POLICY ISSUE
NOTATION VOTE

May 23, 2002 SECY-02-0023A

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: ADDENDUM TO SECY-02-0023: PROPOSED REVISION TO THE ENFORCEMENT POLICY TO INCLUDE AN INTERIM POLICY REGARDING ENFORCEMENT DISCRETION FOR FITNESS-FOR-DUTY ISSUES

PURPOSE:

To request that the Commission approve changes (see Attachment 1) to the enforcement discretion proposed in SECY-02-0023 for 10 CFR Part 26 practices regarding "suitable inquiry" and "pre-access testing." The changes would: (1) provide that licensees complete a suitable inquiry by contacting every subsequent employer following an individual's access authorization having been interrupted for 31 days to 60 days; (2) allow licensees to forego a suitable inquiry for interruptions in authorization of 30 days or less; (3) allow licensees to take credit for the suitable inquiries conducted by previous licensees; and (4) allow licensees to grant authorization, provided the results of an alcohol test are negative and a drug test specimen has been collected. The term "authorization" refers to a period during which an individual maintains unescorted access (i.e., is "badged" at a site) or is assigned to perform activities within the scope of Part 26.

BACKGROUND:

In SECY-02-0023, the staff originally proposed that the NRC would not normally take enforcement action for a licensee's failure, when conducting a suitable inquiry, to contact employers for whom an individual was employed for less than 30 days. Further, the staff proposed that if an individual had periods of less than 30 calendar days of contiguous employment or unemployment, only one of the periods of employment or unemployment need be verified. For example, assume that during the month of April a transient worker was

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employed by Employer A for two weeks, employed by Employer B for one week, and unemployed for one week. Under the proposed interim policy, it would have only been necessary to verify one of the periods for the month of April: employment with Employer A, employment with Employer B or unemployment, but not all three.

The staff also proposed that the NRC would not normally take enforcement action for a licensee's failure to conduct a pre-access test for alcohol and drugs in those cases where an individual has had a short break in fitness-for-duty (FFD) coverage, provided certain conditions are met. This discretion would have applied for candidates that had been covered by a Part 26 FFD program for at least 30 of the previous 60 days and had not, in the past, tested positive for illegal drugs, been subject to a plan for treating substance abuse, been removed from or made ineligible for activities within the scope of Part 26, or been denied unescorted access by any other licensee.

DISCUSSION:

The Commission's Staff Requirements Memorandum, dated October 3, 2001, directed the staff to request additional public comment on the provisions of 10 CFR Part 26 and to conduct several stakeholder meetings concerning combined access authorization and FFD guidance. In response to the Commission's direction, the NRC staff has engaged stakeholders in monthly public meetings since November 15, 2001, to discuss the FFD rule. The staff has also been conducting monthly meetings with stakeholders regarding a revision to the guidance endorsed in Regulatory Guide 5.66 (1991), "Access Authorization Programs for Nuclear Power Plants," that the industry is preparing.

During the course of these meetings, the staff developed a greater appreciation for the implications of several ambiguities in the current FFD rule. Part 26 sets forth requirements for authorizing individuals for unescorted access to nuclear power plant protected areas and for performing activities related to Strategic Special Nuclear Materials. The current FFD regulations contain requirements for the initial granting of authorization, *but do not address transfers within a licensee's corporate organization or to a different licensee, or reinstating authorization after a short break*. Section 26.24(a)(1) requires licensees to test for drugs and alcohol within the 60 days prior to granting authorization and indirectly addresses short breaks by allowing licensees to rely on a pre-access drug and alcohol test that was performed by another licensee within the past 60 days. Therefore, if the individual had a negative result from another licensee's drug and alcohol test within the past 60 days, the individual would not have to be tested again pursuant to §26.24(a)(1) before authorization is granted at the new licensee's site. Although guidance contained in NUREG-1385, "Fitness for Duty in the Nuclear Power Industry: Responses to Implementation Questions," indicates that licensees may "accept" an authorization granted by a previous licensee for individuals who transfer between licensees after only a "short break" in authorization, the period of time considered to be a "short break" is not defined.

The staff's proposed interim enforcement policy in SECY-02-0023 (issued February 1, 2001) was an effort to address these ambiguities. However, additional discussions with stakeholders during subsequent meetings indicated that the staff's proposed enforcement discretion policy could be further enhanced. Specifically:

(1) The proposed enforcement discretion policy did not adequately address new information developed subsequent to the events of September 11, 2001;
(2) The proposed enforcement discretion did not allow a licensee to take credit for the suitable inquiries conducted by previous licensees;
(3) The proposed enforcement discretion would have created an unnecessary burden by requiring licensees to determine the number of days in a 60-day period that an individual had been subject to a Part 26 FFD program; and
(4) The proposed approach would result in continued discrepancies between access authorization and FFD requirements.

In addition, the enforcement discretion policy proposed in SECY-02-0023 did not recognize that many licensees and contractor/vendors (C/Vs) now maintain some personnel in a "ready to be authorized" status (individuals not currently working at a site or assigned to perform activities within the scope of the FFD rule). The individuals in a "ready to be authorized" status have met FFD and access authorization requirements for initial authorization, and are subject without interruption to the licensee's or a C/V's licensee-approved FFD program, including FFD training, behavioral observation, for-cause alcohol and drug testing, and the requirement to report any drug- or alcohol-related arrests. In some cases, they are also subject to random testing for drugs and alcohol. Licensees maintain, and the staff agrees, that licensees should be able to take credit for the elements of the FFD program to which an individual has been subject without interruption when reinstating authorization for unescorted access to a nuclear power plant protected area after a short break. "Taking credit" would include relying upon the information gathered about an individual by a corporate FFD program, or by a previous licensee or C/V, to meet the requirements for a suitable inquiry into an individual's past five years of employment.

