

December 18, 2002

Ralph E. Beedle
Senior Vice President and Chief Nuclear Officer
Nuclear Generation
Nuclear Energy Institution
1776 I Street NW Suite 400
Washington, DC 20006-3708

Dear Mr. Beedle:

SUBJECT: NRC Regulatory Issue Summary 2002-07: Request for Additional Clarification

In your letter of August 5, 2002 (ADAMS accession number ML022830666), you requested revision of Regulatory Issue Summary (RIS) 2002-07, "Clarification of NRC Requirements Applicable to Worker Fatigue and Self-Declarations of Fitness-For-Duty." The staff agrees that (1) workers are responsible for maintaining their own fitness-for-duty and (2) licensees have ultimate responsibility and authority under Part 26 to ensure the fitness-for-duty of their workers. We do not find anything in the RIS that specifically contradicts or is inconsistent with these statements. As a consequence, we believe the RIS to be adequate as written and that revising it is not warranted. However, we understand your concern for clarity in addressing this challenging issue. We believe our responses to your concerns in the enclosure will help ensure a common understanding of RIS 2002-07.

Thank you for your comments on this matter.

Sincerely,

/RA/

David B. Matthews, Director
Division of Regulatory Improvements Program
Office of Nuclear Reactor Regulation

Enclosure: Discussion of Comments on RIS 2002-07

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DISCUSSION OF COMMENTS ON RIS 2002-07

NEI Clarification Request 1: Workers are responsible for maintaining their own fitness-for-duty. They may not engage in off-duty activities that result in impairment from fatigue or other causes. If workers are unfit to perform within their routine work schedules for reasons not attributable to the licensee, they can be subject to discipline. In such cases, the licensee does not have to demonstrate negligence, and the act of self-declaration will not protect the worker from discipline.

NRC Response: The RIS states: "The NRC also notes that pursuant to 10 CFR 50.7(d), an employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons, including personal negligence with respect to maintaining one's fitness-for-duty or from adverse action dictated by nonprohibited considerations." Personal negligence with respect to maintaining one's fitness-for-duty was provided as an example of a legitimate reason for licensee action. The example emphasizes, as noted in your letter, that workers are responsible for maintaining their own fitness-for-duty. The example neither defines nor imposes regulatory requirements. However, as noted in the RIS, sanctions related to worker fitness-for-duty can discourage worker self-declarations, depending upon the specific circumstances. Licensees should be cognizant of this potential effect.

NEI Clarification Request 2: Licensees have ultimate responsibility and authority under Part 26 to ensure the fitness-for-duty of their workers. When a licensee receives information that raises questions relative to a worker's fitness-for-duty, either from self-declaration or another source, an evaluation must be performed.

NRC Response: Pursuant to Part 26, licensees have the ultimate responsibility and authority to ensure the fitness-for-duty of their workers. The RIS specifically states that "when a worker subject to the requirements of a licensee's fitness-for-duty program declares that he or she is not fit for duty, the worker may be returned to duty only after a licensee determination that he or she is fit to safely and competently perform activities within the scope of Part 26." Accordingly, the staff would expect licensees to evaluate information pertinent to a worker's fitness-for-duty and make a fitness-for-duty determination based upon reasonable consideration of that information. Even if a worker disagrees with a licensee determination that a worker is fit for duty, the licensee has the ultimate authority and responsibility for making the fitness-for-duty determination and decision to return a worker to duty. In addition, should a worker disagree with a licensee's fitness-for-duty determination and/or decision to return the worker to duty, it is the staff's expectation that such disagreements would be handled through established processes for reporting and resolution of safety concerns.

NEI Comment: A worker who is not fit to work during a scheduled work period because of alcohol consumption, substance ingestion, or *excessive fatigue* should not be afforded protection under 10 CFR 50.7, regardless of the means by which the fatigue is identified.

Enclosure

NRC Response: As stated on page 4 of the RIS, the staff believes that the act of self-declaration is a protected activity when there is a good faith effort to comply with Part 26 and when such actions are based upon a reasonable concern regarding one's fitness-for-duty. The fact that an individual may be working a scheduled work period does not preclude a worker from having a reasonable concern regarding his or her fitness-for-duty. However, the staff agrees with the comment noting the importance of "decoupling the fact that a fatigue-based self-declaration has been made -- a protected activity -- and licensee action to discipline a worker for failing to be physically prepared to carry out his or her job." The staff believes the RIS is consistent with this latter statement.

NEI Comment: The industry is concerned that the RIS does not provide sufficient guidance to address situations in which a licensee and employee disagree over the degree of the employee's impairment because of fatigue, the good faith of the employee in raising the issue, and/or the reasons for the employee's fatigue.

NRC Response: Disagreements concerning the degree of impairment may result not only from feigned self-declarations, but also because of factors that may not be readily apparent to the licensee (e.g., factors unrelated to the workplace). In addition, there may be substantial variation in the ability of individuals to cope with shiftwork, sleep deprivation, and other factors that may cause fatigue. Communication between workers and licensees concerning the perceived causes of fatigue and the worker's specific fitness-for-duty concern (e.g., the ability to remain attentive) should minimize disagreements over the degree of fatigue and whether a declaration is made in good faith. However, the reason for the worker's fatigue is not necessarily relevant to a fitness-for-duty determination. In accordance with 10 CFR 26.27(b)(1), the basis of the fitness-for-duty determination must be the ability to safely and competently perform activities within the scope of Part 26. Whether a worker's fatigue is attributable to the licensee or the worker may be a relevant factor for decisions concerning sanctions, but not for decisions concerning worker fitness-for-duty.

NEI Comment: The RIS initially identifies several instances of 'excessive fatigue' experienced by workers. This discussion of 'excessive fatigue' is problematic because routine work schedules normally would not be expected to lead to self-declarations of fatigue. It would only be reasonable to anticipate an increase in self-declarations in outage and other atypical situations, such as call-outs, involving workers with extended workdays or extended workweeks.

NRC Response: While the workers in each of the examples cited in the RIS were working extended work schedules or were being called in to work unscheduled hours, routine work schedules, in some circumstances, might lead to legitimate self-declarations of fatigue. Although the staff agrees that workers are expected to maintain their fitness-for-duty to work routine work schedules, legitimate fatigue-based fitness-for-duty concerns can result from factors, not all of which are related to the workplace or under direct control of the employer or the worker (e.g., illness of the worker or sleep deprivation due to caring for an ill member of the worker's household). While self-declarations might be less frequent during routine work schedules, workers should inform their supervisor if they believe they have a legitimate concern regarding their fitness-for-duty, regardless of the cause or their work schedules. As stated previously, workers should be cognizant that self-declaration does not render them immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.