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NUCLEAR ENERGY INSTITUTE

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RULEMAKINGS AND
ADJUDICATIONS STAFF

July 29, 2004

Ms. Rebecca Karas
U.S. Nuclear Regulatory Commission
M/S O-12D3
11555 Rockville Pike
Rockville, MD 20852

SUBJECT: Industry Comments on draft 10 CFR Part 26

On July 7, 2004 the NRC staff conducted a very productive public meeting to discuss the draft Fitness for Duty rule, 10 CFR Part 26. All parts of the draft rule were discussed with the exception of Subpart I which covers work hour restrictions.

During the discussion the industry agreed to provide specific recommendations for improving the rule language and a rational for the proposed changes. Enclosed are twelve papers, FFD 28 through FFD 39, which provide that input.

The industry appreciates the NRC staff's work with all stakeholders, both in periodic meetings and in providing timely draft text. With the exception of Subpart I, this process has resulted in the development of draft language that meets the Commissions intent and provides a level of clarity in requirements that should significantly ease the burden of implementation.

If you have any questions on any of the attached papers please contact me at 202-739-8105, or email jwd@nei.org.

Sincerely,

James W. Davis

Template=SECY-067

SECY-02

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Fitness for Duty Comment Number 28
Licensee-approved C/V programs
July 29, 2004

Purpose: The addition of the term "other entities" was made because the scope of the rule now includes some facilities that do not have an NRC license. In the text other entities now includes "licensee approved Contractor/Vendors." The concern is that, since all requirements apply to those within the scope, the rule can be read to require licensee approved C/Vs to implement all provisions of the rule, not just those that a licensee relies on.

Issue: As an example, Background Screeners are licensee approved C/V and must comply with the regulations in collection of information and developing records upon which the licensee will make a determination. However, it is not practical to interpret the requirement that Background screeners have an EAP program as required in 26.35.(a) for "Each licensee and other entity who is subject to this part." The requirements for protection of information in 26.37 would, however, logically apply.

The fix to this issue appears to reside in 26.3.(d) be clearly stating that a C/V is responsible for those program elements upon which a licensee relies. Clarification is complicated by the fact that there are two different types of C/Vs lumped in this section. The first, of which there is only currently one, is the C/V that implements the entire FFD program and all requirements would apply. The second, the normal case, is where the licensee relies only on a C/V program to meet portions of the overall requirements.

The proposed fix would address only the second case since if all program elements are relied on, then the C/V would be responsible for the entire program.

In Subpart I it is a more difficult to understand what portions of the work hour controls a C/V would implement, if any. In any case the need for a C/V to have a policy in this area depends on the licensee's dependence on that program. We believe that the fix in 26.3.(d) obviates the need to separately address C/Vs in 26.197 since they would be covered if a licensee relied on the C/V for any portion of the fatigue management program. The key word is "part" which is referring the entire 10 CFR Part 26.

Proposed Text:

26.3.(d) The regulations in this part also apply to contractor/vendors (C/Vs) who implement ~~FFD programs or~~ FFD program elements ~~upon which~~to the extent that licensees and others who are subject to this part rely on the C/Vs program elements in order to meet the requirements of this part.

26.197.(a) Policy. Licensees ~~and C/Vs who have licensee-approved FFD programs~~ shall establish a policy for the management of fatigue and incorporate it into the written policy required in §26.27(b);

Fitness for Duty Comment Number 29
Determination of Fitness
July 29, 2004

Purpose: The industry is concerned that changes to the determination of fitness process in the draft rule has removed significant flexibility to address the conditions that caused the evaluation. Requirements have been added to use a Substance Abuse Expert (SAE) in many cases where the MRO would be fully qualified to make the determination.

Issue: In the current rule the primary focus of a determination of fitness is a for cause drug and alcohol test. In early stakeholder meetings the NRC indicated that the draft rule was being revised to provide more flexibility to address a range of behavior issues. Over time the draft rule has shifted so that if there is any chance that the issue could be drug or alcohol related it must be done by a SAE.

The role of the MRO in the overall process is being ignored. With the qualifications required and responsibilities for evaluating non-negative test results it is clear that a MRO has significant understanding of drug and alcohol abuse issues. Referral to an SAE to develop a course of remediation and follow up testing program may be needed, but it is unclear why a MRO is not qualified to make the basic determination of fitness in most cases.

The draft rule is inconsistent with recent NRC orders and clarification if those orders as reflected in additional requirements imposed in the psychological assessments required for the access authorization program. As discussed in NEI 03-01 Section 7.8, an additional focus on potential drug and alcohol abuse has been added with in some cases a requirement for a medical review. Most licensees will use the MRO to conduct this review.

We are particularly concerned with the recent changes to 26.189(1) from the SAE "may" to the SAE "shall" conduct the determination of fitness when substance abuse may be a factor. At the same time the MRO was disqualified in 26.189(a)(5) by changing "but may not be qualified to evaluate potential impairments due to evaluate potential impairment due to mental illness, unless the MRO has had specific training to diagnose and treat these illnesses." to "but many not be qualified to assess the fitness of an individual who may have a **substance abuse disorder, unless the MRO is also an SAE**."

Further section 26.189(a)(5) was originally added to recognize that a MRO had additional qualifications over a "physician" as discussed in 26.189(a)(4). As a result of the changes (4) and (5) are now the same. Although we agree that the restrictions in (4) are appropriate, they are not needed in (5).

It would appear that 189(a) provides adequate guidance if the MRO finds that the circumstances of a particular case are beyond the scope of his/her esperise.

Proposed Text:

189

(a) A determination of fitness is the process whereby it is determined whether there are indications that an individual may be in violation of the licensee's or other entity's FFD policy or is otherwise unable to safely and competently perform his or her duties. A determination of fitness must be made by a licensed or certified professional who is appropriately qualified and has the necessary clinical expertise, as verified by the licensee or other entity, to evaluate the specific fitness issues presented by the individual. A professional called upon by the licensee or other entity may not perform a determination of fitness regarding fitness issues that are outside of his or her specific areas of expertise. The types of professionals and the fitness issues for which they are qualified to make determinations of fitness include, but are not limited to, the following:

(1) An SAE who meets the requirements of §26.187 ~~shall~~ may determine the fitness of an individual who may have engaged in substance abuse, but may not be qualified to assess the fitness of an individual who may have experienced mental illness, significant emotional stress, or other mental or physical conditions that may cause impairment but are unrelated to substance abuse, unless the SAE has additional qualifications for addressing those fitness issues;

....