To illustrate the implications of the current regulations when managing transfers and short breaks in authorization, consider an individual who has been working at a nuclear utility's corporate headquarters for the past 45 days and has been subject to all of the elements of the licensee's FFD program. Now assume that this individual is being transferred to a site and will again require unescorted access to the protected area. Because the individual has not been authorized for unescorted access at a site (i.e., has not been "badged") during the past 45 days, the current regulations can be interpreted as requiring the licensee to:

(1) Obtain another self-disclosure (i.e., a self-report of any drug- or alcohol-related arrests), despite the fact that the individual has been continuously obligated to self-report any drug- or alcohol-related arrests under the corporate FFD program;
(2) Conduct a new suitable inquiry of the individual's past five years of employment before granting authorization, despite the fact that a suitable inquiry was conducted when the individual was first granted authorization and the individual has been continuously employed by the same corporation during the 45-day interruption in access authorization at a site; and

(3) Perform a pre-access test for drugs and alcohol if the individual had not been selected for random testing within the past 60 days, despite the fact that the individual was tested as part of the initial authorization process, has been continuously subject to the possibility of being tested, and may have been subject to random testing several times since the first authorization was granted.

The current regulatory requirements appear to be an unnecessary regulatory burden in such instances. It would also appear to be an unnecessary burden to require such actions where an individual has been covered by a licensee-approved FFD program of another licensee or C/V.

Therefore, the staff believes the suitable inquiry and pre-access testing enforcement discretion proposed in SECY-02-0023 should be modified to address a broader scope of issues. The revised discretion addresses not only short breaks of 30 days or less but also interruptions of 31 to 60 days. In SECY-02-0023, the proposed enforcement discretion for reinstatement or transfer required that the individual be covered by a Part 26 program for "at least 30 of the previous 60 days." The revised enforcement discretion addresses interruptions of up to 60 days consistent with the 10 CFR 26.24(a)(1) requirement that licensees perform "testing within 60 days prior to the initial granting of unescorted access to protected areas or assignment to activities ...". In addition, the revised enforcement discretion is consistent with the interruption periods that are being used in both the draft FFD rule language (http://ruleforum.llnl.gov) and the industry's proposed access authorization guidance (http://www.nrc.gov/NRC/ADAMS/index.html).

Under the revised interim enforcement policy, the NRC normally would not take enforcement action for a licensee's failure to conduct a suitable inquiry for an individual's past five years of employment and a pre-access test for alcohol and drugs in those cases where an individual has had a short interruption in authorization, provided certain conditions are met. Under the revised enforcement discretion policy, licensees that plan to grant authorization to an individual whose last authorization was terminated favorably (i.e., did not violate the licensee's FFD policy) and who has had a short interruption in coverage under a Part 26 program must:

(1) Obtain and verify that a self-disclosure for the period since the last authorization contains no potentially disqualifying FFD information, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption;
(2) Within 5 working days of granting authorization, complete a suitable inquiry for the period since the last authorization was terminated, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption;
(3) Verify that results of an alcohol test are negative and collect a specimen for drug testing, unless either a drug and alcohol test meeting the standards of Part 26 was performed within the past 60 days and results were negative, or the individual was subject to a licensee-approved Part 26 FFD program that included random drug and alcohol testing throughout the period of interruption, or the period of interruption was 30 days or less; and

(4) Ensure that the individual has met FFD refresher training requirements.

"Potentially disqualifying FFD information" means information demonstrating that an individual has, during the period authorization was interrupted: (1) violated an employer's drug and alcohol testing policy; (2) used, sold, or possessed illegal drugs; (3) abused legal drugs; (4) subverted or attempted to subvert a drug or alcohol testing program; (5) refused to take a drug or alcohol test; (6) been subject to a plan for substance abuse treatment (except for self-referral); or (7) had legal or employment action taken for drug or alcohol use.

This revised enforcement discretion policy has several advantages over the enforcement discretion policy originally proposed in SECY-02-0023. The revision would: (1) provide the maximum alignment between the interim enforcement discretion policy and the future FFD rule revision currently envisioned by the staff; (2) achieve greater consistency between FFD and access authorization guidance; (3) reduce unnecessary regulatory burden by allowing licensees to "take credit" for the suitable inquiries performed by previous licensees; (4) clarify the NRC's expectations for managing transfers of personnel between sites and short breaks in authorization; (5) eliminate redundant regulatory requirements; and (6) take a graded approach to updating and reinstating authorization for individuals whose authorization has been interrupted from 1 to 60 days. Further, the revision recognizes that the potential risks of updating or reinstating an individual who has recently held authorization, or has been subject to the majority of the elements of a Part 26 FFD program, are less than those presented by an unknown and unmonitored individual for whom the *current* regulations allow up to 60 unmonitored days between the pre-access test and the authorization to perform activities within the scope of Part 26. The staff believes these measures will maintain safety and increase the overall efficiency and effectiveness of the licensees' Part 26 programs.

