for suitable inquiry,  
26 if we have to go to employers.

27           MODERATOR WEST:           That's    your  
28 interpretation of initiated?

29           MR. BURRELL: That's what I believe this  
30 says. If it's other than that, I would certainly like  
31 to hear that.

32           MODERATOR WEST: I think we have a slide  
33 that will address that. So if you would hold off on  
34 that, we could deal with and, if I'm incorrect -- and  
35 I don't think I am -- I'll revisit it.

36           MR. BURRELL: And I believe I heard t he  
37 word initiate under item (7) or the 72 hour window,  
38 and the word in the rule is complete suitable inquiry  
39 not later than 72 hours after unescorted access has  
40 been restored. Doesn't say initiate; it says  
41 complete.

42           MODERATOR WEST: Correct, with respect to  
43 the 72 hours. Yes.

44           MR. BURRELL: And this is for people  
45 returning to a licensee that they previously held  
46 access?

47           MS. DURBIN: That they currently hold  
48 access in.

49           MODERATOR WEST: I think the point here --

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1 MR. BURRELL: I'm sorry. Say that again.

2 MS. DURBIN: This particular requirement,  
3 I believe, is the same as for return -- the category  
4 of people that were in return-to-duty testing. They  
5 are people that have been in your program. They are  
6 your employees. They have been away for more than 60  
7 days, not covered by the program, and so this is a  
8 very quick check to see where they were and what they  
9 were doing during the period of time that they were  
10 still in your employe but out of your -- out from  
11 under your program.

12 MODERATOR WEST: And I think the point --

13 MS. DURBIN: If they were on medical  
14 leave, you might deal with the hospital. I don't  
15 know. You know, you're not -- You're just going to  
16 check.

17 MODERATOR WEST: And I think the point  
18 here with the 72 hours is that you would -- As Nancy  
19 has pointed out, the concern would be that portion of  
20 the time that they were away, and the assumption would  
21 be they are not covered by a fitness-for-duty program,  
22 for whatever the reason, and now they are returning.  
23 They are your employee, and you are going to be  
24 expected to do the suitable inquiry, and you would  
25 have a 72-hour time frame to do it. However, you have  
26 to be careful with the 72 hours.

27 It's not just simply a safe haven, if you  
28 will, with respect to 72 hours. As it is, you would  
29 be expected to make some determination that you could  
30 conduct this suitable inquiry within 72 hours. Go  
31 right ahead.

32 MR. BURRELL: And this is a suitable  
33 inquiry of the individual returning.

34 MODERATOR WEST: Correct.

35 MR. BURRELL: Okay. Not a suitable  
36 inquiry to the employer. I mean --

37 MODERATOR WEST: No, this is the employee  
38 that's returning. Yes.

39 MR. DiPIETRO: This has been an issue with  
40 me for a long time. You got the individual's suitable  
41 inquiry, which now we're calling a written statement.  
42 Is that correct?

43 MODERATOR WEST: That's a fair statement,  
44 yes.

45 MR. DiPIETRO: So why don't we just get  
46 rid of the these terms suitable inquiry, when you are  
47 doing it back to the employer to the individual. Why  
48 don't we come up with a different name for this  
49 written statement, like self-disclosure or something

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1 like that, and then leave the suitable inquiries  
2 strictly the verifications that you are doing with  
3 past employers or licensees or whatever else you are  
4 doing, because this suitable inquiry language keeps  
5 plopping back and forth, and it's nothing but  
6 confusing. Do you understand?

7 MS. DURBIN: Yes, but I do think under  
8 (7), if we are talking about (7) here, that the intent  
9 was if the person was working at another site or  
10 another -- say they were working at a fossil fuel  
11 plant and they weren't under a fitness-for-duty  
12 program but they are still your employee and still had  
13 access, you might contact the site that they were  
14 working at.

15 I mean, it was -- and see if they have had  
16 a violation, a DUI, a arrest for drug use. It's a  
17 check of that period.

18 MR. DiPIETRO: You would ask the employee  
19 that or you would ask --

20 MS. DURBIN: You would ask the employee  
21 that, and you would verify it, just as you would --

22 MR. DiPIETRO: And that's what I'm saying.  
23 We ought to change that language of the suitable  
24 inquiry. We should capture that under the written  
25 statement or whatever you want to call it.

26 MODERATOR WEST: But I think the point  
27 here in the discussion you were just having is that  
28 it's twofold, though. You have the written statement,  
29 and then there's some aspect of the verification of  
30 that written statement.

31 MR. DiPIETRO: Right. But going back to  
32 73.56, if an employee holds unescorted access and even  
33 though he may have been absent of the possibility of  
34 being tested, they still have the requirement to  
35 report arrests and things that impact on their  
36 trustworthiness and reliability.