(4) A physician may determine the fitness of an individual who may be ill, injured, fatigued, taking medications in accordance with one or more valid prescriptions, or using over-the-counter medications, but may not be qualified to assess the fitness of an individual who may have a substance abuse disorder, unless the physician is also an SAE;

(5) As a physician, the MRO may determine the fitness of an individual who may be ill, injured, fatigued, taking medications in accordance with one or more valid prescriptions, and/or using over-the-counter medications, but may not be qualified to assess the fitness of an individual who may have a ~~substance abuse disorder, unless the MRO is also an SAE~~impairment die to mental illness, unless the MRO has had specific training to diagnose and treat these illnesses.

(b) A determination of fitness must be made in at least the following circumstances:

(1) When there is an acceptable medical explanation for a non-negative test result, but there is a basis for believing that the individual could be impaired while on duty;

(2) Before making return-to-duty recommendations after an individual's authorization has been terminated unfavorably in accordance with the licensee's or other entity's FFD policy;

(3) Before an individual is granted authorization when potentially disqualifying FFD information is identified and has not previously been evaluated by another licensee or entity who is subject to this part; and

(4) When potentially disqualifying FFD information is otherwise identified.

Fitness for Duty Comment Number 30
Applicant status
July 29, 2004

Purpose: To discuss the remaining issues related to an individual who has applied for authorization.

Issue: Changes to the draft rule made in March 2004 addresses several issues related to an individual in an "applicant status." At some point in the application process the individual becomes subject to certain portions of the rule and the associated policy. The concern is that, as written, this will be interpreted that this requirement starts at the point that an individual completes the application for access. In implementation the issue is more complex than that.

An additional concern is that only very limited portions of the policy applies to an individual who has applied. Sections on the EAP and pre-work abstinence periods only apply to someone with authorization. There is a concern with broadly applying "The Policy" to someone early in the process, before they have arrived at the facility and been trained on their responsibilities under the program and policy.

The industry does not believe that there is an implementation problem today. For example, in completing the application it is made very clear to the individual that arrest reporting starts at that point. Before collection of a drug and alcohol sample, the individual is provided detailed information on the process and their rights. Ultimately, before authorization is granted the individual is trained on the policy and their rights and responsibilities under the policy.

Section 26.25 is trying to define those individuals subject to the fitness for duty program. In doing that 26.25(d) is the only place that the applicability of additional sections is listed. Although the protection in 26.37 and 26.39 is warranted it is adequately covered in those two sections.

The methods of making the policy available as listed in 26.27 are appropriate. The industry does not believe that this section needs to be expanded to those who have applied and are not on site where the policy is available.

Proposed Text:

26.25(d) Individuals who have applied for authorization from a licensee or other entity subject to this part to perform the types of job duties described in paragraph (a) of this section shall, while they remain an applicant for authorization, be subject to the applicable requirements of this part~~, and provided with the information specified in §26.27(b) and the protections specified in §§26.37 and 26.39~~.

26.27(b) Policy. The FFD policy statement must be clear, concise, and readily available, in its most current form, to all individuals who are subject to the policy~~, including individuals who have applied for authorization under this part~~. Methods of making the statement readily available

include, but are not limited to, posting the policy in multiple work areas, providing individuals with brochures, or allowing individuals to print the policy from a computer. The policy statement must be written in sufficient detail to provide affected individuals with information on what is expected of them and what consequences may result from a lack of adherence to the policy. At a minimum, the written policy statement must

§26.37 Protection of information.

(a) Each licensee or other entity who is subject to this part who collects personal information about an individual for the purpose of complying with this part, shall establish and maintain a system of files and procedures to protect the personal information. Licensees and other entities shall maintain and use such records with the highest regard for individual privacy.

(b) Licensees and other entities shall obtain a signed consent that authorizes the disclosure of the personal information collected and maintained under this part before disclosing the personal information, except for disclosures to the following individuals:

(1) The subject individual or his or her representative, when the individual has designated the representative in writing for specified FFD matters;

(2) Assigned MROs;

(3) NRC representatives;

(4) Appropriate law enforcement officials under court order;

(5) A licensee's or other entity's representatives who have a need to have access to the information in performing assigned duties, including determinations of fitness, audits of FFD programs, and human resources functions;

(6) The presiding officer in a judicial or administrative proceeding initiated by the subject individual;

(7) Persons deciding matters on review or appeal; and

(8) Other persons pursuant to court order.

(c) Personal information that is collected under this part must be disclosed to other licensees and entities, including C/Vs, or their authorized representatives, who are legitimately seek the information for authorization decisions as required by this part and who have obtained a release from the subject individual.

36.39(a) Each licensee and other entity who is subject to this part shall establish procedures for the review of a determination that an individual who they employ or who has applied for authorization has violated the FFD policy. The procedure must provide for an objective and impartial review of the facts related to the determination that the individual has violated the FFD policy.

Fitness for Duty Comment Number 31
Background requirements for FFD personnel
July 29, 2004

Purpose: To propose an alternative approach to the background screening requirements for FFD personnel to allow them to be included in the program used to ensure other plant personnel are trustworthy, reliable and fit-for-duty.

Issue: Early in the process for developing the draft FFD rule, the industry asked to be allowed to process FFD personnel at a power reactor site in the same manner that individuals with unescorted access are processed. This could significantly reduce the burden of separate procedures and separate tracking systems. For example, issues of broken service and reinstatements tend to require the development of a complex set of procedures.

The industry believes that the access authorization program, as currently represented by NEI 03-01 provides a fully equivalent process for initial determination and maintaining FFD personnel as trustworthy, reliable, and fit for duty. In implementation individuals would be required to maintain Unescorted Access Authorization and be in a random testing program. This is equivalent to Unescorted Access without requiring that the individual be given the physical means of access. It also would incorporate arrest reporting, periodic training and annual supervisory reviews.

