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PROPOSED RULE **PR 26**  
(67FR07093)

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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**Subpart A - Administrative Provisions** (Draft by 1/31/02)

[This note only applies to **Subpart A** text that was provided by the NRC at the January 17, 2002 public meeting. The unmarked text seems satisfactory at this stage of rulemaking, however, ***bolded italicized text in brackets*** is proposed for further stakeholder discussion.] {Explanations/rationale in footnotes.}

**§ 26.1 Purpose.**

This part prescribes requirements and standards for the establishment and maintenance of certain aspects of fitness-for-duty (FFD) programs and procedures by the licensed nuclear power industry, and by licensees authorized to possess, use, or transport formula quantities of strategic special nuclear material (SSNM)<sup>1</sup>.—

**§ 26.3 Scope and applicability.**

- (a) General. Regulations in this part apply to licensees authorized to operate a nuclear power reactor and to handle spent fuel at a decommissioning plant, to possess or use formula quantities of SSNM, or to transport formula quantities of SSNM. Each licensee shall implement an FFD program that complies with this part.
- (b) Certain regulations in this part apply to licensees holding permits to construct a nuclear power plant. Each construction permit holder, with a plant under active construction, shall comply with [§§ 26.10, 26.20, 26.23, 26.70, and 26.73 of this part *when revised marker*]; shall implement a chemical testing program, including random tests; and shall make provisions for employee assistance programs, imposition of sanctions, [***appeals vs. due process protection***]<sup>2</sup> procedures, the protection of information, and recordkeeping.—
- (c) The regulations in this part apply to a Corporation required to obtain a certificate of compliance or an approved compliance plan under part 76 of this chapter only if the Corporation elects to engage in activities involving formula quantities of strategic special nuclear material. When applicable, the requirements apply only to the Corporation and personnel carrying out the activities specified in [§ 26.2(a), (3), and (4) *when revised marker*].
- (d) Certain regulations in this part apply to both current and future decommissioning plants.
- (e) The provisions of this part apply to:

<sup>1</sup> Power Reactor Licensees (Part 50) should be separated in text from Fuel Facilities, Reprocessing, Transport, etc.?

<sup>2</sup> "Appeal rights" should be changed to "due process protection." Appeal rights have been adequate for the past decade and nothing has changed.

<sup>3</sup> The industry wants to move from the currently unique FFD personnel background check program to the mainstream program for trustworthiness and reliability—the unescorted access authorization (UAA)

Template = SECY-067

SECY-02

- (1) [All **FFD program personnel at the licensee's plant and** persons granted unescorted access to nuclear power plant protected areas;]<sup>3</sup>
- (2) [**Licensee**]<sup>4</sup>, [**contractor/vendor Vs. vendor, or contractor**]<sup>5</sup> personnel required to physically report to a licensee's Technical Support Center (TSC) or Emergency Operations Facility (EOF) in accordance with licensee emergency plans and procedures;
- (3) SSNM licensee and transporter personnel who:
  - (i) Are granted unescorted access to Category IA Material;
  - (ii) Create or have access to procedures or records for safeguarding SSNM;
  - (iii) Make measurements of Category IA Material; or
  - (iv) Guard Category IA Material; and-
- (4) [**Other personnel providing support to this program on a day-to-day basis as determined by the FFD Program Manager. Vs. FFD Program personnel who:**
  - (i) **Can link test results with the person who was tested prior to determination of an FFD policy violation;**
  - (ii) **Make medical or management determinations of fitness;**
  - (iii) **Make removal or return-to-work decisions; or**
  - (iv) **Are involved in the selection or notification of employees for testing or in the collection or onsite testing of specimens.]**<sup>6</sup>
- (5) [**All Vs. Licensee**]<sup>7</sup> personnel at decommissioning plants who:
  - (i) Are responsible for onsite fuel handling; or
  - (ii) Have unescorted access to areas containing irradiated fuel.<sup>8</sup>
- (f) The regulations in this part do not apply to NRC employees, to law enforcement personnel, or offsite emergency fire and medical response personnel while responding onsite, or SSNM transporters who are subject to U.S. Department of Transportation drug or alcohol fitness programs that require random testing for drugs and alcohol. [Following sentence may be changed to conform with § 73.6.] The regulations in this part also do not apply to spent fuel storage facility licensees or non-power reactor licensees who possess, use, or transport formula quantities of irradiated SSNM as these materials are exempt from the Category I

program pursuant to 10 CFR § 73.56 and Regulatory Guide 5.66. Adding the proposed wording accomplishes this and removes the unintended consequences of the wording below. See Footnote 6.