37 So it's kind of redundant to go back and  
38 verify with yourself whether that individual has self-  
39 disclosed any arrests or anything while they were out  
40 of the --

41 MODERATOR WEST: I guess your point is  
42 that you would have done that already over on this  
43 73.56?

44 MR. DiPIETRO: Yes.

45 MODERATOR WEST: That makes sense. Thank  
46 you.

47 MR. CASEY: I'd like to have a little  
48 clarification, because, obviously, I missed this one  
49 in my interpretation, because I guess I thought that

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1 this was like a contractor that worked at your  
2 facility that you granted access, let's say, in May,  
3 and then they returned in less than a year as a  
4 reinstatement, that you could initiate suitable  
5 inquiries for up to 72 hours before granting.

6 So now I understand, no, that's not the  
7 case, but I guess the reason I missed that is because  
8 in your other commentary here you say employed by the  
9 licensee in the language, and I don't -- Maybe I've  
10 overlooked it, but I don't see that word "employed by  
11 the licensee." So I assumed this was everybody.

12 So if this is not the case now, as I  
13 understand, and this is just for a category of people  
14 that's been out of -- your own employees out of the  
15 possibility of being tested for more than 60 days that  
16 you can do this, then what is the expectation for  
17 suitable inquiries for reinstatement of contractors.

18 You know, you've done your initial five-  
19 year background attempt and your five-year -- You  
20 know, you grant them access. They work. They leave  
21 in the spring, and then they come back in the fall. Do  
22 you do suitable inquiries for those periods of time  
23 and getting the results before you reinstate or is  
24 there any provision in here to talk about that?

25 MODERATOR WEST: I think unless someone  
26 has additional insight, I think it's fair to say that  
27 we need to provide you some clarification under item  
28 (7) as to whether it's speaking to all individuals  
29 versus only the licensee's employees.

30 MR. CASEY: Because, I mean, we're not  
31 only talking here just licensees, but I mean,  
32 obviously, when you say back to that licensee's  
33 program, but we've also got transfers in here. This  
34 goes back to a statement that I had made earlier  
35 about when you read this rule and you go back to the  
36 access rule, you know, we've got categories of  
37 transfers or reinstatements and updates. It's  
38 difficult to go in here and try to determine exactly  
39 what you need to do.

40 The new person coming in that's never been  
41 granted access is pretty clear, but we've got that  
42 same problem in this rule now where there's  
43 interpretations of what do you do for reinstatements  
44 on suitable inquiries. I guess I thought this was  
45 your attempt to close that hole and say, well, you  
46 know, you got to do suitable, but you can do them up  
47 to 72 hours. But, obviously, that's not correct.

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1                   So it seems like there's still something  
2 missing here in suitable inquiries for reinstatements  
3 and transfers.

4                   MR. MORIARTY: This was also part of the  
5 reason why I had asked my question on EAP about -- if  
6 you go back to the scope, it says all persons granted  
7 unescorted access. So all these requirements, and  
8 we're talking about who is an employee, who is not an  
9 employee, is a contractor.

10                  MODERATOR WEST: Transfers and so on.

11                  MR. MORIARTY: Yes. I suppose a basic  
12 question would be under the meaning of this rule  
13 throughout, what does employee mean? It's pretty  
14 clear in the beginning that it's all persons granted  
15 unescorted access. It doesn't differentiate any  
16 standards from one to the other.

17                  MODERATOR WEST: Okay. Thank you.

18                  MR. NOEL: Just one more brief question.  
19 We already have requirements for the DOE for every  
20 employee to be on a continuous reporting process with  
21 us for any change in status of marriage or divorce or  
22 bankruptcy or any charge for any reason, any  
23 conviction for any reason.

24                  That's an ongoing program. They have to  
25 continue it. am I correct in assuming now that, when  
26 an employee comes back off of family leave or medical  
27 leave, I actually have to sit them down and ask them  
28 a series of questions relevant to fitness-for-duty,  
29 have them fill out perhaps a standard form giving them  
30 an opportunity to declare as a part of the return-to-  
31 duty process?

32                  MS. DURBIN: For someone who has been gone  
33 for more than 60 days?

34                  MR. NOEL: I'm sorry?

35                  MS. DURBIN: This would be someone who has  
36 been gone for more than 60 days?

37                  MR. NOEL: Correct. As a part of their  
38 return to duty process, even though they are required  
39 to do this for us real time all the time without us  
40 asking them, but for this particular instance we'll  
41 have to sit them down face to face and ask them these  
42 questions. Is that correct?

