



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D C. 20555-0001

October 4, 2002

OFFICE OF THE  
SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-02-0023A

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

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of October 4, 2002.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
EDO  
PDR

VOTING SUMMARY - SECY-02-0023A

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X				X	9/3/02
COMR. DICUS	X				X	8/30/02
COMR. DIAZ	X					9/23/02
COMR. McGAFFIGAN	X				X	9/18/02
COMR. MERRIFIELD	X				X	9/19/02

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and some provided additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on October 4, 2002.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN MESERVE

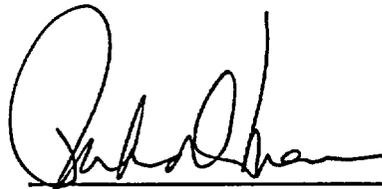
SUBJECT: **SECY-02-0023A - PROPOSED REVISION TO THE ENFORCEMENT POLICY TO INCLUDE AN INTERIM POLICY REGARDING ENFORCEMENT DISCRETION FOR FITNESS-FOR-DUTY ISSUES AND STATUS OF RULEMAKING EFFORT**

Approved  X  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS:

See attached.



\_\_\_\_\_  
SIGNATURE

Sept 3, 2002  
DATE

Entered on "STARS" Yes  X  No \_\_\_\_\_

## **Comments of Chairman Meserve on SECY-02-0023A**

I approve the staff's plan to implement fitness-for-duty (FFD) enforcement discretion, subject to the following comments.

The revised policy reduces unnecessary regulatory burden because it allows licensees to take credit for testing and inquiries conducted under other Part 26 programs monitored by the NRC. This practice assumes the previous programs were in compliance with the regulations. The staff should develop guidance to help ensure that any violations of the requirements of Part 26 by one licensee are immediately reported to other licensees who have taken credit for the Part 26 program of the licensee in violation.

I attach some minor edits to the Federal Register notice.

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](mailto: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](mailto: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

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 <sup>2</sup>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 <sup>documented in</sup> ~~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 CVs for special expertise and to staff <sup>g</sup> 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<sup>and</sup> 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.

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

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;

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER DICUS  
SUBJECT: **SECY-02-0023A - ADDENDUM TO SECY-02-0023:  
PROPOSED REVISION TO THE ENFORCEMENT POLICY  
TO INCLUDE AN INTERIM POLICY REGARDING  
ENFORCEMENT DISCRETION FOR FITNESS-FOR-DUTY  
ISSUES**

Approved XX Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: See attached comments

Aneta Jay Dicus  
SIGNATURE

August 30, 2002  
DATE

Entered on "STARS" Yes X No \_\_\_\_\_

Commissioner Dicus' Comments on  
SECY-02-0023a, "ADDENDUM TO SECY-02-0023: PROPOSED  
REVISION TO THE ENFORCEMENT POLICY TO INCLUDE AN INTERIM  
POLICY REGARDING ENFORCEMENT DISCRETION FOR FITNESS-  
FOR-DUTY ISSUES"

I approve the staff's proposed enforcement policy amendment and publication of the amendment in the *Federal Register*. The amendment appears to reduce unnecessary burdens in the area of fitness-for-duty while still requiring adequate measures so that licensees and the NRC will continue to have reasonable assurance that employees are fit to perform their duties. Edits to the *Federal Register* Notice are attached.

gjd

8-30-02

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](mailto: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 <sup>a</sup> ~~the affirmed~~ final rule, *Insert A* ~~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~~ <sup>on</sup> 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

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*Insert A: stakeholders expressed a number of concerns about the rule and its implementation*

- (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." <sup>NRC</sup>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

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break" in authorization, but the period of time considered to be a "short break" is not defined. As a result, the current FFD regulations <sup>have the potential to</sup> ~~may~~ be interpreted as requiring licensees to treat each individual under consideration for authorization as a new hire, because of the absence of the <sup>similar to that</sup> ~~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 <sup>particularly</sup> ~~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 <sup>NRC</sup> Information Notice 2001-02), the NRC believed the regulation's requirements were warranted.

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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~~ <sup>documented in</sup> 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~~ <sup>seldom</sup> 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

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8-30-02

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 <sup>believed</sup> ~~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. <sup>Specifically</sup> ~~That is,~~ until a final rule that would address this issue became effective, under the 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.

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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 CV'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,~~ <sup>under an interim enforcement policy</sup> in SECY-01-0134, the staff proposed ~~that~~ <sup>the following approach:</sup> 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

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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 <sup>approach</sup> ~~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

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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. 1

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. 1

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. *and unnecessary* 1

*gial*

*B - 30 - 02*

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  $\rightarrow$  GIVE THE ACCESSION # (<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.