Given the previously discussed ambiguities of the current FFD rule, the staff does not intend to pursue past violations for insufficient suitable inquiries (where licensees failed to contact employers when individuals had worked for employers for less than 30 days) and past violations for failures to perform pre-access drug tests (where individuals were subject to a FFD program within the last 30 days). The NRC staff believes that this exercise of enforcement discretion is appropriate because: (1) pursuing past violations would not be an effective and efficient use of NRC resources; (2) individuals who currently have authorization under the past suitable inquiry and pre-access testing practices have successfully maintained their authorizations while subject to Part 26 FFD programs over time; and (3) requiring licensees to conduct new suitable inquiries and pre-access tests would represent undue regulatory burden.

RECOMMENDATION:

The staff recommends that the Commission approve publication of the attached *Federal Register* notice (Attachment 2) announcing the revision to the Enforcement Policy. The staff further recommends that this discretion become effective 60 days after publication in the *Federal Register*.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper.

Notes:

1. The interim enforcement policy will be published in the *Federal Register* and will become effective 60 days after publication. Comments on this policy will be accepted for 30 days after publication and will be considered prior to the next revision of the Enforcement Policy.

2. The appropriate Congressional Committees will be notified.

3. The change to the Policy Statement does not impact information collections that are subject to the requirements of the Paperwork Reduction Act.

4. The staff has determined that this is not a "major" rule as defined in the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804(2).

5. The Office of Enforcement's web site will be updated. Necessary changes to the Enforcement Manual will also be made.

/RA/

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Executive Director
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Attachments: 1. Contrast Between SECY-02-0023 and Revised Enforcement Discretion
2. Draft *Federal Register* notice with revision to Enforcement Policy

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FILE NAME: G:\SECY_Comm Papers\Addendum to FFD Enforcement Discretion SECY.wpd
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DATE	5/13/2002	5/2/2002	5/ 23/2002

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Current Rule	SECY-02-0023	Revised Discretion
Suitable inquiry (26.3): Suitable inquiry means best-effort verification of employment history for the past five years, but in no case less than three years, obtained through contacts with previous employers to determine if a person was, in the past, tested positive for illegal drugs, subject to a plan for treating substance abuse, removed from, or made ineligible for activities within the scope of 10 CFR part 26, or denied unescorted access at any other nuclear power plant or other employment in accordance with a fitness-for-duty policy.	The NRC normally will not take enforcement action for a licensee's failure to contact all employers when an individual candidate was employed for less than 30 days, provided that a licensee verifies at least one period of employment status during that 30-day period.	If the individual applicant's authorization has been interrupted for 30 calendar days or less and the individual's last authorization was terminated favorably, before granting authorization for unescorted access to the protected area of a nuclear power plant or assigning the individual to perform activities within the scope of Part 26, the licensee shall obtain and verify that a self-disclosure (i.e., a report of any drug- or alcohol-related arrests) for the period since the last authorization contains no potentially disqualifying FFD information, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption. Potentially disqualifying FFD information means information demonstrating that an individual has, during the period authorization was interrupted: (1) Violated an employer's drug and alcohol testing policy; (2) Used, sold, or possessed illegal drugs; (3) Abused legal drugs; (4) Subverted or attempted to subvert a drug or alcohol testing program; (5) Refused to take a drug or alcohol test; (6) Been subjected to a plan for substance abuse treatment (except for self-referral); or (7) Had legal or employment action taken for alcohol or drug use. The licensee shall also ensure that the individual has met FFD refresher training requirements. Licensees may rely upon the information gathered by previous licensees regarding an individual applicant's past five years of employment to meet the suitable inquiry requirement.

Current Rule	SECY-02-0023	Revised Discretion
Pre-access testing ((26.24(a)(1)): Testing within 60 days prior to the initial granting of unescorted access to protected areas or assignment to activities within the scope of this part.	Pre-access testing for drugs and alcohol must be conducted within 60 days before the granting of unescorted access to protected areas or assignment to activities within the scope of this part, unless the individual: (a) Has been covered by a program meeting the requirements of this part for at least 30 days during the 60 days immediately previous to the granting of unescorted access; and (b) Has not tested positive for illegal drugs, been subject to a plan for treating substance abuse, been removed from or made ineligible for activities within the scope of Part 26, or been denied unescorted access at any other nuclear power plant or other employment in accordance with a fitness-for-duty policy.	If the individual applicant's authorization has been interrupted for 30 calendar days or less and the individual's authorization was terminated favorably, in order to grant authorization for unescorted access to the protected area of a nuclear power plant or assigning the individual to perform activities within the scope of Part 26, the licensee shall: (1) Obtain and verify that a self-disclosure for the past 30 days reveals no potentially disqualifying information; and (2) Ensure that the individual has met FFD refresher training requirements. If the individual applicant's authorization has been interrupted for 31 days to 60 days and the individual's last authorization was terminated favorably, in order to grant authorization for unescorted access to the protected area of a nuclear power plant or assigning the individual to perform activities within the scope of Part 26, the licensee shall: (1) Obtain and verify that a self-disclosure for the period since the last authorization contains no potentially disqualifying FFD information, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption; (2) Within 5 working days of granting authorization, complete a suitable inquiry for the period since last authorization was terminated, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption; (3) Verify that results of an alcohol test are negative and collect a specimen for drug testing, unless either a drug and alcohol test meeting the standards of Part 26 was performed within the past 60 days and results were negative or the individual was subject to a licensee-approved Part 26 FFD program that included random drug and alcohol testing throughout the period of interruption; and (4) Ensure that the individual has met FFD refresher training requirements.

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

[NUREG - 1600]

Revision of the NRC Enforcement Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: revision.