43                  MODERATOR WEST: If the individual has not  
44 been covered by an acceptable fitness-for-duty program  
45 and has exceeded that 60 day threshold, I think the  
46 answer would be yes.

47                  MR. NOEL: Thank you.

48                  (Slide change)

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1 MODERATOR WEST: Now with regard to the  
2 next slide, 63, please, note that the sanctions  
3 haven't changed substantially. Now also it applies to  
4 applicants. I think that's an interesting point with  
5 respect to the scope.

6 We don't in the rule call this out and  
7 didn't address under the scope, but in this particular  
8 section there has been a change in that respect in  
9 that it does now clearly apply to applicants.

10 The same, as we mentioned before, with  
11 respect to the sanctions for alcohol. They have come  
12 up to the standard of the same sanctions for drug  
13 violations. And subversion, including refusal to take  
14 a test, must be a violation of the licensee's fitness-  
15 for-duty program.

16 (Slide change)

17 MODERATOR WEST: You note on 64 that  
18 personnel, including applicants, just to reiterate  
19 that point, and you can see the other portions that  
20 have been added to this particular requirement.

21 (Slide change)

22 MODERATOR WEST: You note, too, that  
23 whenever there is a clear indication that someone is  
24 not fit -- for example, erratic behavior -- there must  
25 be a full evaluation before the person is returned to  
26 duty, and potentially this could override the  
27 provision -- and this is something we have to  
28 admittedly discuss a little bit more, but I'll share  
29 it with you, nevertheless.

30 This could potentially override the  
31 provision that under a for-cause testing, which we  
32 discussed previously, that a person who tests negative  
33 in a for-cause test does not need a medical evaluation  
34 of fitness. In that instance, a management  
35 determination would be good enough.

36 This would mean that in a for-cause test  
37 initiated because of a credible allegation or smelling  
38 alcohol on someone's breath, there would not need to  
39 be a medical evaluation of fitness. But if the for-  
40 cause test was initiated due to clear impairment or an  
41 indication of lack of fitness, then there would be a  
42 need for a medical determination of fitness.

43 So I think with all these words what I'm  
44 trying to say is that, generally speaking, we do have  
45 a new provision in the rule that would speak to the  
46 fact that, if you simply have a negative test from an  
47 alcohol results, there wouldn't be any necessity as a  
48 stand-alone consideration, if you will, to have a  
49 medical determination as well.

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1           The only thing I'm trying to emphasize,  
2 there may be some other considerations that would, in  
3 fact, necessitate a medical determination, even with  
4 that medical result. Yes?

5           MR. HARRIS: Neil Harris, TXU Electric.  
6 I'd like clarification on two generic items within  
7 this document.

8           MODERATOR WEST: Okay.

9           MR. HARRIS: One, are all return-to-duty  
10 tests, regardless of where they occur within the  
11 document -- are they always considered random tests?

12          MODERATOR WEST: No.

13          MR. HARRIS: All right. Second one then:  
14 The use of the word "must" within your document rather  
15 than the word "shall" where it's been stricken -- does  
16 "must" equal "shall" or does "must" actually equal  
17 "should"?

18          MODERATOR WEST: I think they are  
19 essentially the same.

20          MS. DURBIN: "Must" actually replaced  
21 "should." So "must" and "shall" are the same.

22          (Slide change)

23          MODERATOR WEST: And on slide 65 note that  
24 lacking other evidence of use, sale or possession of  
25 illegal drugs or use of alcohol on site, the following  
26 would indicate a violation: A laboratory confirmed  
27 positive test verified by the MRO as a policy of  
28 violation -- certainly nothing new there; and then the  
29 second area which we've given some attention to  
30 already, we would have still the BAC at .04, but then  
31 also the considerations with regard to .02 and .03,  
32 depending on long the individual had actually been on  
33 shift.

34          (Slide change)

35          MODERATOR WEST: After a first violation  
36 involving a confirmed positive drug or alcohol  
37 determination, the individual can be reinstated after  
38 appropriate treatment, evaluation by the MRO and  
39 manager, follow-up testing program established, and  
40 return-to-duty testing.

41          Then lastly, if they are in a work status  
42 prior to reinstatement of unescorted access, they must  
43 still be covered by the program.

44          (Slide change)

45          MODERATOR WEST: Now shifting to a second  
46 violation or determination of subversion must result  
47 in revocation of authorization to perform activities  
48 described in 26.2: (a) for a minimum of three years;  
49 further, revocation of authorization for five years

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1 for determination of sale, use or possession of  
2 illegal drugs or use of alcohol within the protected  
3 area.

4 Note that now NRC contractors are now  
5 covered, along with NRC employees in that they cannot  
6 be contractors. In other words, they cannot be denied  
7 access, but they can be escorted, and the appropriate  
8 regional administrator must be immediately notified.