The industry believes that under these conditions the 5 year psychological reassessment would not be needed.

Figuring out how to write this into the regulation is somewhat of a problem. Currently NEI 03-01 implements requirements from 10 CFR Parts 26, 73.56, 73.57, the AA Order and the DBT order. At some future date it is expected that a revised security rule will replace these orders. Additionally NEI 03-01 will have to be updated when the revised 10 CFR Part 26 is implemented.

The concept is more important than the text proposed below. There are two concepts mixed into one item, which makes it hard to draft simple change.

Proposed Text:

Line-in line-out version

26.31(b) FFD program personnel.

(1) Licensees and other entities who are subject to this part shall carefully select and monitor FFD program personnel, as defined in §26.25(a)(4), based upon the highest standards for honesty and integrity. These measures must meet the requirements of either (i) or (ii) as follows:~~, and shall implement measures to ensure that these standards are maintained. These measures must ensure that the honesty and integrity of such individuals are not compromised and that FFD~~

~~program personnel are not subject to influence attempts attributable to personal relationships with any individuals who are subject to testing, an undetected or untreated substance abuse problem, or other factors. At a minimum, these measures must include the following considerations:~~

~~(i) Individuals who have personal relationships with the individual being tested may not perform any assessment or evaluation procedures. These personal relationships may include, but are not limited to, supervisors, coworkers within the same work group, and relatives of an individual being tested. The integrity of specimen collections in these instances may be assured through monitoring of the collection by individuals who do not have personal relationships with the individuals subject to testing, who are designated by the licensee or other entity for this purpose, including, but not limited to, security force or quality assurance personnel, and who have been trained to monitor specimen collections and the preparation of specimens for shipping in accordance with the requirements of this part, except if a directly observed collection is required;~~

(~~ii~~) Appropriate background investigations, credit and criminal history checks, and psychological evaluations of the FFD program personnel must be completed before assignment to tasks directly associated with administration of the FFD program. ~~The background investigations, credit and criminal history checks, and psychological evaluations conducted under 10 CFR 73.57 are acceptable to meet the requirements of this paragraph.~~

(A)The credit and criminal history checks and psychological evaluations must be updated nominally every 5 years; and

(~~iii~~B) FFD program personnel shall be subject to a behavioral observation program designed to assure that they continue to meet the highest standards of honesty and integrity.

(ii) FFD program personnel shall meet all requirements for granting and maintain unescorted access under a power reactor licensee program with the exception that it is not necessary to provide the physical means to gain access to the protected area.

(iii) When the MRO is on site at a licensee's or other entity's facility, the MRO shall be subject to behavioral observation.

(2) Licensees and other entities who are subject to this part shall implement measures to ensure that the honesty and integrity of such individuals are not compromised and that FFD program personnel are not subject to influence attempts attributable to personal relationships with any individuals who are subject to testing, an undetected or untreated substance abuse problem, or other factors. At a minimum, individuals who have personal relationships with the individual being tested may not perform any assessment or evaluation procedures. These personal relationships may include, but are not limited to, supervisors, coworkers within the same work group, and relatives of an individual being tested. The integrity of specimen collections in these instances may be assured through monitoring of the collection by individuals who do not have personal relationships with the individuals subject to testing, who are designated by the licensee or other entity for this purpose, including, but not limited to, security force or quality assurance personnel, and who have been trained to monitor specimen collections and the

preparation of specimens for shipping in accordance with the requirements of this part, except if a directly observed collection is required;

Clean Text version

26.31(b) FFD program personnel.

(1) Licensees and other entities who are subject to this part shall carefully select and monitor FFD program personnel, as defined in §26.25(a)(4), based upon the highest standards for honesty and integrity. These measures must meet the requirements of either (i) or (ii) as follows:

(i) Appropriate background investigations, credit and criminal history checks, and psychological evaluations of the FFD program personnel must be completed before assignment to tasks directly associated with administration of the FFD program.

(A)The credit and criminal history checks and psychological evaluations must be updated nominally every 5 years; and

(B) FFD program personnel shall be subject to a behavioral observation program designed to assure that they continue to meet the highest standards of honesty and integrity.

(ii) FFD program personnel shall meet all requirements for granting and maintain unescorted access under a power reactor licensee program with the exception that it is not necessary to provide the physical means to gain access to the protected area.

(iii) When the MRO is on site at a licensee's or other entity's facility, the MRO shall be subject to behavioral observation.

(2) Licensees and other entities who are subject to this part shall implement measures to ensure that the honesty and integrity of such individuals are not compromised and that FFD program personnel are not subject to influence attempts attributable to personal relationships with any individuals who are subject to testing, an undetected or untreated substance abuse problem, or other factors. At a minimum, individuals who have personal relationships with the individual being tested may not perform any assessment or evaluation procedures. These personal relationships may include, but are not limited to, supervisors, coworkers within the same work group, and relatives of an individual being tested. The integrity of specimen collections in these instances may be assured through monitoring of the collection by individuals who do not have personal relationships with the individuals subject to testing, who are designated by the licensee or other entity for this purpose, including, but not limited to, security force or quality assurance personnel, and who have been trained to monitor specimen collections and the preparation of specimens for shipping in accordance with the requirements of this part, except if a directly observed collection is required;

Fitness for Duty Comment Number 32
Review Process for Policy violations
July 29, 2004

Purpose: To discuss the number of individuals required to conduct a review of a FFD policy violation.

Issue: In the current rule reviews "...may be an impartial internal management review." In The affirmed rule and the November 5, 2002 draft rule reviews were to be conducted by "...persons not associated with the administration of the FFD program..." In March 2004 the wording was change to require review by more than one individual, "...conducted by more than one individual and that the individuals who conduct the review are not associated with the administration of the FFD program."

The industry believes that the addition of the new requirement that the review be conducted by more than one individual is unnecessary and that the intent of the current, affirmed, and 2002 draft rule are adequate to protect the individual's rights.

Proposed Text:

§26.39 Review process for fitness-for-duty policy violations.

(a) Each licensee and other entity who is subject to this part shall establish procedures for the review of a determination that an individual who they employ or who has applied for authorization has violated the FFD policy. The procedure must provide for an objective and impartial review of the facts related to the determination that the individual has violated the FFD policy.