SUMMARY: The Nuclear Regulatory Commission (NRC) is publishing a revision to its General Statement of Policy and Procedure for NRC Enforcement Actions (NUREG-1600) (Enforcement Policy or Policy) to include an interim enforcement policy regarding enforcement discretion for certain fitness-for-duty issues.

DATES: This revision is effective on (insert 60 days after date of publication in the *Federal Register*), while comments are being received. Submit comments on or before (30 days after publication in the *Federal Register*).

ADDRESSES: Submit written comments to: Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop: T6D59, U. S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., Federal workdays.

Copies of comments received may be examined at the NRC Public Document Room, Room O1F21, 11555 Rockville Pike, Rockville, MD.

FOR FURTHER INFORMATION CONTACT: Garmon West, Jr., Office of Nuclear Security and Incident Response, Senior Program Manager, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-1044, (fitnessforduty@nrc.gov) or Renée Pedersen, Senior Enforcement Specialist, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-2742, e-mail (RMP@nrc.gov).

SUPPLEMENTARY INFORMATION:

A proposed amendment to the NRC's fitness-for-duty (FFD) regulations (10 CFR Part 26) was published on May 9, 1996 (61 FR 21105). After consideration of public comment, a final rule was affirmed by the Commission on December 4, 2000. When the NRC sought clearance from the Office of Management and Budget (OMB) to publish the affirmed final rule, stakeholders objected and expressed a number of concerns regarding the affirmed final rule. Because of stakeholder concerns and questions about implementation of the final rule, the NRC met with stakeholders several times to discuss implementation questions and to more fully understand their concerns. Given the significance of stakeholder concerns, the NRC considered several options and concluded in the Commission's Staff Requirements Memorandum, dated October 3, 2001, that it should: (1) withdraw the OMB clearance request; (2) request additional public comment on all of the rule's provisions; and (3) conduct several stakeholder meetings concerning a combined access authorization and FFD guidance document. As a result of public meetings with stakeholders, the NRC learned of licensee

practices in two FFD areas, “suitable inquiry” and “pre-access testing,” that did not meet the current Part 26 requirements.

Current FFD Requirements

Among its other provisions, the FFD rule provides drug- and alcohol-related requirements for authorizing individuals for unescorted access to nuclear power plant protected areas or for performing activities related to Strategic Special Nuclear Materials. Under the FFD rule, to grant authorization to an individual who has not been employed in the nuclear industry before, licensees must:

(1) Conduct a “suitable inquiry” into the individual’s employment history for the past five years to identify if the individual had any substance abuse problems;
(2) Ask the individual to provide a “self-disclosure” of any substance abuse problems;
(3) Perform a “pre-access” drug and alcohol test and verify that the results are negative; and
(4) Provide training to the individual regarding the effects of drugs and alcohol on job performance and the requirements of the licensee’s FFD program.

To maintain authorization, individuals must:

(1) Be subject to “behavioral observation” by supervisors who are trained to detect signs of possible impairment and changes in behavior;
(2) Report any drug- or alcohol-related arrests; and

(3) Be subject to random and “for-cause” drug and alcohol testing with negative test results.

Other requirements for authorizing individuals for unescorted access to nuclear power plant protected areas are defined in 10 CFR 73.56, “Personnel Access Authorization Requirements for Nuclear Power Plant Personnel.” Regulatory Guide (RG) 5.66 (1991), “Access Authorization Program for Nuclear Power Plants,” provides guidance for implementing §73.56. One requirement in §73.56 is that licensees must conduct a background investigation with former employers to determine whether an individual is trustworthy and reliable. Licensees typically ask employers the FFD suitable inquiry questions at the same time.

Although the FFD regulations (10 CFR Part 26) and the access authorization regulations (§73.56) are intended to assure that nuclear personnel are trustworthy and reliable, there are some differences between them. One important difference is that the access authorization regulations and RG 5.66 address licensees authorizing unescorted access for individuals who are transferring between licensee sites and have interruptions in their authorization. The FFD regulations are less clear on the subject of transfers and short breaks in authorization. For example, the only provision in the current FFD regulations that indirectly addresses these situations allows licensees to rely on a pre-access drug and alcohol test that was performed by another licensee within the past 60 days. Therefore, if the individual had a negative result from another licensee’s drug and alcohol test within the past 60 days, the individual does not have to be tested again pursuant to §26.24(a)(1) before authorization is reinstated at the new licensee’s site. Guidance contained in NUREG-1385, “Fitness for Duty in the Nuclear Power Industry: Responses to Implementation Questions,” states that licensees may “accept” an authorization granted by a previous licensee for individuals who transfer between licensees with a “short break” in authorization, but the period of time considered to be a “short break” is not defined.

As a result, the current FFD regulations may be interpreted as requiring licensees to treat each individual under consideration for authorization as a new hire, because of the absence of the clear requirements for transfers and reinstatements that are found in the access authorization regulations.

Changing Industry Conditions

At the time the FFD regulations were developed (June 7, 1989; 54 FR 24468), the industry structure was different and personnel transfers (i.e., leaving the employment of one licensee to work for another licensee) between licensees with interruptions in authorization were less common. Most licensees operated plants at a single site and maintained a FFD program that applied only to that site. When an individual left employment at one site and began working for another licensee, the individual would be subject to a different FFD program that often had different requirements. Further, because some licensees were reluctant to share information about previous employees with the new employer, licensees often did not have access to the information the previous licensee had gathered about the individual. With relatively few licensee employees changing jobs, the approach in the current FFD regulations caused some delays in granting authorization, but assured that a licensee had complete information upon which to base an authorization decision. The current FFD requirements are especially burdensome regarding to contractor/vendor (C/V) personnel who more frequently transfer between sites, but, because C/V personnel as a group consistently tested positive for drugs and alcohol at a higher rate than permanent licensee employees (see Information Notice 2001-02), the NRC believed the regulation's requirements were warranted.