9 During off-normal working hours, the NRC  
10 Operations Center must be notified. The addition here  
11 is certainly with respect to NRC contractors, and this  
12 addition was in response to an NEI comment.

13 (Slide change)

14 MODERATOR WEST: Now we have certainly  
15 some questions that we received in this particular  
16 area for 26.27, and we'll see how many of these we can  
17 address in the next remaining 15 minutes or so.

18 First of all, what is the difference  
19 between 26.27(A)(1)(a) and (b), and then secondly,  
20 what is the difference between 26.27(A)(1)(i)(b) and  
21 26.27(A)(1)(i)(c)?

22 I'll read you out response to this, and  
23 then we can probably add a few caveats with respect to  
24 essentially the (a)-(b) and the (c). Much of what I'm  
25 going to say is largely coming from the rule, for  
26 sure.

27 A refers to the use, sale or possession of  
28 illegal drugs or legal or employment action taken  
29 against the individual for alcohol or drug use in the  
30 past five years. Just in passing, I think the  
31 emphasis there and the distinction is the fact that  
32 it's somewhat general, certainly covering the five-  
33 year period. And (B) refers to having been determined  
34 to have violated a fitness-for-duty policy or as a  
35 result of an action taken in accordance with the  
36 fitness for duty policy being denied initial  
37 assignment to activities within the scope of Part 26  
38 in the past five years.

39 I think there the distinction we were  
40 trying -- in response to this question, trying to make  
41 is that, unlike (A), this one is not general, but it's  
42 specific to a fitness-for-duty violation, and the  
43 commonality, for sure, is still within the scope of  
44 the five years.

45 Then lastly regarding (C), it refers to  
46 removal from activities within the scope of Part 26 as  
47 a result of an action taken in accordance with a  
48 fitness-for-duty policy at anytime. I think that's  
49 the key distinction; whereas, similar to (B), it also

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1 involves a fitness-for-duty violation, but the  
2 distinguishing aspect of (C) is that it covers all  
3 time rather than just simply five years.

4 MR. CASEY: Can I ask a question?

5 MODERATOR WEST: Please.

6 MR. CASEY: Maybe I didn't understand  
7 exactly what you said. But if (C) -- (B) is ever  
8 violated in five years, and if (C) is you ever violate  
9 it, why do you need (B)? That's where I'm confused on  
10 this, because what I'm trying to do is write up a  
11 questionnaire that I can ask the pipefitter,  
12 boilermaker, whoever to fill out this written  
13 questionnaire, because I'm going to use that to do a  
14 background and potentially deny them for  
15 falsification.

16 So I've got to be clear in what I'm asking  
17 them to declare when I do this check to see if there's  
18 any -- and I'm still not clear about the difference  
19 between (B) and (C). I understand (A) and (B). It's  
20 (B) and (C).

21 MODERATOR WEST: I don't know if there are  
22 any additional insights that anyone at the table might  
23 provide, but it seems to me it's just the one of the  
24 time frame that you are considering or asking  
25 information about.

26 MR. CASEY: I mean again, why would I --

27 MODERATOR WEST: I hear what you're  
28 saying. If you ask the more general one, it's going  
29 to be overlapping with the other one.

30 MS. DURBIN: I can think of a reason you  
31 might want to know whether it was within the past five  
32 years, because you are only going to be doing the  
33 background check for five years. But I can't answer  
34 your general question, which is why have both.

35 MR. CASEY: And I would counter with that  
36 by saying again, why would you need (B) if you're  
37 going to say forever, because if you said yes for  
38 "ever," you then go down and say they got to give the  
39 duration, the time, etcetera, etcetera, and the person  
40 then would say, well, that was in 1989.

41 MS. DURBIN: Right. So you would have the  
42 information.

43 MR. CASEY: And there was a difference  
44 between the two.

45 MODERATOR WEST: Thank you for your  
46 question. Yes?

47 MR. SEARS: When I looked at that, the  
48 only thing that I thought there might be some  
49 application for is because the sanctions are going to

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1 be different for a second positive. You need to know  
2 if that person has ever tested positive before,  
3 because the second strike would be different than how  
4 you would treat the first strike.

5 MODERATOR WEST: I see.

6 MR. SEARS: And I just -- I had just made  
7 that, and I don't know if that's what it was intended  
8 for, but that's what I was going to use it for.

9 MODERATOR WEST: That's certainly an  
10 insight. Thank you for that.

11 (Slide change)

12 MODERATOR WEST: With the next question we  
13 received concerning 26.27(A)(4): How does the  
14 licensee determine what is sufficient evidence for  
15 proof of abstinence?