(b) The procedure must provide notice to the individual of the grounds for the determination that the individual has violated the FFD policy, and must provide an opportunity for the individual to respond and submit additional relevant information.

(c) The procedure must ensure that ~~the review is conducted by more than one individual and that the~~ individuals who conduct ~~the~~ reviews are not associated with the administration of the FFD program (see description of FFD program personnel in §26.25(a)(4)). ~~The~~ Iindividuals who conduct the reviews may be management personnel.

(d) If the review finds in favor of the individual, the licensee or other entity shall correct the relevant records.

(e) Licensees and other entities need not provide a review procedure to a C/V's employee or applicant when the C/V is administering its own FFD program and the FFD policy violation was determined under the C/V's program.

Fitness for Duty Comment Number 33
Updates to Subpart C
July 29, 2004

Purpose: This paper recommends changes to Subpart C to improve the integration of additional steps required by 26.69 when there is "Potentially Disqualifying Information" (PDI) with the normal investigation requirements of 26.55, 26.57 and 26.59.

Issue:

1. The investigation for authorization update or reinstatement only goes back to the date when the individual was terminated at by a licensee or other entity. The basis for this more limited investigation is the fact that the individual was previously found to be trustworthy, reliable, and fit for duty. Through the random testing program and behavioral observation program the individual was further evaluated and found to be trustworthy, reliable, and fit for duty up to the date of his authorization termination. This assumption only remains valid if the individual was terminated favorably.

   Therefore, as is the case for access authorization, the updates and reinstatements should only be allowed when the individual has been terminated favorably, within the designated period. Changes are recommended to incorporate this concept.

2. Section 26.69 is written as a stand alone section, with all the requirements for initial, update and reinstatement repeated. However, in many cases the fact that there is PDI does not become apparent until the investigation is well underway. The industry believes that the added investigation elements are more evident if the redundant wording is removed. There are four different cases discussed in 26.69 which we recommend handling as follows:

   26.69(b)—authorization after the first positive test, a condition that requires unfavorable termination, will require an initial investigation.

   26.69(c)—authorization after a five year denial is a special case and this section should stand alone.

   26.69(d)(1)—other cases were PDI is developed can occur during an initial, update or reinstatement.

   26.69 (d)(2)—Is unrelated to the "authorization" process and should be renumbered as 26.69(e). At the July 7 workshop there was discussion of moving this material to 26.71. The industry believes that this material should stay in 26.69 where there is a consistent discussion of handling PDI. It provides a complete list of all the possibilities.

We also believe that 26.71 is currently simple and straight forward. Maintaining authorization has generated a lot of arguments over the years and this section provides a good summary of the requirements, even if they can dig them out of other sections.

Proposed Text: Edits are provided based on the June 2004 draft and only includes those sections were change is recommended by this paper. Some supporting text has been highlighted in yellow.

Subpart C – Granting and Maintaining Authorization
§26.51 Purpose.

§26.53 General provisions.

§26.55 Initial authorization.

(a) Before granting authorization to an individual who ~~either~~ has never held authorization under this part, ~~or~~ whose authorization has been interrupted for a period of 3 years or more ~~and~~ or whose last period of authorization was terminated unfavorably, the licensee or other entity shall —

....

(b) If potentially disqualifying FFD information is disclosed or discovered, the licensee or other entity may not grant authorization to the individual, except in accordance with §26.69.

§26.57 Authorization update.

(a) Before granting authorization to an individual whose authorization has been interrupted for more than 365 days but less than 3 years and whose last period of authorization was terminated favorably, the licensee or other entity shall —

....

(b) If potentially disqualifying FFD information is disclosed or discovered, the licensee or other entity may not grant authorization to the individual, except in accordance with §26.69.

§26.59 Authorization reinstatement.

(a) In order to grant authorization to an individual whose authorization has been interrupted for a period of more than 30 days but no more than 365 days and whose last period of authorization was terminated favorably, the licensee or other entity shall —

....

(d) If potentially disqualifying FFD information is disclosed or discovered, the licensee or other entity may not grant authorization to the individual, except in accordance with §26.69.

§26.61 Self-disclosure and employment history.

....

(3) Address the shortest of the following periods:

(i) The past 5 years;

(ii) Since the individual's eighteenth birthday; or

(iii) [Since the individual's last period of authorization which was terminated favorably]~~.~~(why use different words—a better choice may be)[Since authorization was last terminated, if authorization was terminated favorably within the past 3 years.]

(c) The individual shall provide a list of all employers, including the current employer, if any, with dates of employment, for the shortest of the following periods:

(1) The past 3 years;

(2) Since the individual's eighteenth birthday; or

(3) Since authorization was last terminated, if authorization was terminated favorably within the past 3 years.

.....

§26.63 Suitable inquiry.

(f) The licensee or other entity shall conduct the suitable inquiry as follows:

(1) Initial authorization. The period of the suitable inquiry must be the past 3 years or since the individual's eighteenth birthday, whichever is shorter. For the 1-year period immediately preceding the date upon which the individual applies for authorization, the licensee or other entity shall conduct the suitable inquiry with every employer, regardless of the length of employment. For the remaining 2-year period, the licensee or other entity shall conduct the suitable inquiry with the employer by whom the individual claims to have been employed the longest within each calendar month, if the individual claims employment during the given calendar month.

(2) Authorization update. The period of the suitable inquiry must be the period since authorization was terminated favorably. For the 1-year period immediately preceding the date upon which the individual applies for authorization, the licensee or other entity shall conduct the suitable inquiry with every employer, regardless of the length of employment. For the remaining period since authorization was terminated, the licensee or other entity shall conduct the suitable inquiry with the employer by whom the individual claims to have been employed the longest within each calendar month, if the individual claims employment during the given calendar month.

(3) Authorization reinstatement after an interruption of more than 30 days. The period of the suitable inquiry must be the period since authorization was terminated favorably. The licensee or other entity shall conduct the suitable inquiry with the employer by whom the individual claims to have been employed the longest within the calendar month, if the individual claims employment during the given calendar month.

§26.65 Pre-access drug and alcohol testing.

