UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION
OFFICE OF NUCLEAR MATERIALS SAFETY AND SAFEGUARDS
WASHINGTON, D.C. 20555-0001

May 10, 2002

NRC REGULATORY ISSUE SUMMARY 2002-07: CLARIFICATION OF NRC REQUIREMENTS APPLICABLE TO WORKER FATIGUE AND SELF-DECLARATIONS OF FITNESS-FOR-DUTY

ADDRESSEES

All licensees authorized to operate a nuclear power reactor, to possess or use formula quantities of strategic special nuclear materials (SSNM), or to transport formula quantities of SSNM.

INTENT

The U.S. Nuclear Regulatory Commission (NRC) is issuing this regulatory issue summary to highlight recent concerns about worker self-declarations of fitness-for-duty (FFD) and to clarify the applicable regulatory requirements.

BACKGROUND INFORMATION

During the past several years, the NRC has become aware of concerns about employee declarations of unfitness for duty because of excessive fatigue, the actions taken by licensees or their contractors in response to these declarations, and licensee policies for limiting the potential abuse of leave. The following are examples of recent concerns about worker fatigue and self-declarations regarding FFD:

Concern 1

A contractor to the licensee for nuclear power plant Site A asked an individual to work unscheduled overtime. The individual, who was subject to the requirements of Title 10 of the *Code of Federal Regulations* (CFR), Part 26, "Fitness for Duty Programs," made a written declaration of being unfit for duty because of fatigue and refused to work the overtime. The individual did not report to work for the assigned overtime shift and the contractor subsequently terminated the employment of the individual, citing the terms of employment requiring the individual to work when needed. The individual filed a discrimination suit with the Department of Labor alleging that the adverse employment action was taken because the individual had engaged in a protected activity.

Concern 2

Several individuals at nuclear power plant Site B completed the last shift of a series of scheduled consecutive night shifts. Instead of sleeping after their last night shift, the

individuals conducted various activities during the day. During that day the licensee contacted the individuals and asked them to report that night for unscheduled duty. The individuals reported that they either were not or would not be fit for duty because of fatigue. The licensee for Site B directed the individuals to report to work despite their concerns about their FFD.

Concern 3

The licensee for nuclear power plant Site C established a program requiring supervisory review of the absences of individuals that do not report to scheduled work more than 3 times in a 12-month period. Several individuals expressed concern that the program discouraged individuals from reporting that they are unfit for duty, yet their current work schedules caused excessive fatigue.

ISSUE SUMMARY

Licensee policies and actions concerning individuals (e.g., licensed operators, security guards, maintenance personnel) who assert they are unfit for duty because of fatigue have raised questions about the applicability of 10 CFR Part 26 to worker fatigue, the potential for sanctions related to worker FFD to have adverse implications for maintaining a work environment conducive to reporting FFD concerns, and the protections afforded workers by 10 CFR 50.7, "Employee Protection." Following are the applicable requirements and NRC positions concerning these matters.

Applicability of 10 CFR Part 26 to fatigue-related worker impairment

Section 26.10(a) requires licensees to "provide reasonable assurance that nuclear power plant personnel . . . are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties." It is the NRC's position that this requirement includes impairments caused by worker fatigue. This position is consistent with § 26.20(a)(2), which states that "licensee policy should also address other factors that could affect fitness for duty such as mental stress, fatigue, and illness."

Self-declaration of fitness-for-duty

Although 10 CFR Part 26 does not specifically require, permit, or otherwise refer to employee self-declarations of FFD, it in no way prohibits self-declarations of FFD and § 26.10(b) requires licensees to "provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of [Part 26]." The NRC believes that self-declaration, when made in good faith, can be an important adjunct to behavioral observation in promptly detecting persons who are unfit for duty. The NRC encourages workers to inform a responsible supervisor if they have concerns regarding their FFD.

Assessment of worker FFD and worker duty assignments

In accordance with 10 CFR 26.27(b)(1), a worker who is impaired or whose fitness may be questionable may be returned to duty only after a determination that he or she is fit to safely and competently perform activities within the scope of Part 26. It is the NRC's position that this requirement is applicable to circumstances involving a worker's self-declaration of FFD. Accordingly, when a worker subject to the requirements of a licensee's FFD program declares that he or she is not fit for duty, the worker may be returned to duty only after a licensee determination that he or she is fit to safely and competently perform activities within the scope of Part 26.