16 (Slide change)

17 MODERATOR WEST: Here our response would  
18 be as follows: Negative results from a regimen of  
19 follow-up testing by the licensee is identified by the  
20 rule as the method by which proof of abstinence is  
21 provided.

22 In cases where there is a break in  
23 employment and/or changes in employers during the  
24 period when follow-up testing would have been  
25 administered by the licensee, the licensee may but is  
26 not obligated to consider other evidence; for example,  
27 verified testing by another employer or an independent  
28 testing agency as proof of abstinence.

29 We need to -- admittedly, to identify all  
30 of the places that proof of abstinence is mentioned in  
31 the rule and look for perhaps some further  
32 clarification in this area, but hopefully, that's  
33 getting at some aspects of the question, however.

34 (Slide change)

35 MODERATOR WEST: Another question: What  
36 constitutes a three-year follow-up program for  
37 transient workers? Is the three years consecutive or  
38 cumulative? Do we credit time spent in another  
39 licensee's programs?

40 I've certainly personally received a fair  
41 number of calls, different variations of this same  
42 question.

43 Our answer is as follows: The licensee  
44 must assure that there has been at least a consecutive  
45 three-year period during which the individual has been  
46 subject to a testing program that assures abstinence.  
47 The licensee may, but is not obligated to, verify and  
48 then credit testing at another licensee's program or  
49 an independent testing program if that testing

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1 represents a consecutive period; that is, no more than  
2 30 days without the possibility of being tested, and  
3 is verified as continuing a testing program as  
4 described in 26.24(A)(4).

5 (Slide change)

6 MODERATOR WEST: What flexibility does the  
7 MRO have with regard to recommending follow-up testing  
8 for individuals who have some history of substance  
9 abuse, for example, a DUI, but have not violated an  
10 NRC licensee's fitness-for-duty program?

11 Our answer is as follows: The MRO has  
12 flexibility in determining whether an individual with  
13 a history of substance abuse requires any program of  
14 response, such as counseling or follow-up testing.

15 I think that is perhaps related to some  
16 previous discussions we were having in that area.

17 MR. CASEY: It must be getting late in the  
18 day. Nobody has questions. Could we go back to the  
19 previous slide for one second?

20 MODERATOR WEST: That's 72?

21 MR. CASEY: Yes. I need clarification.  
22 My understanding now of the new rule, if you test  
23 positive the first time now you've got to go and you  
24 go through your rehab or whatever. You come back, you  
25 got to go through three years of consecutive -- a  
26 three-year follow-up program.

27 MODERATOR WEST: Correct.

28 MR. CASEY: And I think I heard you say  
29 basically that, if a person -- you know, if they were  
30 in a year at our program and then left and came back,  
31 I would have to put them back into Day One again, and  
32 I have to do three years consecutive before I could  
33 take them out of the follow-up.

34 MODERATOR WEST: That's not precisely what  
35 I was trying to say. What I was trying to say is that,  
36 generally speaking, you're correct. We would consider  
37 the answer to this question of whether -- essentially,  
38 whether it has to be consecutive or cumulative, the  
39 answer would clearly be consecutive. But the attempt  
40 here was also to acknowledge that the consecutive --  
41 there would be some leeway with respect to perhaps  
42 taking credit under certain conditions for the fact  
43 that the person, even though they have left your  
44 particular program -- let's say Licensee A's program  
45 -- but if certain conditions were met with respect to,  
46 let's say, going to Licensee B, you could, in fact,  
47 take credit for that.

48 MR. CASEY: Okay. Because I didn't --

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1 MODERATOR WEST: You wouldn't necessarily  
2 have to reset the clock, if the conditions were met,  
3 and the most obvious one would be with respect to  
4 whether the individual actually continued on in a  
5 consecutive fashion with Licensee B.

6 MR. CASEY: Right. I guess I wouldn't try  
7 to apply it if the guy would be, say, at our place,  
8 and you put him in a year and, if some reason or  
9 other, take him out but he's still working here, and  
10 then put him back in again. He would be consecutive  
11 with us, but he could leave, you know, and then come  
12 back. Do we have to reset it again or could I take  
13 another licensee person and add back or do I start one  
14 day again?

15 MODERATOR WEST: I think the concern there  
16 would be during that period that the individual left,  
17 what was happening? Was there some continuation of  
18 the testing regimen that the individual was under  
19 before he left?

20 My general answer is that, if indeed you  
21 can answer that to the level that we are looking for,  
22 you could take credit for that. If you can't, then  
23 you would, in fact, have to do what you're saying.  
24 You would have to reset the clock when the individual  
25 came back.

