EDO Principal Correspondence Control

FROM: DUE: 12/05/02 EDO CONTROL: G20020673
DOC DT: 11/18/02
FINAL REPLY:

Thomas W. Ortciger
State of Illinois
Department of Nuclear Safety

TO:

Chairman Meserve

FOR SIGNATURE OF : ** PRI ** CRC NO: 02-0764

Chairman Meserve

DESC:

Request for Exemption - Fitness-for-Duty Rule (10 CFR 26)

ROUTING:

Travers
Paperiello
Kane
Norry
Craig
Burns
Collins, NRR
Dyer, RIII
Lohaus, STP
Cyr, OGC

DATE: 11/22/02

ASSIGNED TO: CONTACT:

NSIR Zimmerman

SPECIAL INSTRUCTIONS OR REMARKS:

Template: SECY-017

E-RIDS: SECY-01

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

Date Printed: Nov 22, 2002 12:06

PAPER NUMBER:	LTR-02-0764	**LOGGING DATE:**	11/22/2002
ACTION OFFICE:	EDO		
AUTHOR:	Thomas Ortciger (Dept. Nuc. Safety)		
AFFILIATION:	IL		
ADDRESSEE:	CHRM Richard Meserve		
SUBJECT:	Concerns Request for Exemption... Fitness-for-Duty Rule (10 CFR 26)		
ACTION:	Signature of Chairman		
DISTRIBUTION:	RF		
LETTER DATE:	11/18/2002		
ACKNOWLEDGED	No		
SPECIAL HANDLING:	SECY to Ack		
NOTES:	COMMISSION CORRESPONDENCE		
FILE LOCATION:	ADAMS		
DATE DUE:	12/09/2002	**DATE SIGNED:**	

EDO --G20020673

STATE OF ILLINOIS
DEPARTMENT OF NUCLEAR SAFETY
1035 OUTER PARK DRIVE • SPRINGFIELD, ILLINOIS 62704
217-785-9900 • 217-782-6133 (TDD)

George H. Ryan
Governor

Thomas W. Ortciger
Director

November 18, 2002

Chairman Richard A. Meserve
United States Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: Request for Exemption
Fitness-for-Duty Rule (10 CFR 26)

Dear Chairman Meserve:

In accordance with 10 CFR §26.6, the Illinois Department of Nuclear Safety (Department) requests that the Nuclear Regulatory Commission (NRC) exempt Department employees from the provisions of Part 26 that subject them to the fitness-for-duty programs of NRC licensees authorized to operate nuclear power reactors in Illinois. In conjunction with the exemption, the Department requests that its employees who require unescorted access to nuclear power stations in Illinois be allowed to participate in NRC's fitness-for-duty program. The Department is willing to pay the actual additional costs that may be incurred by NRC as a result of such participation.

The Department previously made an informal inquiry of Paul Lohaus, Director, Office of State and Tribal Programs, NRC. Mr. Lohaus recently advised the Department that the NRC would not be able to conduct drug testing of Illinois employees based on a lack of authority to do so. A copy of Mr. Lohaus's correspondence is enclosed. We respectfully disagree with Mr. Lohaus's assessment of NRC's authority. Section 274(i) of the Atomic Energy Act states, in part:

> "The Commission in carrying out its licensing and regulatory responsibilities under this chapter is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, *and such other assistance to*, any State or political

recyclable

subdivision thereof or group of States as the Commission deems appropriate." [Emphasis added.]

Eighteen Department employees require unescorted access to nuclear power stations in Illinois. The eighteen include nine resident inspectors, two American Society of Mechanical Engineers (ASME) code inspectors, one health physicist, a telecommunications technician, and five emergency response Gaseous Effluent Monitoring System/Reuter-Stokes technicians.