Since 1989, the industry has undergone significant consolidation and developed new business practices to more efficiently use its workforce. The FFD regulations that treat all individuals who are transferring between licensees as new hires, and the lack of detailed requirements in the FFD regulations for managing transfers between sites when authorization is interrupted for short periods, have created a number of unnecessary burdens on licensees.

For example, a single nuclear utility may now operate many sites and maintain one corporate FFD program that applies to multiple sites. Thus, an employee at one site operated by the corporation may be transferred to another site operated by the same corporation, and still be subject to the same FFD program. However, the individual is technically transferring to a new licensee and so, under the current regulations, is required again to meet the FFD requirements for authorization at the new site. Although the individual's work history is well known to the FFD program, if that individual takes an extended vacation, for example, or spends 60 days at corporate headquarters between onsite assignments, the current FFD regulations require that the individual be treated as a new hire. The individual's ability to start work at the new site may be unnecessarily delayed until the suitable inquiry and pre-access drug and alcohol testing requirements of the current FFD regulations are met.

In addition, industry efforts to better use expertise and staffing resources have resulted in the development of a large transient workforce within the nuclear industry that travels from site to site as needed, such as roving outage crews. Although the industry has always relied upon C/Vs for special expertise and to staff up for outages, the number of transient personnel who work only in the nuclear industry has significantly increased and the length of time they are onsite has decreased. Although the employment histories of these individuals are well

known within the industry, these individuals also must be treated as new hires under the current FFD regulations.

Because the current FFD regulations were written on the basis that individual licensees would maintain independent, site-specific FFD programs, would share limited information, and that the majority of nuclear personnel would remain at one site for years, the regulations do not adequately address the transfer of personnel between sites with short interruptions in authorization between assignments. As a result, licensees applied the principles of their access authorization programs (under §73.56 and RG 5.66) to the FFD programs, and developed three practices that do not meet the intent of the current FFD rule's requirements, but are consistent with the NRC's intent that licensees assure that personnel who are authorized to perform activities within the scope of Part 26 are trustworthy and reliable.

Suitable Inquiry Practices

With regard to conducting a suitable inquiry before authorizing unescorted access, many licensees have adopted two practices that are consistent with access authorization requirements for background investigations, but are inconsistent with the FFD requirements regarding suitable inquiries. First, many licensees were not contacting employers when an individual had worked for an employer for less than 30 days. Instead, licensees followed the practice for background investigations set forth in RG 5.66. Licensees only contacted employers for whom the individual had worked for 30 days or more. Second, in many cases, if an individual left one licensee's site and worked at a job that did not require access authorization for two weeks, and then was assigned to another licensee within 30 days of leaving the previous licensee, the receiving licensee would not contact the interim employer for

the suitable inquiry. However, if the individual had an interruption in authorization of more than 30 days, the licensee would contact interim employers for suitable inquiry purposes. As is allowed under access authorization guidance, licensees focused the suitable inquiry on the period of interruption, and relied on the information collected by previous licensee(s) to meet the five-year suitable inquiry requirement. Although the requirements for a suitable inquiry under the FFD regulations and those for a background investigation under the access authorization regulations differ, licensees maintained that it was reasonable to use the same practices for these regulations.

As a result of initial meetings with stakeholders, the NRC developed an approach, in SECY-01-0134, to address inconsistent implementation with regard to contacting employers for each 30-day period. That is, until a final rule that would address this issue became effective, under this interim enforcement policy, the following approach would be taken: The NRC normally would not take enforcement action for a licensee's failure to contact all employers when an individual was employed for less than 30 days, provided that the licensee verified at least one period of employment status during that 30-day period. For example, during the month of April, if a transient worker was employed by Employer A for two weeks, Employer B for one week, and unemployed for one week, under this interim policy, it would only be necessary to verify the individual's status for one of these periods. Because this practice required at least one contact for each 30-day period, the NRC believed, at the time the policy was proposed, that this approach provided adequate safety in a cost-effective manner.

Pre-Access Testing

With regard to pre-access testing, many licensees were not conducting a pre-access test for alcohol and drugs in those cases where an individual was subject to a licensee's FFD program within the past 30 days. However, the fact that an individual was recently subject to a FFD program does not necessarily mean the individual was recently tested for drugs and alcohol. Thus, this practice conflicts with 10 CFR 26.24(a)(1) and the applicable provisions of the NRC's guidance in NUREG-1385. The current regulations require, and the guidance provides, that an applicant be tested for drugs and alcohol "within 60 days prior to the initial granting of unescorted access." They do not provide an exception for a reinstatement or transfer where there is little or no interruption in authorization.

Licensees were not conducting the pre-access test in these cases because they viewed the initial FFD pre-access screening as being the same as initial screening for access authorization under 10 CFR 73.56. Initial screening for access authorization is completed once and, as long as the individual remains subject to behavioral observation and arrest-reporting requirements, the initial screening is not repeated.