26 MR. CASEY: Okay. My second question  
27 follow-up to that is: For the current rule my  
28 understanding, your first positive you don't go into  
29 a follow-up. It's only into your second. Now it's  
30 your first.

31 MODERATOR WEST: We've had a fair amount  
32 of discussion on this. I think, clearly, we would  
33 agree to this point. If there was any confusion about  
34 a distinction being attendant with respect to first  
35 positive versus second positive, it was our intent --  
36 and, hopefully, we've cleared that up in the new rule,  
37 where in the new, certainly, there is no distinction.

38 MR. CASEY: Right. So I understand now  
39 that that is intended first positive, three years.  
40 But one scenario: So if an individual -- This new  
41 rule has passed. We're not talking here about  
42 grandfathering or whatever.

43 Now I have a contractor coming to me who  
44 in 1992 tested positive, was terminated by that  
45 utility, and never went into any type of follow-up  
46 program because we terminate contractors on a first  
47 positive, because we don't offer them EAP, and we  
48 don't put them in follow-up.

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1                   Now this person is coming to me eight,  
2 nine, name any time, never served any type of follow-  
3 up. Does that mean -- I mean, I understand, number  
4 one, I can't grant him a temporary clearance. I  
5 believe that's clear. It says you've had a prior  
6 violation, you can't do EAP.

7                   Now do I have to then turn around and put  
8 him or her into a three-year follow-up program?

9                   MODERATOR WEST: Would anyone at the tale  
10 care to comment on that?

11                  MR. ALBERT: Go first. I'll let you go  
12 first.

13                  MS. DURBIN: I think the answer is yes.  
14 I mean, basically, you have somebody who has violated  
15 the policy and has never demonstrated that they have  
16 been abstinent from the use of whatever they abused,  
17 even if they have been -- if it's been eight or nine  
18 years. There's no evidence that they have had a  
19 significant period without using. That's my level of  
20 reaction.

21                  MR. CASEY: So what I think I'm hearing:  
22 Anytime you've had a positive, even if it was prior to  
23 this rule being established, we're then going to say  
24 we can't grant you a temp, and we're going to have to  
25 put you in a follow-up for three years. However,  
26 knowing the nature of the transient workers, they are  
27 not going to be at your location anytime to get a  
28 three-year period, even if you could do it  
29 cumulatively, and particularly you're, you know,  
30 having to look at what conditions.

31                  You would possibly have to go back and  
32 reset the clock. So, basically, you know, even if you  
33 didn't have to reset the clock and he's there for 14  
34 days or whatever, you're talking about people who the  
35 last ten years tested positive, but you can't prove in  
36 some form or fashion went through a three-year follow-  
37 up program, but you've got to put them in your follow-  
38 up, track that, make sure they are in there when they  
39 come in, when they leave or if they come back in.

40                  In essence, you know, they may be in there  
41 for 105 years to be able to get their --

42                  MODERATOR WEST: I hear your concern.  
43 There is one example I'll throw out for you. It  
44 actually comes up on a later slide, but I think it's  
45 relevant to what you are asking. This is the only  
46 good example in my own mind that I can think of, and  
47 I think it's relevant to this -- you know, way back  
48 when, when something occurred.

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1                   We do have an example that goes something  
2 like this, that if you have an instance where an  
3 individual, let's say, had tested positive for alcohol  
4 some years back and didn't, for the reasons, let's  
5 say, you described, whatever the reasons, didn't go  
6 through a program. But yet -- and I think this is in  
7 the spirit of what I was trying to describe relative  
8 to not so much in the past but an individual goes away  
9 from you but is still covered by something. You have  
10 some assurance that they are coming back, and you  
11 could take credit for that.

12                   The one example I would note would be  
13 something along the lines of, let's say, for alcohol.  
14 The individual didn't go into a particular program,  
15 but you have historical evidence to show that (a) this  
16 was somewhat of a -- just not a pattern of substance  
17 abuse but rather just isolated incidents; and (b) you  
18 have historical evidence to show that the individual,  
19 let's say, has gone through a Alcoholics Anonymous  
20 program.

21                   I think that would be an example where  
22 there would be some consideration, even from a  
23 historical perspective. I can't think of another one,  
24 but that would be a potential one, and maybe there  
25 would be other examples of that, because in that  
26 instance the -- again, it's isolated. It's not a  
27 frequent occurrence, and you have some assurance that  
28 the issue has been addressed, even though it is  
29 historical and even though the individual didn't, in  
30 fact, for whatever the reasons, go through the program  
31 with the particular licensee.