<sup>4</sup> Term to be defined—as the entity holding the license (several plants use same procedures and have centrally managed programs)—not individual docket. See definitions.

<sup>5</sup> The current industry-used term for this single category of personnel is "contractor/vendor." There is no apparent reason to separate the category into two, contractor and vendor. See definitions.

<sup>6</sup> The NRC proposed wording is too open ended with potential tentacles spread far and wide and should be deleted because the subject is adequately covered above—see Footnote 3. A discretionary piece has been suggested for this subparagraph to cover any loose ends. Also, there needs to be no separation of requirements between licensee personnel and contractor/vendor personnel that work at the plant.

<sup>7</sup> Contractor/vendor personnel should also be included.

<sup>8</sup> Not sure what this adds—these personnel work inside the PA and have UA. ISFSIs purportedly were not included.

physical protection requirements as set forth in 10 CFR 73.6.–

***[(g) Exclusions—In offsite locations or in unique situations, where their personnel may be called upon to make an FFD determination, e.g., at hospitals, EAP or substance abuse facilities, etc., those personnel are specifically excluded from being subject to the requirements of Part 26.]<sup>9</sup>***

## **§ 26.5 Definitions.**

***Abuse of legal drugs*** means the confirmed use of a legal drug (e.g., alcohol, prescription drugs, over-the-counter drugs) in a manner that constitutes a health or safety hazard to the individual or to others in the workplace, including on-the-job impairment. Documented or corroborated Legal actions beyond the application of probable cause, or documented or corroborated employment actions greater than administrative warning against an individual for use of legal drugs are presumptive of the abuse of legal drugs.

***Aliquot*** means a portion of a specimen used for testing. It is taken as a sample representing the whole specimen.

***Behavioral observation*** means a licensee-approved program of personnel observation.

***Blood Alcohol Concentration (BAC)*** means a measure for determining the mass of alcohol in a volume of blood ***[as determined by use of a breathalyzer]***<sup>10</sup>.

***Commission*** means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

***Confirmatory test*** means a second analytical procedure to identify the presence of a specific drug or drug metabolite which is independent of the screening test and which uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. (At this time, gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) For determining blood alcohol concentration levels, a "confirmatory test" means a second test using another breath alcohol analysis device.

***[Delete—Additional information may be obtained by gas chromatography analysis of blood.]***

***Confirmed positive test result*** means a laboratory confirmed positive test result that has been verified as a violation of FFD policy by the Medical Review Officer (MRO) after evaluation. A "confirmed positive test" for alcohol is obtained as a result of a confirmation of BAC levels of 0.04 percent or higher or a BAC of 0.02 percent or higher after an individual has been in a work status for two (2) or more hours or a BAC of 0.03 percent or higher after an individual has been in a work status for more than one (1) hour with a second breath analysis without MRO evaluation.

***[Contractor/vendor (C/V) means any company or individual providing services inside the protected area boundary, whether by contract, purchase order, verbal agreement***

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<sup>9</sup> Need a clear exclusion of programs that are used in unique situations, like hospitals, etc., whose personnel may be called upon to make an FFD determination.

<sup>10</sup> The use of a blood specimen is inappropriate so only a breathalyzer would be used for this determination

***or other arrangement.]***

*Cut-off level* means the value set for designating a test result as positive.

*Follow-up program* is a specific random testing program required for individuals with unescorted access who have been evaluated as substance dependent or who has a strong potential for further substance abuse.

*HHS-certified laboratory* means a laboratory that is certified to perform urine drug testing under the Department of Health and Human Services "Mandatory Guidelines for Federal Workplace Drug Testing Programs," June 9, 1994, (59 FR 29908), and all revisions thereto.