The NRC believes that it is reasonable that short interruptions in authorization be treated similarly to continuous coverage under a FFD program. For example, a worker who is subject to a FFD program, but is unavailable for behavioral observation and possible random testing while on vacation for two or three weeks, is generally considered to be under continuous coverage and is not given a pre-access test upon return. Also, the practice of omitting the pre-access test when the interruption in coverage is less than 30 days is similar to NRC's practice in related areas. For example, using the guidance endorsed by RG 5.66 for access authorization

programs, licensees generally do not conduct a background investigation for an individual when the interruption in authorization is less than 30 days. In another example, the guidance in NUREG-1385, states that an individual covered by a C/V's FFD program may take a (reasonably short) period of time to transfer from one site to another without invoking the need for a pre-access test.

For these reasons, in SECY-01-0134, the staff proposed that the NRC normally would not take enforcement action for a licensee's failure to conduct a pre-access test for alcohol and drugs in those cases where an individual has had a short break in FFD coverage, provided certain conditions are met. That is, the individual was subject to a FFD program for at least 30 of the previous 60 days and has not, in the past, tested positive for illegal drugs, been subject to a plan for treating substance abuse, been removed from or made ineligible for activities within the scope of Part 26, been denied unescorted access by any other licensee, or had adverse employment action taken by another employer in accordance with a drug and alcohol policy.

Additional Considerations

The Commission's Staff Requirements Memorandum dated October 3, 2001, directed the staff to request additional public comment on all the proposed rule's provisions and to conduct several stakeholder meetings concerning combined access authorization and FFD guidance. In response to the Commission's direction, the NRC staff has engaged stakeholders in monthly public meetings since November 15, 2001. As a result of these meetings, and as the industry develops new access authorization guidance that is currently

under NRC review, the NRC has determined that the enforcement discretion proposed in SECY-01-0134 would not adequately address a number of concerns.

These concerns include:

(1) The proposed enforcement discretion policy does not adequately address new information developed subsequent to the events of September 11, 2001;

(2) The proposed approach does not allow a licensee to “take credit” for the information gathered about an individual during suitable inquiries conducted by previous licensees;

(3) A determination of the number of days in a 60-day period that an individual had been subject to a Part 26 FFD program would create an unnecessary regulatory burden; and

(4) The proposed approach is inconsistent with current and anticipated access authorization guidance and would result in continued discrepancies between access authorization guidance and FFD requirements.

In light of the events of September 11, 2001, and the increased interactions with stakeholders, the NRC now believes that contacting only one employer in each 30-day period in which the individual was employed by more than one employer does not provide a sufficient level of assurance that individuals granted initial authorization are trustworthy and reliable. Short periods of employment could be a warning sign of substance abuse problems and persons with substance abuse problems are potentially more vulnerable to influence attempts than persons without such problems. Therefore, in order to increase the likelihood of early detection of any developing substance abuse problems, the NRC has concluded that it is necessary (with the one exception noted below) that every employer be contacted to meet the five-year suitable inquiry requirement, as required in the current regulations.

The NRC believes that a suitable inquiry is not necessary for individuals being reinstated or transferred with an interruption in authorization of 30 days or less. Based upon industry experience, the NRC has concluded that there is limited risk from individuals who have established a work history within the nuclear industry, have previously met the access authorization and FFD regulations for granting and maintaining authorization, and have a short break in authorization due to a vacation or a transfer to a different site. This is a very different scenario than that of new prospective employees as previously discussed. Further, these individuals are required to self-disclose any drug- and alcohol-related problems that may have occurred during the period of interruption, and they recognize that a failure to report this information to the licensee may result in permanent revocation of authorization throughout the nuclear power industry. The requirement for a self-disclosure prior to reinstating authorization provides additional assurance that any developing substance abuse problems are detected for the period in which authorization was interrupted.

The NRC has also concluded that it is reasonable for licensees to rely upon the information gathered by previous licensees, and by C/Vs with licensee-approved FFD programs, to meet the suitable inquiry requirement. Because licensees and C/Vs now share the information they have gathered about an individual applicant for authorization, the requirement for each new licensee to independently contact every employer from the past five years is redundant.

The discretion policy proposed in SECY-01-0134 also did not recognize that many licensees and C/Vs now maintain some personnel in a “ready to be authorized” status, although the individuals are not currently working at a site or assigned to perform activities within the scope of the FFD rule. These individuals have met the FFD and access

authorization regulations for authorization, and are subject without interruption to the licensee's or C/V's FFD program, including FFD training, behavioral observation, for-cause alcohol and drug testing, and are required to report any drug- or alcohol-related arrests. In some cases, they are also subject to random testing for drugs and alcohol. Licensees maintain that they should be able to "take credit" for the elements of the FFD program to which an individual has been subject without interruption when deciding whether to grant authorization for unescorted access to a nuclear power plant protected area.

To illustrate the implications of the current FFD regulations in these cases, consider an individual who has been working at a nuclear utility's corporate headquarters for the past 45 days and has been subject to all of the elements of the licensee's FFD program. This individual is being transferred within the licensee corporation or to a site of a different licensee and will again require unescorted access to the protected area. Because the individual has not been authorized for unescorted access at a site during the past 45 days, the current regulations require the licensee to:

(1) Obtain another self-disclosure (i.e., a self-report of any drug- or alcohol-related arrests), despite the fact that the individual has been continuously obligated to self-report any drug- or alcohol-related arrests under the corporate FFD program;

(2) Conduct a new suitable inquiry of the individual's past five years of employment before granting authorization, despite the fact that a suitable inquiry was conducted when the individual was first granted authorization and the individual has been continuously employed by the same corporation during the 45-day interruption in access authorization at a site; and

(3) Perform a pre-access test for drugs and alcohol if the individual had not been selected for random testing within the past 60 days, despite the fact that the individual was tested as part of the initial authorization process, has been continuously subject to the possibility of being tested, and may have been subject to random testing several times since the first authorization was granted.