Sanctions against workers unfit for duty because of fatigue and employer policies and practices for limiting personnel use of leave

Pursuant to the requirements of 10 CFR 26.27, licensees are required to take specific actions, as a minimum, in response to confirmed misuse of alcohol, valid prescriptions, and over-the-counter drugs. Part 26 does not require, prohibit, or make specific reference to sanctions in situations involving worker fatigue. However, the NRC notes that pursuant to 10 CFR 26.10(b), FFD programs must provide reasonable measures for the early detection of persons who are not fit to perform their activities. As stated previously, the NRC considers a self-declaration, when made in-good faith, to be an important adjunct to behavioral observation in providing early detection of persons who are not fit for duty because of fatigue. Sanctions related to worker FFD, depending on the specific circumstances, can potentially discourage future self-declarations. Similarly, licensee policies and practices for limiting personnel use of leave, though not necessarily in violation of Part 26, have the potential to discourage employees from making FFD declarations. Licensees should be cognizant of the potential for such policies and practices to create an environment that is not conducive to the reporting of FFD concerns and thereby compromise their ability to identify factors (e.g., excessive work schedules) that may broadly affect personnel FFD and the licensee's ability to meet the performance objectives of Part 26.

Fitness-for-duty declarations—10 CFR 50.7, "Employee protection"

Section 50.7 prohibits discrimination[1] by a licensee, or a licensee contractor or subcontractor, against an employee for engaging in protected activities. Protected activities include refusing to engage in any practice made unlawful under Section 211 of the Energy Reorganization Act, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act. It is the NRC's view that an individual's assertion that he or she is not fit for duty or an individual's refusal to work are protected activities when

[1] Discrimination includes discharge and other adverse actions that relate to compensation, terms, conditions, or privileges of employment.

there is a good faith effort to comply with Part 26, and when such actions are based upon a reasonable concern regarding one's fitness for duty. In contrast, it would generally not be a violation of § 50.7 if a licensee takes adverse personnel action against an individual following his or her fitness-for-duty declaration, if such action is taken following a licensee's reasonable determination that: 1) the individual was fit-for-duty, and 2) the worker had no reasonable basis for making a declaration that he or she was not fit for duty. The NRC also notes that pursuant to 10 CFR 50.7(d), an employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons, including personal negligence with respect to maintaining one's fitness for duty, or from adverse action dictated by nonprohibited considerations.

BACKFIT DISCUSSION

This RIS requires no action or written response and does not set forth a new or changed position. Consequently, the NRC did not perform a backfit analysis.

NO *FEDERAL REGISTER* NOTIFICATION

The NRC did not publish a notice of opportunity for public comment in the *Federal Register* because the RIS is informational and pertains to an NRC position that does not represent a departure from current regulatory requirements and practice.

PAPERWORK REDUCTION ACT STATEMENT

This RIS does not request any information collection.

If you have any questions about this issue, please telephone or e-mail one of the technical contacts listed below.

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LIST OF RECENTLY ISSUED
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Regulatory Issue Summary No.	Subject	Date of Issuance	Issued to
2002-06	Evaluating Occupational Dose for Individuals Exposed to NRC-Licensed Material and Medical X-ray	04/16/2002	All medical licensees.
2002-05	NRC Approval of Boiling Water Reactor Pressure Vessel Integrated Surveillance Program	04/08/2002	All holders of operating licenses for boiling-water-reactors (BWRs), except those who have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.
2002-04	Results of the Pilot Test of the Proposed Changes to the Unplanned Scrams Performance Indicator and the Scrams with Loss of Normal Heat Removal Performance Indicator	03/01/2002	All holders of operating licenses for nuclear power reactors, except those who have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.
2002-03	Guidance on the Content Measurement Uncertainty Recapture Power Uprate Applications	01/31/2002	All holders of operating licenses for nuclear power reactors, except those that have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.
2002-02	Lessons Learned Related to Recently Submitted Decommissioning Plans and License Termination Plan	01/16/2002	All NRC licensees.
2002-01	Changes to NRC Participation in the International Nuclear Event Scale	01/14/2002	All NRC licensees and certificate holders.

OL = Operating License
CP = Construction Permit