....

§26.67 Random drug and alcohol testing of individuals who have applied for authorization.

(a) Beginning on the day that the licensee or other entity collects specimens from an individual for any pre-access testing that may be required under §§26.65 or 26.69, and thereafter, the licensee or other entity shall subject the individual to random testing in accordance with §26.31(d)(2), except if —

§26.69 Authorization with potentially disqualifying fitness-for-duty information.

....

(b) Authorization after a first confirmed non-negative drug or alcohol test result. The requirements in this paragraph apply to an individual whose authorization was denied or terminated unfavorably for a first violation of an FFD policy involving a confirmed non-negative drug or alcohol test result. In order to grant, and subsequently maintain, the individual's authorization, the licensee or other entity shall —

(1) ~~Obtain and review a self-disclosure from the individual for the applicable period specified in §26.61(b)(3) and verify that the self-disclosure does not contain any previously undisclosed potentially disqualifying FFD information before granting authorization~~Complete the initial authorization requirements of §26.55;

(2) Complete a suitable inquiry with all employers by whom the individual claims to have been employed in accordance with the requirements of §26.63; ~~and as follows before granting authorization to the individual:~~

~~(i) Conduct the suitable inquiry for the period addressed in the self-disclosure; and~~

(3~~ii~~) Obtain and review any records that other licensees or entities who are subject to this part may have developed related to any potentially disqualifying FFD information about the individual from the past 5 years;

(4~~3~~) Ensure that a determination of fitness has indicated that the individual is fit to safely and competently perform his or her duties, and that plans for treatment and followup testing are developed before granting authorization;

(5~~4~~) Verify that the individual is in compliance with, and successfully completes, the treatment plans;

(6~~5~~) Within 5 business days before granting authorization, perform a pre-access alcohol test and collect a specimen for drug testing under direct observation and verify that the test results are negative before granting authorization;

~~(6) Ensure that the individual is subject to random testing in accordance with the applicable requirements in §26.67, and thereafter;~~(does not need to be repeated)

(7) Ensure that, during any periods in which the individual holds authorization, he or she is subject to selection for followup testing, at a daily probability of at least 2 percent, for a period of 3 calendars years after the date upon which the individual's last period of authorization was terminated, and verify that the individual has negative test results from a minimum of 15 followup tests distributed over the 3-year period; and

(8) Verify that any drug and alcohol tests required in this paragraph, and any other drug and alcohol tests that are conducted under this part since authorization was terminated, yield results indicating no further drug or alcohol abuse.

(c) Authorization following a 5-year denial of authorization. The requirements in this paragraph apply to an individual whose authorization was denied for 5 years under §26.75(c), (d), (e)(2), or (f). In order to grant, and subsequently maintain, the individual's authorization, the licensee or other entity shall —

(1) Verify that the individual has abstained from substance abuse for at least the past 5 years;

(2) Obtain and review a self-disclosure from the individual, which addresses the past 5 years, and verify that the individual's self-disclosure does not contain any previously undisclosed potentially disqualifying FFD information before granting authorization;

(3) Complete a suitable inquiry with every employer by whom the individual claims to have been employed during the past 5 years in accordance with the requirements of §26.63 and obtain and review any records that other licensees or entities who are subject to this part may have developed related to the 5-year denial of authorization;

(4) Ensure that a determination of fitness indicates that the individual is fit to safely and competently perform his or her duties before granting authorization;

(5) Ensure that any recommendations for treatment and followup testing from the determination of fitness are initiated before granting authorization;

(6) Verify that the individual is in compliance with, and successfully completes, any treatment plans;

(7) Within 5 business days before granting authorization, perform a pre-access alcohol test and collect a specimen for drug testing under direct observation and verify that the test results are negative before granting authorization;

(8) Ensure that the individual is subject to random testing in accordance with the applicable requirements of §26.67, and thereafter; and

(9) Verify that any followup drug and alcohol testing that may required under this paragraph and any other drug and alcohol testing conducted under this part yield negative results.

(d) Authorization with other potentially disqualifying FFD information. The requirements in this paragraph apply to an individual who has not previously had his or her authorization terminated unfavorably or denied for 5 years under this part, who has either applied for

authorization or is currently authorized, and about whom potentially disqualifying FFD information has been discovered or disclosed.

(1) If the individual has applied for authorization, before granting authorization, in addition to complete the applicable requirements of 26.55, 26.57, or 26.59, the licensee or other entity shall —

~~(i) Obtain and review a self-disclosure from the individual for the applicable period in §26.61(b)(3);~~

(ii) Complete a suitable inquiry with every employer by whom the individual claims to have been employed in accordance with the requirements of §26.63~~and as follows~~:

~~(A) Conduct a suitable inquiry for the period addressed in the self-disclosure; and~~

(ii~~B~~) Obtain any records that other licensees or entities who are subject to this part may have developed with regard to potentially disqualifying FFD information about the individual from the past 5 years;

[(~~ii~~iv~~i~~) Verify that a determination of fitness indicates that the individual is fit to safely and competently perform his or her duties;](Note there is a separate paper on this item)

(iv) Ensure that the individual is in compliance with, or has completed, any plans for treatment and drug and alcohol testing from the determination of fitness;

~~(iv) Ensure that the individual is subject to random testing in accordance with the applicable requirements of §26.67, and thereafter; and~~

(v) Verify that the results of pre-access drug and alcohol tests are negative before granting authorization.

(e~~2~~) If the individual is authorized when the potentially disqualifying FFD information is disclosed or discovered, in order to maintain the individual's authorization, the licensee or other entity shall —

(i) Ensure that the licensee's or entity's designated reviewing official completes a review of the circumstances associated with the information;

(ii) If the designated reviewing official determines that a determination of fitness is required, verify that the determination of fitness has indicated that the individual is fit to safely and competently perform his or her duties; and

(iii) If the reviewing official determines that maintaining the individual's authorization is warranted, implement any recommendations for treatment and followup drug and alcohol testing from the determination of fitness, and ensure that the individual successfully completes them.