These actions represent an unnecessary regulatory burden in such instances.

The NRC further believes that one FFD program element cannot be substituted for another. So, for example, if an individual has been subject to a licensee's or C/V's FFD behavioral observation and arrest-reporting requirements, but was not subject to random testing, then the licensee would be required to conduct a pre-access test for drugs and alcohol. If an individual was not under arrest-reporting and behavioral observation requirements without interruption, but had a drug and alcohol test within the past 60 days, then only the self-disclosure and suitable inquiry would be necessary before granting authorization.

Revised Enforcement Discretion

Based on these considerations, the NRC has revised the enforcement discretion policy proposed in SECY-01-0134 as follows:

Licensees may rely upon the information gathered by previous licensees regarding an individual applicant's past five years of employment to meet the suitable inquiry requirement. Because licensees now share information from the suitable inquiries they have conducted, as well as information about an individual's compliance with the licensee's FFD policy during the

period authorization is held at each site, the NRC believes that relying upon the information gathered by previous licensees provides adequate safety.

If an individual's authorization has been interrupted for 30 calendar days or less and the individual's last authorization was terminated favorably (i.e., the individual did not violate the licensee's FFD policy), before granting authorization for unescorted access to the protected area of a nuclear power plant or assigning the individual to perform activities within the scope of Part 26, the licensee shall:

(1) Obtain and verify that a self-disclosure (i.e., a report of any drug- or alcohol-related arrests) for the period since the last authorization contains no potentially disqualifying FFD information, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption; and

(2) Ensure that the individual has met FFD refresher training requirements.

If an individual's authorization has been interrupted for 31 days to 60 days and the individual's last authorization was terminated favorably, in order to grant authorization for unescorted access to the protected area of a nuclear power plant or assigning the individual to perform activities within the scope of Part 26, the licensee shall:

(1) Obtain and verify that a self-disclosure for the period since the last authorization contains no potentially disqualifying FFD information, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption;

(2) Within 5 working days of granting authorization, complete a suitable inquiry for the period since last authorization was terminated by contacting every interim employer, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption;

(3) Verify that results of an alcohol test are negative and collect a specimen for drug testing, unless either a drug and alcohol test meeting the standards of Part 26 was performed within the past 60 days and results were negative, or the individual was subject to a licensee-approved Part 26 FFD program that included random drug and alcohol testing throughout the period of interruption; and

(4) Ensure that the individual has met FFD refresher training requirements.

This revised enforcement discretion policy addresses not only short breaks of 30 days or less but also an interruption of 31 days to 60 days. In SECY-01-0134, the proposed enforcement discretion for reinstatement or transfer indicated that the individual must be subject to a Part 26 program for "at least 30 of the previous 60 days" to be exempt from a pre-access test. The revised enforcement discretion policy addresses interruptions up to 60 days, provides a graded approach to pre-access testing, and ensures consistency with the § 26.24(a)(1) requirement that licensees perform "testing within 60 days prior to the initial granting of unescorted access to protected areas or assignment to activities with the scope" of Part 26. In addition, the revised enforcement discretion policy is consistent with the interruption periods that are being used in both the draft FFD rule (http://ruleforum.llnl.gov) and the industry's proposed new access authorization guidance (http://www.nrc.gov/NRC/ADAMS/index.html). The NRC's goal is to have the revised

enforcement discretion match both the draft FFD rule language and the new access authorization guidance, to ensure that the access authorization requirements are more closely aligned.

This enforcement discretion policy has several advantages over the enforcement discretion policy proposed in SECY-01-0134. This policy:

(1) Provides greater assurance that individuals granted unescorted access to nuclear power plants are trustworthy and reliable;
(2) Provides the maximum match between the interim enforcement discretion policy and the future FFD rule;
(3) Achieves greater consistency between FFD and access authorization guidance;
(4) Allows licensees to “take credit” for the suitable inquiries conducted by previous licensees;
(5) Reduces the ambiguity in the current rule regarding the NRC’s expectations for managing transfers of personnel between sites;
(6) Eliminates redundant regulatory requirements; and
(7) Takes a graded approach to updating and reinstating authorization for individuals whose authorization has been interrupted from 1 day to 60 days.

Further, the revision recognizes that the potential risks of updating or reinstating an individual who has recently held authorization, or has been subject to the majority of the elements of a Part 26 FFD program, are less than those presented by an unknown and unmonitored individual, for whom the <u>current</u> regulations allow up to 60 unmonitored days between the pre-access test and the authorization to perform activities within the scope of

Part 26. The NRC believes these measures will maintain safety and increase the overall efficiency and effectiveness of the licensees' Part 26 programs, while reducing unnecessary regulatory burden.

The NRC does not intend to pursue past violations for insufficient suitable inquiries (where licensees failed to contact employers when individuals had worked for employers for less than 30 days) and past violations for failures to perform pre-access drug tests (where individuals were subject to a FFD program within the last 30 days). The NRC believes that this exercise of enforcement discretion is appropriate because:

(1) Individuals who currently have authorization under the past suitable inquiry pre-access testing practices have successfully maintained their authorizations while subject to Part 26 FFD programs over time;

(2) Pursuing past violations would not be an effective and efficient use of NRC resources; and

(3) Requiring licensees to conduct new suitable inquiries and pre-access tests would represent undue regulatory burden.