*Illegal drugs* means those drugs included in Schedules I through V of the controlled Substances Act (CSA), but not when used pursuant to a valid prescription or when used as authorized by law.

*Laboratory confirmed positive* means the result of a confirmatory test that has established the presence of drugs, or drug metabolites, at a sufficient level to be an indication of prohibited drug use.

***[Legal action means documented or corroborated information a candidate for, or a person holding unescorted access, has had formal action taken by a recognized law enforcement authority, beyond the application of standards of probable cause, e.g., (but not limited to) a record of arrests/convictions obtained from FBI criminal history record information (CHRI). A lesser-included term could be a licensee's employment action, documented or corroborated action taken by an employer—greater than administrative warning, which required or requires, the employee to take or sustain some action internal to the company.]***<sup>11</sup>

***[Licensee means the company or entity that holds the NRC license to construct, operate a nuclear power plant or fuel handling/storage associated with them.]***

*Licensee's testing facility* means a drug testing facility operated by a licensee or one of its contractor/vendors to perform onsite screening testing of urine specimens.

***[Management] determination of fitness means the process whereby an individual who seeks to regain unescorted access to a plant protected area after a violation of the licensee's FFD policy or, was otherwise unable to safely and competently perform assigned duties is evaluated to determine whether he or she has completed rehabilitation and may be considered for acceptance. The authorized manager would make this determination after considering the advice provided by medical professionals or trained counselors in accordance with standard procedures. If appropriate, the individual may be placed in a follow-up testing program as a condition of unescorted access authorization.]***<sup>12</sup>

***[Medical professional means an appropriately trained/qualified/health care clinician whose services are used in support of a Part 26 FFD program.]***

*Medical Review Officer* means a licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's

<sup>11</sup> Term included as a placeholder in case the subject is included in a follow-on to history of substance abuse.

<sup>12</sup> Substitute the word management for medical and modify definition to be compatible with industry practices.

positive test result together with his or her medical history and any other relevant biomedical information.

***[Potentially disqualifying information means that the specific information must be judged in context with all other known information about the individual by the company-authorized adjudicating official who makes the final determination as to whether the information is sufficiently proven to disqualify the individual from unescorted access.]***

*Pre-access test* means the required test for drugs and alcohol to be conducted within 60 days before the granting of unescorted access to protected areas or assignment to activities within the scope of this part.—

*Presumptive positive screening test result* means the result of a screening test for drugs and drug metabolites that indicates the presence of some drug or drug metabolite and that has the potential to be confirmed through gas chromatography/mass spectrometry testing by an HHS-certified laboratory as a laboratory confirmed positive test result, or the result of a positive test for alcohol.

*Protected area* has the same meaning as in § 73.2(g) of this chapter, an area encompassed by physical barriers and to which access is controlled.

*Screening test* means an immunoassay screen for drugs or drug metabolites that may be used to eliminate "negative" urine specimens from further consideration; or the first breathalyzer test for alcohol.

*Substance abuse* means the use, sale, or possession of illegal drugs or the abuse of legal drugs or other substances.

*Subversion or subvert the testing process* means an act intended to avoid being tested or to bring about an inaccurate drug or alcohol test result for oneself or others. Acts of subversion can occur at any stage of the testing program including selection and notification of individuals for testing, specimen collection, specimen analysis, and testing result reporting processes, and can include providing a surrogate urine specimen, diluting a specimen (in vivo or in vitro), and adding an adulterant to a specimen.

*Suitable Inquiry* means a best-effort verification of employment history for a minimum of the past three years ***[but may be done in concurrent with the employment checks under § 73.56.]*** It is obtained through contacts with previous employers to determine if a person was, during that period, tested positive for illegal drugs or abuse of alcohol that resulted in on-duty impairment, subject to a plan for treating substance abuse (except for self-referrals), or removed from, or made ineligible for activities within the scope of this part, including being denied unescorted access or other employment in accordance with a licensee fitness-for-duty policy.