(~~e~~f) Accepting followup testing and treatment from another Part 26 program. If an individual leaves the FFD program in which a treatment and followup testing plan was required under paragraphs (b), (c), or (d) of this section, and is granted authorization by another licensee or entity with a different FFD program, the receiving licensee or entity shall ensure that any treatment and followup testing requirements are met, with accountability assumed by the receiving licensee or entity. Licensees and other entities may rely upon followup testing that was conducted in accordance with this part by another licensee or entity. If the previous licensee or other entity determined that the individual successfully completed any required treatment and followup testing, and the individual's authorization was terminated favorably, the receiving licensee or entity may rely upon the previous determination of fitness and no further review or followup is required.

(~~f~~g) Sanctions for confirmed non-negative test results. If an individual has non-negative test results from any drug and alcohol testing required in this section, the licensee or other entity shall, at a minimum and as appropriate —

(1) Deny authorization to the individual, in accordance with §§26.75(b), (d), (e)(2), or (g); or

(2) Terminate the individual's authorization, if it has been granted, in accordance with §§26.75(e)(1) or (f).

§26.71 Maintaining authorization. (no changes)

Fitness for Duty Comment Number 34
Follow-up Program
July 29, 2004

Purpose: Follow-up testing needs to be adaptable for travelling nuclear industry contract employees as well as for the licensee employees.

Issue: Travelling nuclear workers who are in a 10 CFR Part 26 Follow-up Program have a difficult time completing the program in the stated time frame due to breaks in service and shorter outages.

In an April 2004 public meeting the industry raised this issue. The draft language at that time did not allow any flexibility if an individual missed one of the quarterly periods, which very typically happens for workers with broken service.

> "26.69(b)(8) Ensure that the individual is subject to followup drug and alcohol testing of a period of 3 years from the date authorization was terminated at a frequency at a frequency of no less than once every 30 days for 4 months and after authorization is granted, and at least once every 90 days for the next 2 years and 8 months."

To address this problem the following language was substituted in the June 2004 draft.

> "26.69(b)(7) Ensure that, during any periods in which the individual holds authorization, he or she is subject to selection for followup testing, at a daily probability of at least 2 percent, for a period of 3 calendars years after the date upon which the individual's last period of authorization was terminated, and verify that the individual has negative test results from a minimum of 15 followup tests distributed over the 3-year period; and "

The current draft language in the rule is very confusing, cumbersome and would require yet another tracking and random selection program for follow-up. It also does not solve the basic problem of an individual not completing the 15 tests with in three years.

The industry proposes the following approach:

1. A followup or random test conducted at least quarterly while an individual is subject to the FFD program.
2. At a minimum this program must consist of 15 tests over a three year period. The industry would include both followup tests and random tests in this area. As far as the individual is concerned a test is a test and they should not know which system it came from.

3. For individuals who are not continuously under a 10 CFR Part 26 program may be considered satisfactorily completed if 15 tests are completed within 5 years.
4. At the end of 5 years a FFD determination may be conducted to determine what if any further followup testing is required.

The industry believes this consistent with the basic three year program that is currently in use and the intent in the draft rule. The 5 year limit is consistent with length of background investigations seen in other sections of the draft rule.

The issue of followup testing extends beyond 26.69(b)(7). This may be best handled by modifications to 26.69(e) as indicated below.

Proposed Text:

"26.69(b)(7) Ensure that, during any periods in which the individual holds authorization, he or she is subject to ~~selection for followup~~ testing, ~~at a daily probability of at least 2 percent~~conducted unannounced, at least quarterly for a period of 3 calendars years after the date upon which the individual's last period of authorization was terminated, and verify that the individual has negative test results from a minimum of 15 ~~followup~~ tests distributed over the 3-year period; and "

26.69(e) Accepting followup testing and treatment from another Part 26 program. If an individual leaves the FFD program in which a treatment and followup testing plan was required under paragraphs (b), (c), or (d) of this section, and is granted authorization by the same or another licensee or entity with a different FFD program, the followup testing program shall be continued. Tthe ~~receiving~~ licensee or entity granting authorization shall ensure that any treatment and followup testing requirements are met, with accountability assumed by the receiving licensee or entity. Licensees and other entities may rely upon followup testing that was conducted in accordance with this part by another licensee or entity. If the previous licensee or other entity determined that the individual successfully completed any required treatment and followup testing, and the individual's authorization was terminated favorably, the receiving licensee or entity may rely upon the previous determination of fitness and no further review or followup is required.

(i) If the testing program is not completed within the specified time, due to periods when the individual did not hold authorization, the followup program may be extended up to 5 years to complete the required number of followup tests.

(ii) If followup program requirements are not completed within 5 years, a determination of fitness may be conducted to determine what, if any, further followup is required.

Fitness for Duty Comment Number 35
Addition of new requirements to the draft FFD Rule
July 29, 2004

Purpose: To discuss the industry's concern that fundamentally new requirements continue to be added to the FFD rule with each draft revision. An excellent example of this concerned is the June 2004 addition of the following new item in 26.77(c):

> "If an individual's confirmatory alcohol test result from testing conducted under any of the conditions specified in §26.31(c) is greater than 0.00 percent BAC, but does not exceed the cutoff levels specified in §26.103, the licensee or other entity shall remove the individual from performing any job duties that require the individual to be subject to this part and ensure that a determination of fitness indicates that the individual is fit to safely and competently perform his or her duties before the individual may be returned to performing those duties."

Issue: There is continuing concern that the stability of this draft rule and value of past stakeholder meetings continues to be challenged by the sudden, unexpected appearance of new requirements. This has been a problem since the close of the first public comment period in 1996. In March 2004 the concept of "applicant status" was first introduced. Now in the June 2004 draft a fundamental change to the concept that an alcohol reading less than 0.04 BAC, a negative test, is acceptable. In this particular case:

1. **The change appears unnecessary.** At the July 7, 2004 public meeting the NRC staff indicated that this addition was made to address the case where a worker had been in a duty status for a significant period but had a BAC somewhat less than the 0.02 limit imposed after the 2 hour point. The discussion also referred to the following Frequently Asked Question (FAQ) posted on the NRC web site.