<sup>revised</sup> This enforcement discretion policy has several advantages over the enforcement discretion policy proposed in SECY-01-0134. <sup>Specifically</sup> this policy:

- (1) Provides greater assurance that individuals granted unescorted access to nuclear power plants are trustworthy and reliable;
- (2) Provides <sup>greater alignment</sup> ~~the maximum match~~ between the interim enforcement discretion policy and the future FFD rule;
- (3) Achieves greater consistency between FFD and access authorization guidance;

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8-30-02

- (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~~ <sup>Minimizes the unnecessary burden</sup> redundant regulatory requirements; and (won't be eliminated" until rule is changed)
- (7) Takes a graded approach to updating and reinstating authorization for individuals whose authorization has been interrupted <sup>for up</sup> ~~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 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 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:

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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;

*gjd*

8-30-02

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NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER DIAZ  
SUBJECT: **SECY-02-0023A - ADDENDUM TO SECY-02-0023:  
PROPOSED REVISION TO THE ENFORCEMENT POLICY  
TO INCLUDE AN INTERIM POLICY REGARDING  
ENFORCEMENT DISCRETION FOR FITNESS-FOR-DUTY  
ISSUES**

Approved   Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS:

  
\_\_\_\_\_  
SIGNATURE

9.23.02  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

NOTATION VOTE

RESPONSE SHEET

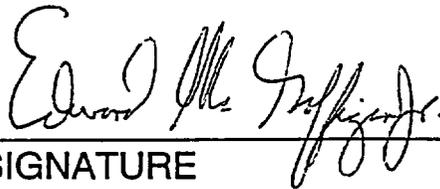
TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MCGAFFIGAN  
SUBJECT: **SECY-02-0023A - ADDENDUM TO SECY-02-0023:  
PROPOSED REVISION TO THE ENFORCEMENT POLICY  
TO INCLUDE AN INTERIM POLICY REGARDING  
ENFORCEMENT DISCRETION FOR FITNESS-FOR-DUTY  
ISSUES**

Approved  Disapproved  Abstain

Not Participating

COMMENTS:

I concur in the Chairman's edits and comments and offer one additional edit.



SIGNATURE

September 18, 2002

DATE

Entered on "STARS" Yes  No

- (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~~  
*BELIEVES THAT THE PRACTICES INCLUDED IN THIS INTERIM ENFORCEMENT POLICY*  
NRC considers the risk associated with issuing an interim enforcement policy to authorize the  
*WILL ENSURE ADEQUATE PROTECTION OF PUBLIC HEALTH AND SAFETY AND NUCLEAR SECURITY.*  
~~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

\* \* \* \* \*

**INTERIM ENFORCEMENT POLICIES**

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

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MERRIFIELD  
SUBJECT: **SECY-02-0023A - ADDENDUM TO SECY-02-0023:  
PROPOSED REVISION TO THE ENFORCEMENT POLICY  
TO INCLUDE AN INTERIM POLICY REGARDING  
ENFORCEMENT DISCRETION FOR FITNESS-FOR-DUTY  
ISSUES**

Approved X Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS:  
*See attached comments.*

  
\_\_\_\_\_  
SIGNATURE  
  
\_\_\_\_\_  
9/15/02  
DATE

Entered on "STARS" Yes ✓ No \_\_\_\_\_

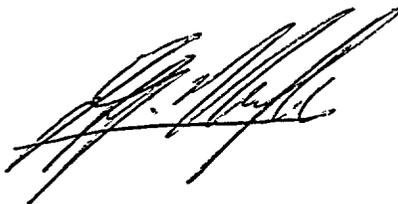
COMMISSIONER MERRIFIELD'S COMMENTS ON SECY-02-0023A

I approve the staff's plan to implement fitness-for-duty (FFD) enforcement discretion as discussed in SECY-02-0023 and SECY-02-0023A, and modified in the staff's Correction Notice of July 24, 2002. The Commission has been very clear in its support of prudent fitness-for-duty measures aimed at ensuring that the nuclear power plant workplace is drug and alcohol free and that plant workers are fit to perform their duties. Based on my review of the information provided by the staff, I believe the staff's final recommendations are consistent with the Commission's views on FFD as well as the agency's performance goals.

I am pleased that the staff has established frequent communication with stakeholders on the FFD rulemaking effort and other FFD initiatives including those associated with the subject SECY paper. Based on the information provided by the staff in SECY-02-0023, SECY-02-0023A, and the July 24<sup>th</sup> Correction Notice, it is clear that our stakeholder outreach efforts have been beneficial and I commend the staff for leading these efforts. However, I ask the staff to reflect further on what the results of these outreach efforts may be indicating. Specifically, significant stakeholder discussions preceded the staff's proposed revision to the Enforcement Policy described in SECY-02-0023 (dated February 1, 2002). Subsequently, following further dialogue with stakeholders, the staff recognized that their recommendations proposed in SECY-02-0023 were not entirely appropriate and recommended additional changes in SECY-02-0023A (dated May 23, 2002). Then, following further dialogue with stakeholders, the staff recognized that additional changes were necessary to their recommendations provided in SECY-02-0023A and submitted the July 24<sup>th</sup> Correction Notice. From my perspective, the numerous changes made since the staff's initial submission of SECY-02-0023 clearly reflect that there is constructive dialogue occurring between the staff and our stakeholders. However, they may also reflect that our staff is still trying to get its arms completely around our FFD requirements and how licensees implement these requirements.

I encourage the staff to aggressively continue their dialogue with stakeholders to ensure that our oversight of licensee FFD programs is sound. As I am sure the staff would agree, anything short of this outcome would simply be unacceptable. I also encourage the staff to keep me and my Commission colleagues informed on significant FFD matters including those associated with the FFD rulemaking effort.

Finally, I support the edits proposed by the Chairman and Commissioner McGaffigan.



9/19/02

- (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.~~  
*BELIEVES THAT THE PRACTICES INCLUDED IN THIS INTERIM ENFORCEMENT POLICY WILL ENSURE ADEQUATE PROTECTION OF PUBLIC HEALTH AND SAFETY AND NUCLEAR SECURITY.*

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

**GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS**

\* \* \* \* \*

**INTERIM ENFORCEMENT POLICIES**

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