The inspectors all serve explicit regulatory functions under Illinois law and memoranda of understanding between NRC and Illinois. The resident inspectors have unescorted access to Illinois nuclear power stations on an ongoing basis to perform their duties within the context of the Department's participation in NRC's inspection program and in the case of emergencies to fulfill their emergency preparedness roles from the plant technical support centers. The ASME inspectors have unescorted access to verify compliance with boiler and pressure vessel ASME provisions that are incorporated both in Department rules and NRC regulations. The other personnel install and maintain the Department's remote monitoring equipment.

When the NRC's fitness-for-duty rule was promulgated, the Department as a matter of expedient compliance with the new rule modeled its fitness-for-duty program after the NRC licensees' fitness-for-duty programs. The result is that Department employees meet requirements for chemical testing by directly participating in the licensees' fitness-for-duty program(s). From the beginning, this participation has been a source of concern to the Department.

In NUREG-1354, NRC observed that NRC "...cannot allow the access of its employees to any part of licensees' nuclear power facilities to be restricted or in any way enable a licensee to intimidate or compromise the proper performance of its regulatory responsibilities, or create a public perception thereof. The NRC expects that any NRC employee who requires unescorted access will be subject to the chemical testing provisions of the Commission's fitness-for-duty program." The wisdom of this NRC policy is self-evident. A regulated entity should not in any way have a means to create even an appearance of control or influence over employees and agents of the regulator who are most directly capable of and responsible for independently verifying the entity's compliance with applicable regulations and conditions of licensure. Consequently the Department agrees with NRC that NRC employees should not be subject to NRC licensees' fitness-for-duty programs. As a matter of plant security and safety, the Department also agrees with NRC that NRC employees with unescorted access should nonetheless be subject to a fitness-for-duty program, albeit not that of a licensee.

Equally important, the Department holds that it is inappropriate for a regulated entity (the NRC's licensee) to restrict the accessibility of its facility by imposing or approving testing program requirements for Department employees with unescorted access to nuclear power facilities. This is particularly true of Department personnel with regulatory responsibilities, as is the case with Department employees who participate in NRC inspections under Subagreements 2 and 3 between the State of Illinois and NRC. From a regulatory standpoint, their activities are very closely intertwined with those of NRC employees with unescorted access to nuclear power stations in Illinois. In the final analysis, Department inspectors participate in NRC inspections. From a public perception viewpoint Department employees should be no more susceptible to potential influence from a licensee than an NRC employee. Indeed, NRC recognized this similarity in its responses to comments published in NUREG-1354, which states, "...the NRC would consider state employee coverage under the NRC program on a case-by-case basis where continuing access is required (as for a resident inspector)."

The Department believes that its employees are in a unique situation with respect to NRC and to NRC licensees and as such should be candidates for coverage under the NRC program.

The Department is prepared to cooperate with NRC to obtain the exemption and to enter into any necessary agreements or subagreements with NRC to establish the parameters of an alternative Department fitness-for-duty testing program. Department staff are available as needed to meet with NRC staff to work toward accomplishing this goal. The Department contact on this issue is Deputy Director, Gordon Appel, who can be reached at (217) 524-4723. Thank you for your consideration of this request.

Respectfully submitted,

Thomas W. Ortciger
Director

TWO:kw
Enclosure
cc: Mr. Paul H. Lohaus

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

October 11, 1002

Mr. Gordon Appel, Deputy Director
Illinois Department of Nuclear Safety
1035 Outer Park Drive
Springfield, IL 62704

Dear Mr. Appel,

I am responding to your e-mail dated May 8, 2002 regarding the request for Illinois Department of Nuclear Safety personnel to be tested under the U.S. Nuclear Regulatory Commission's (NRC) Fitness For Duty program. We have evaluated your request and find that it is not possible to provide such testing based on the fact that the employees in question are non-Federal workers. The NRC's authority to conduct drug testing is limited to NRC employees and applicants. Thus, the NRC would not be able to conduct drug testing of Illinois inspectors.

If you have any questions, please feel free to contact me at 301-415-3340 or email: PHL@nrc.gov.

Sincerely,

Paul H. Lohaus, Director
Office of State and Tribal Programs