> **Question: "Could a blood alcohol level below 0.04% require action by the licensee to determine fitness to safely and competently perform duties?"**
>
> Answer: "Yes. 10CFR §26, 26.10 requires that a "fitness for duty program must", in part, "Provide a reasonable assurance that nuclear power plant personnel are not under the influence of any substance which in any way affects their ability to safely and competently perform their duties." Further, §26.27(b)(1) requires that, "Impaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this part, and may be returned only after determined to be fit to safely and competently perform activities within the scope of this part." While a licensee may not have specified a more stringent cut-off level as authorized in Appendix A to Part 26, §2.7(e)(1), the licensee is required to remove a worker from activities and make a determination of fitness at any time a worker's fitness is questionable."

From the above answer, it appears the NRC staff believes the current rule provides the authority to conduct a determination of fitness under the specific case in question and the myriad of other scenarios that have not yet been encountered. The draft rule provides the same authority and has been expanded to clearly cover a

variety of potential fitness issues beyond drug and alcohol abuse. It appears both the current and draft rules are adequate for this issue.

The imposition of additional layers of guidance makes compliance increasingly difficult, promotes a checklist mentality, and masks the basic program objective of maintaining worker fitness when unusual situations develop.

2. The change has significant consequences. The impact of this change goes well beyond the relatively simple problem it was designed to fix. Unfortunately the draft rule has reached a level of complexity that makes it very difficult to effectively integrate new requirements.

a. Section 26.31(c) is a lists all conditions under which a individual shall receive an alcohol test. Thus the reference to 26.31(c) expands the new requirement to preaccess tests which are clearly conducted before an individual can be in a work status.

b. Limited discussion with equipment suppliers indicates there will be significant questions about the relationship between instrument readings below 0.01 and actual BAC levels. Additionally some machines display readings down to 0.001. Based on information provided at the public meeting, the technical viability of this option does not appear to have fully investigated.

c. There has been discussion in past meetings that the mandatory abstinence period of 5 hours before scheduled work may not always assure that an individual will be below the 0.04 BAC limit when they report for a work period. In this discussion it has been very clear that that a worker who arrives for a duty period with a BAC less than 0.04 meet the requirements of the draft rule. The additional requirement for a determination of fitness at a level greater than 0.00 BAC provides an unacceptable challenge in developing a viable FFD policy, and training program for the workforce.

The industry therefore recommends the deletion of this unnecessary and burdensome new requirement.

Proposed Text:

~~26.77(c) If an individual's confirmatory alcohol test result from testing conducted under any of the conditions specified in §26.31(c) is greater than 0.00 percent BAC, but does not exceed the cutoff levels specified in §26.103, the licensee or other entity shall remove the individual from performing any job duties that require the individual to be subject to this part and ensure that a determination of fitness indicates that the individual is fit to safely and competently perform his or her duties before the individual may be returned to performing those duties.~~

Fitness for Duty Comment Number 36
MRO Staff Independence
July 29, 2004

Purpose: In 26.183 there is discussion of the need for independence of the MRO staff when performing functions that support the MRO. It is written in a manner that would indicate the staff should not be licensee employees.

Issue: At some facilities the MRO is a licensee employee. There is no reason that the MRO staff should not also be licensee employees. The intent of 183(c)(4) is to ensure that MRO staff functions are performed under the MRO direction. Referring to licensee and other entity's staff is problematic since there is no reason why the MRO staff cannot be licensee employees. Additionally the term "strictly limited" will be hard to define. Does this mean zero? The last sentence "Such independence may not be compromised directly or indirectly by the licensee or other entity." does not add to the understanding of the requirement. Aren't licensees supposed to follow the regulations? Why is a special reminder needed here? Why not at the end of every paragraph add, "Please don't subvert these regulations."?

The term "rather than the licensee or other entity" also seems unnecessary. It is meant to say under the direct control of the MRO—period—not the licensee, a hospital, another doctor, and in no case a HMO!

The MRO staff duties must be maintained independent from any other licensee or other entity's activity or function—that seems clear.

When acting as part of the MRO staff, the staff member must be under the direct supervision and control of the MRO—seems to be clear.

In discussion on July 7, the industry also indicated problems with the wording of 26.183(d). Upon further review the responsibilities are clear and it would be equally applicable if the MRO was an employee or under contract.

Proposed Text:

26.183–

(c) MRO staff. The MRO's staff may perform routine administrative support functions, including receiving test results, reviewing negative test results, and scheduling interviews for the MRO.

(1) Staff under the supervision of the MRO may receive, review, and report negative test results to the licensee's or other entity's designated representative.

(2) Staff reviews of non-negative drug test results must be limited to reviewing the custody-and-control form to determine whether it contains any errors that may require corrective action and to ensure that it is consistent with the information on the MRO's copy.

(3) The staff may not conduct verification interviews with donors.

(4) The MRO staff duties must be maintained independent from any other licensee or other entity's activity or function.~~The designation of licensee or other entity's staff to perform~~

~~MRO functions under MRO direction must be strictly limited.~~ When acting as part of the MRO staff, the staff member must be under the direct supervision and control of the MRO.~~rather than the licensee or other entity. The MRO staff duties must be maintained independent from any licensee or other entity's activity or function. Such independence may not be compromised directly or indirectly by the licensee or other entity.~~

(5) The MRO shall be directly responsible for all administrative, technical, and professional operations of the staff under his or her direction. The MRO's responsibilities for directing MRO staff must include, but are not limited to, ensuring that procedures being performed by MRO staff meet NRC regulations and HHS standards of practice; that records are maintained confidential by MRO staff; that data transmission is secure; and that drug test results are reported to the licensee or other entity only in accordance with the requirements of this part. The MRO may not defer any of these responsibilities, in whole or in part~~, to the licensee or other entity~~.

(d) Responsibilities. The primary role of the MRO is to review and interpret non-negative test results obtained through the licensee's or other entity's testing program and to identify any evidence of subversion of the testing process. The MRO is also responsible for identifying any issues associated with collecting and testing specimens, and for advising and assisting FFD program management in planning and overseeing the overall FFD program. In carrying out these responsibilities, the MRO shall examine alternate medical explanations for any non-negative test result. This action may include, but is not limited to, conducting a medical interview with the donor, reviewing the donor's medical history, or reviewing any other relevant biomedical factors. The MRO shall review all medical records that the donor may make available when a non-negative test result could have resulted from responsible use of legally prescribed medication, a documented condition or disease state, or the demonstrated physiology of the donor. The MRO may not consider the results of tests that are not obtained or processed in accordance with this part, although he or she may consider the results of tests of split specimens in making his or her determination, as long as those split specimens have been stored and tested in accordance with the procedures described in this part.