In conclusion, based on the judgment that these practices provide adequate safety, the NRC considers the risk associated with issuing an interim enforcement policy to authorize the use in suitable cases of enforcement discretion pending rulemaking to be insignificant.

Accordingly, the proposed revision to the NRC Enforcement Policy reads as follows:

GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS

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INTERIM ENFORCEMENT POLICIES

Interim Enforcement Policy for Generally Licensed Devices Containing Byproduct Material (10 CFR 31.5)

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Interim Enforcement Policy Regarding Enforcement Discretion for Certain Fitness-for-Duty Issues (10 CFR Part 26)

This section sets forth the interim enforcement policy that the NRC will follow to exercise enforcement discretion for certain violations of requirements in 10 CFR Part 26, Fitness-for-Duty Programs that occur after (insert 60 days after date of publication in the *Federal Register*). The NRC will also exercise enforcement discretion and normally not pursue past violations for insufficient suitable inquiries (where licensees failed to contact employers when individuals had worked for employers for less than 30 days) and past violations for failures to perform pre-access drug tests (where individuals were subject to a FFD program within the last 30 days) that occurred prior to (insert 60 days after date of publication in the

Federal Register). The policy, subject to subsequent Commission-approved associated policy, guidance, or regulation, is in effect until a final revision of 10 CFR Part 26 is issued and becomes effective.

Suitable Inquiry

The regulation in 10 CFR 26.3 requires that before granting an individual unescorted access, a licensee must conduct a suitable inquiry consisting of a "best-effort verification of employment history for the past five years, but in no case less than three years, obtained through contacts with previous employers to determine if a person was, in the past, tested positive for illegal drugs, subject to a plan for treating substance abuse, removed from, or made ineligible for activities within the scope of 10 CFR Part 26, or denied unescorted access at any other nuclear power plant or other employment in accordance with a fitness-for-duty policy."

The requirement does not provide an exception when an individual is reinstated at a licensee facility or transferred within a licensee corporation or to another licensee where there is little or no interruption in authorization. The term, “authorization,” refers to a period during which an individual maintained unescorted access or was assigned to perform activities within the scope of Part 26. However, enforcement action will not normally be taken for failure to contact interim employers, if the following practice is adopted:

If the individual applicant’s authorization has been interrupted for 30 calendar days or less and the individual’s last authorization was terminated favorably, before granting authorization for unescorted access to the protected area of a nuclear power plant or assigning

the individual to perform activities within the scope of Part 26, the licensee shall obtain and verify that a self-disclosure (i.e., a report of any drug- or alcohol-related arrests) for the period since the last authorization contains no potentially disqualifying FFD information, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption. Potentially disqualifying FFD information means information demonstrating that an individual has, during the period authorization was interrupted:

(1) Violated an employer's drug and alcohol testing policy;

(2) Used, sold, or possessed illegal drugs;

(3) Abused legal drugs;

(4) Subverted or attempted to subvert a drug or alcohol testing program;

(5) Refused to take a drug or alcohol test;

(6) Been subjected to a plan for substance abuse treatment (except for self-referral); or

(7) Had legal or employment action taken for alcohol or drug use.

The licensee shall also ensure that the individual has met FFD refresher training requirements.

The requirements also do not provide an exception for each licensee to conduct a suitable inquiry into an individual applicant's past five years of employment when an individual is reinstated at a licensee facility or transferred to another licensee facility. However, enforcement action will not normally be taken for failure to contact employers from the past five years, if the following practice is adopted:

Licensees may rely upon the information gathered by previous licensees regarding an individual applicant's past five years of employment to meet the suitable inquiry requirement.

The NRC may take enforcement action when a licensee does not follow these practices.

Pre-access Testing

The regulation in 10 CFR 26.24(a)(1) requires that a person be tested for drugs and alcohol "within 60 days prior to the initial granting of unescorted access to protected areas."

The requirement does not provide an exception when an individual is reinstated at a licensee facility or transferred within a licensee corporation or to another licensee where there is little or no interruption in authorization. However, enforcement action will not normally be taken for failure to conduct a pre-access test for alcohol and drugs, if the following practice is adopted:

If the individual applicant's authorization has been interrupted for 30 calendar days or less and the individual's last authorization was terminated favorably, in order to grant authorization for unescorted access to the protected area of a nuclear power plant or assigning the individual to perform activities within the scope of Part 26, the licensee shall:

(1) Obtain and verify that a self-disclosure for the past 30 days reveals no potentially disqualifying information; and

(2) Ensure that the individual has met FFD refresher training requirements.

If the individual applicant's authorization has been interrupted for 31 days to 60 days and the individual's last authorization was terminated favorably, in order to grant authorization for unescorted access to the protected area of a nuclear power plant or assigning the individual to perform activities within the scope of Part 26, the licensee shall:

(1) Obtain and verify that a self-disclosure for the period since the last authorization contains no potentially disqualifying FFD information, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption;

(2) Within 5 working days of granting authorization, complete a suitable inquiry for the period since last authorization was terminated, unless the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption;

(3) Verify that results of an alcohol test are negative and collect a specimen for drug testing, unless either a drug and alcohol test meeting the standards of Part 26 was performed within the past 60 days and results were negative or the individual was subject to a licensee-approved Part 26 FFD program that included random drug and alcohol testing throughout the period of interruption; and

(4) Ensure that the individual has met FFD refresher training requirements.

The NRC may take enforcement action when a licensee does not follow these practices.

Dated at Rockville, MD, this day of , 2002.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.