*Supervisor* means any person who has the authority, immediate oversight or on-going responsibilities to direct or control activities of any other person or persons where those persons or activities fall within the scope of this part.

***[The following definitions in the NRC first outline are discussed in this block:<sup>13</sup>***

***Blood alcohol concentration—Units need to put in Appendix A***

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<sup>13</sup> These definitions were on the NRC list in the outline. The notes advise what we think of each.

- *The blood draw should be removed from the rule. It is an issue for each licensee and its legal department to decide.]*

**Category IA material**—*move out of Part 50 licensee section.*

**Chain of custody** (*Keep in Appendix A, 1.2*)

- *What is the difference between this term and "custody and control"? They seem to be used interchangeably and the result is confusion.*
- *Need to have only one term and one tracking form, why not use this one and eliminate the custody-and-control form?*

**Collection site** (*Leave in Appendix A, 1.2*)

**Collection site person** (*Leave in Appendix A, 1.2*)

**Custody-and-control form**—(*Why need a definition?*)

- **History of substance abuse (delete)** (*see Legal action definition.*) Agree to deletion—do not need this categorization with its unintended consequences in deciding whether an individual needs to be in a follow-up program. Do we need anything pertaining to legal and employment action?

**Limit of detection** (*Keep in Appendix A, 1.2*)

**Medical/[Management] determination of fitness**

- *[The determination that an individual is not currently under the influence of drugs, alcohol, or fatigue can be made by management with medical/clinical advice. There is the second issue of predicting the potential for future abuse. This is more of a psychological evaluation. Will one term cover both? Do we need separate terms for review and determination of need for follow-up testing.]*

**Potentially disqualifying FFD information**

- *[Need to look at this closely since this term cannot be easily qualified—it is in relation to the standards of RG 5.66 as adjudicated by the licensee AA manager.]*

**SSNM**—**means Strategic Special Nuclear Material.** *[Separate section?]*

**Transporter**—**means a general licensee pursuant to 10 CFR 70.20a, who is authorized to possess formula quantities of Strategic Special Nuclear Material as defined in 10 CFR 73.2 in the regular course of carriage for another or storage incident thereto, and includes the driver or operator of any conveyance, and the accompanying guards or escorts.** *[Separate section?]*

## § 26.7 Interpretations

Except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission.

## § 26.9 Exemptions

The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines

are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest. Any exemptions submitted under this part must meet the provisions of § 50.12 or §70.14, as applicable.

### **§ 26.11 Communications**

Except where otherwise specified in this part, all communications and reports concerning the regulations in this part must be addressed to the NRC Document Control Desk, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Copies of all communications must be sent to the appropriate regional office and resident inspector. Communications and reports may be delivered in person at the Commission's offices at 11555 Rockville Pike, One White Flint North, Rockville, Maryland 20852-2738, or at the Commission's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, MD.

### **§ 26.13 Information Collection Requirements OMB Approval**

- (a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). OMB has approved the information collection requirements contained in this part under control number [update 3150-0146].
- (b) The approved information collection requirements contained in this part appear in [update §§]

**§ 26.15 Future Revisions**

Changes to this part that are necessary to ***[comply Vs be in appropriate alignment]*** with the Department of Health and Human Services "Mandatory Guidelines for Federal Workplace Drug Testing Programs." June 9, 1994 (59 FR 29908). ***[If these changes would establish new requirements for Part 26 programs, a mechanism for stakeholder input would be established in order that all revisions thereto would not require a backfit analysis pursuant to § 50.109 of this chapter.]*** Changes to this part that depart from the provisions of this paragraph are subject to the provisions of § 50.109. ***[The information in HHS Program Directives will be considered advisory in nature for NRC licensees until an official NRC process make them mandatory.]***<sup>14</sup>

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<sup>14</sup> The NRC rule is not tied to the HHS Guidelines—they are only required for Federal programs. However, DHHS has the scientific expertise to know the drug panels, cutoff levels, technologic and forensic changes, etc., and these could pass through to licensee programs so that industry programs are not unique as seen by the HHS laboratories unless there would be an increase in requirements without stakeholder input.