32                   MR. ALBERT: Okay, Garmon, could I jump  
33 in, please? All right, let's back up a second. The  
34 first thing you said, that after the first positive  
35 test the existing rule doesn't require you to be in a  
36 follow-up program for X amount of time. That's not  
37 correct. It does require you to be in a follow-up  
38 testing program for the first positive.

39                   PARTICIPANTS: Not for alcohol.

40                   MR. ALBERT: Okay. But we were talking  
41 about drugs, so to speak.

42                   MR. CASEY: And we do that, okay? But I  
43 was under the impression it was not required, and  
44 maybe I'm thinking of the alcohol.

45                   MR. ALBERT: Okay. And one thing about  
46 the rule as it exists now: It was misplaced as for  
47 the duration, but this iteration of the rule put it  
48 where it was supposed to be, to begin with. I just  
49 wanted to clear that up.

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1                   Now let's go back to the other individual  
2 who comes to your site. Now I got to ask you another  
3 question. What have you done to assure that the  
4 individual had ever been rehabilitated from being  
5 kicked out of a fitness-for-duty program the first  
6 time?

7                   MR. CASEY: Okay. What we do currently  
8 now, we put a three-year restriction on you that you  
9 can't come to work for us. So after three years when  
10 you process back in and you declare your positive  
11 whenever, we'll put you --

12                  MR. ALBERT: But still, you have not  
13 established that the individual has been  
14 rehabilitated.

15                  MR. CASEY: I'm not finished yet. What  
16 I'm saying is, when they come back -- We put three  
17 years out. Then when they come back, then what we do,  
18 we do an evaluation. We send them over to the  
19 psychologist. They do a substance abuse profile on  
20 them. They determine -- and that is when we get  
21 notified by our psychologist who we use and who, I  
22 might say, is a much better assessor and like a SAP  
23 program as far as substance abuse professional to  
24 determine substance abuse problems and rehab than a  
25 licensed physician who basically is going to be  
26 sitting there determining whether or not -- what the  
27 effect of alcohol is on you for that day or maybe  
28 medical causes. But all of our physicians, when they  
29 evaluate a person and they detect there could possibly  
30 be a problem of alcohol of substance abuse, they call  
31 me and say we need to get this person further  
32 evaluated by professionals in the substance abuse  
33 arena, which we have a psychologist who is certified  
34 in that.

35                  Then we go into our EAP, and we -- you  
36 know, we go into that program. So the question is  
37 nobody just walks in, you know, and says, well, it's  
38 been five years ago. We put them through this  
39 substance abuse evaluation and profile, and I have a  
40 licensed psychologist come back and tell me this  
41 person is rehabilitated.

42                  It could be in many forms. He could have  
43 gone through a treatment program in the community  
44 somewhere or whatever, but that, along with a negative  
45 drug test, is my satisfaction that a guy that tested  
46 positive ten years ago, you know, and has no history  
47 since that time would be evidence of rehabilitation  
48 from, you know, periods of times of cessation of the

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1 behavior that we know of and through a professional  
2 substance abuse evaluation.

3 MODERATOR WEST: I think we could provide  
4 some further clarification in this area.

5 MR. ALBERT: Wait a minute. At first  
6 glance, I'm not sure that I agree totally with what  
7 you are doing, but we can address that later.

8 I guess, going back to the individual  
9 coming back --

10 MR. CASEY: Could I ask you one -- Excuse  
11 me.

12 MR. ALBERT: Yes.

13 MR. CASEY: If you're not comfortable or  
14 understanding exactly what I just said we did, what  
15 would the expectation be that we would do for a person  
16 that's coming back that had a positive test nine years  
17 ago?

18 MR. ALBERT: I'd have to visit you to tell  
19 you. I'm only kidding.

20 MR. CASEY: I got a feeling I'm going to  
21 get a visit next week.

22 MR. ALBERT: I would have to get some more  
23 specific information on how you are applying this. On  
24 the surface, I can see some problems with it, but  
25 let's get back to the individual when he shows up.

26 In essence, what you are doing then, you  
27 are putting that individual into your EAP program.

28 MR. CASEY: No. No.

29 MR. ALBERT: Why are you not, because now  
30 you're going to put him in a follow-up testing  
31 program, and that's what you would have done if you  
32 had put him into your EAP program, had he tested  
33 positive at your site the first time?

34 MR. CASEY: No, and let me try to explain.  
35 If a person comes to me and tested positive nine years  
36 ago as a contractor somewhere else --

37 MR. ALBERT: Let's not make it nine. That  
38 was in the first example. Let's make it two years  
39 ago.

40 MR. CASEY: Well, we put three years.

41 MR. ALBERT: Oh, disqualified by three  
42 years.

43 MR. CASEY: Three years, you know, and we  
44 look at that as just kind of an evidence of  
45 rehabilitation for potential of cessation of any type  
46 of activities, at least that we know of, because  
47 you're not testing positive somewhere else or being  
48 arrested for some other type of substance abuse.

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1           So we have the three years. They come in.  
2 They fill out the questionnaires. They declare they  
3 had a positive three and a half years ago, four years  
4 or whatever. That information goes to our  
5 psychologist. Our psychologist, along with doing the  
6 MMPI, also does a substance abuse evaluation. I can't  
7 remember the -- It's a different type of -- like it's  
8 not the MMPI. It's in addition to the an MMPI.  
9 There's a test. Okay?

10           There's a substance abuse test going  
11 along with the MMPI. Then they do a clinical  
12 interview. After that clinical interview, the  
13 psychologist there will say, you know, I feel this  
14 person no longer has a substance abuse problem, and  
15 they are rehabilitated.

16           They could have had other outside  
17 treatment that they've brought in for them to look at.  
18 Maybe not, depending on the time, but I rely on the  
19 qualified, licensed psychologist to administer the  
20 MMPI, this additional substance abuse test, do the  
21 clinical interview, and come back and give me  
22 assurances that this person has rehabilitated and is  
23 not a substance abuser at that time.

24           Then, of course, along with that, we would  
25 certainly do a pre-access test, you know. If he's  
26 clean or she's clean on that one, then we grant  
27 access.

28           MR. ALBERT: And then you put him in a  
29 follow-up testing? Was that where you ended up?

30           MR. CASEY: No. No. We do not put --

31           MR. ALBERT: Okay. That's where I want to  
32 get to.

33           MR. CASEY: We do not -- they do not go  
34 into the follow-up as far as --

35           MODERATOR WEST: Because of the historical  
36 nature of the incidence, you don't have any --  
37 whatever the time frame is, three years or greater,  
38 and you don't have any evidence, and you examine this  
39 to indicate otherwise?

40           MR. CASEY: Right. There is no history of  
41 DUI or any other type of legal history. When we do  
42 the background, the psychologist does all of these  
43 steps that I just described, and then he certifies  
44 back to me that this person meets access requirements  
45 under the rule and has rehabilitated and is not a  
46 substance abuser or needs any type of further  
47 counseling or follow-up counseling, as far as EAP,  
48 etcetera. And we will grant access.

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1 MODERATOR WEST: We are going to stop on  
2 this particular question that we're dealing with. But  
3 I would add this. I think what you have described is  
4 perhaps, in my opinion, an approximate example of the  
5 example that I gave you. We'll get into that specific  
6 example on tomorrow.

7 I would say the long and the short of it  
8 is that we acknowledge, even given the fact that I  
9 gave you an example, that we need to provide you some  
10 considerations in this area, and we'll certainly do  
11 that.

12 Ted, did you have any final thoughts?

13 MR. SHULTS: Just before we lose the  
14 thought on this, what I think you also would like to  
15 do, I think, is take a look at this from the  
16 perspective of the Americans With Disabilities Act,  
17 because the scenario that I was presented with a week  
18 or two ago was the utility that had somebody who even  
19 -- they had already interpreted this under the  
20 existing rule that it would be a cumulative three  
21 years, but it was a transient worker that only worked  
22 during outages.

23 So it would be 32 years or so by the time  
24 that individual finished. My concern is, if those  
25 tests are negative, and the operators don't want to  
26 use this individual. Why? Because of the additional  
27 time it takes to do those additional tests.

28 So at some point or other, the allegation  
29 is going to be that there has been disparate impact  
30 based upon a history of substance abuse here that  
31 really has been attenuated or can be disproved.

32 So if you look at private employers, what  
33 they will do is they will put in a follow-up program  
34 but will usually say at some point, three years, five  
35 years, cap it so you don't have that scenario where we  
36 are looking at 30 years or 40 years of testing, just  
37 because of one violation.

38 So I think that this approach of looking  
39 at it from a substantive -- Do I have a substance  
40 abuse problem now is a substantive approach than just  
41 more of a formalistic approach and saying, well, we're  
42 just going to run out the three years, one way or the  
43 other.

44 So I think the ADA is a significant issue  
45 in all of this.

46 MODERATOR WEST: I appreciate the insight.

47  
48 Before we close, tomorrow is essentially  
49 a continuation of today in that we will try to get

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1 through the last section of the rule, and we certainly  
2 should be able to do that. If we, in fact, finish up  
3 a little bit earlier, then that will be a pleasant  
4 surprise for everyone.  
5 Thank you for your patience today, and  
6 I'll look forward to seeing you tomorrow.  
7 (Whereupon, the foregoing matter went off  
8 the record at 5:12 p.m.)  
9  
10  
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