Fitness for Duty Comment Number 37
Nominal Definition
July 29, 2004

Purpose: Although there appears to be agreement in concept, there has been difficulty finding an acceptable definition of nominal in the FFD rule. In FFD 17, which this paper replaces, the industry tried to address the situation where a company would want to shift the schedule so that in the future training would be scheduled at an earlier date. This recommendation may have been misinterpreted in preparing the current draft rule.

Issue: Based on NRC guidance the industry has been using the Technical Specification definition of nominal frequency which defines the allowed deviation from a schedule over a three year period. In developing implementing guidance for recent security orders, a definition as been developed that is more directly applicable to training and periodic audits:

From NEI 03-12 (Rev 1) the NRC approved template for security plans:

> "**Annual** – Requirements specified as "annual" should be scheduled at a nominal 12-month periodicity. Performance may be conducted up to three months before to three months after the scheduled date. The next scheduled date is 12-months from the originally scheduled date."

From NEI 03-01 the NRC approved implementation of AA and FFD programs:

> "**Annual**—Requirements specified as "annual" should be scheduled at a nominal 12-month periodicity. Performance may be conducted up to three months before to three months after the scheduled date. The next scheduled date is 12-months from the originally scheduled date."

From NEI 03-09 (Rev 2) the NRC approved Security Officer Training Program implementation guidance

> "**Annual** – Requirements specified as "annual" should be scheduled at a nominal 12-month periodicity. Performance may be conducted up to three months before to three months after the scheduled date. The next scheduled date is 12-months from the originally scheduled date."

> "**Quarterly**— Requirements specified as "quarterly" should be scheduled at a nominal 13-week periodicity. Performance may be conducted up to four weeks before to four weeks after the scheduled date. The next scheduled date is 13 weeks from the originally scheduled date."

To ensure the issue was clear additional discussion of expectations was included in Section 8.2 of NEI 03-09.

"TRAINING PERIODICITY

"To be effective, some training elements must be periodically repeated to maintain individual and team proficiency. For example, an item specified as annual should be repeated about every 12 months. However, regulations have used different terms such as annual, not to exceed 12 months, and every 12 months. The commitment made in standard Training and Qualification plan, Appendix B, is to a nominal annual periodicity. The same process applies to training conducted on a quarterly and four month cycle.

"The training program provides for flexibility in execution of periodic training. For annual training a window of three months before to three months after the scheduled date is provided. The next scheduled date shall not be more than 365 days from the current scheduled date.

"The intent of these requirements must be met. For example, conducting quarterly training the last week of one quarter, then repeating it the first week of the next quarter violates the intent of the training being periodic. Conduct of annual training in the fifteenth month and scheduling the next date 12 months from that date violates the intent that training be conducted on a nominal annual basis.

Proposed Text:

The following change is consistent with the definitions of annual and quarterly used above, using the terms "scheduled due date" and "frequency". Adding a "not later than" solves the problem raised in FFD 17, but with a lot fewer words.

Nominal means the limited flexibility that is permitted in meeting a scheduled due date for completing a recurrent activity that is required under this part, such as the nominal 12-month frequency required for FFD refresher training in §26.29(c)(2) and the nominal 12-monthfrequency required for certain audits in §26.41(c)(1). Completing a recurrent activity at a nominal frequency means that the activity may be completed within a period that is 25 percent longer or shorter than the period required in this part with the next scheduled due date no later than the current scheduled due date plus the frequency. ~~following limitations: (1) if the date upon which the activity is completed is later than the scheduled date, the next due date for completing the activity would be calculated from the scheduled date that was missed and may not exceed the specified scheduling frequency, and (2) if the date upon which the activity is completed is earlier than the scheduled date, the next due date for completing the activity would be calculated from the date upon which the activity was completed.~~
~~he date the activity was performed~~

Fitness for Duty Comment Number 38
MRO Staff
July 29, 2004

Purpose: To discuss the MRO's relationship with the Licensee and MRO supporting staff.

Issue: In section 26.183 (c) there is an emphasis on the need for the MRO to be actively involved in the management of staff that supports him. The industry is concerned that an emphasis on independence may have gone too far. Although we do not have specific text, we believe the NRC should evaluate the following two issues:

1. Generally the licensee is held responsible for ensuring the proper implementation of regulatory requirements. This is done through oversight, audits and other reviews. As written 16.183(c)(5) would appear to restrict the licensees ability to manage and put the regulatory burden on the MRO. If there is a regulatory violation by a MRO's staff will the MRO or licensee be held accountable?

2. This section is written as if there is one MRO—"The MRO". However, when the draft 10 CFR Part 26 is implemented each licensee and other entity will be required to have a minimum of two MROs. It is not clear whether each MRO would have a separate staff or whether one staff would perform functions for several MROs. It would appear that the intent of this language is for the MRO to take responsibility for those samples he reviews and provides a determination to the licensee. However, in implementation there will be a concern with exactly what "in whole or in part" means.

Since it is not clearly understand exactly what problem is being fixed by the extreme isolation of the MRO staff, the industry recommends that the NRC review the intent of the wording of 26.183(c) (4) and (5).

Proposed Text: (A Specific proposals is not being provided)

26.183 (c) MRO staff.

....

(5) The MRO shall be directly responsible for all administrative, technical, and professional operations of the staff under his or her direction. The MRO's responsibilities for directing MRO staff must include, but are not limited to, ensuring that procedures being performed by MRO staff meet NRC regulations and HHS standards of practice; that records are maintained confidential by MRO staff; that data transmission is secure; and that drug test results are reported to the licensee or other entity only in accordance with the requirements of this part. The MRO may not defer any of these responsibilities, in whole or in part~~, to the licensee or other entity~~.(See FFD 36)

Fitness for Duty Comment Number 39
Some General Comments
July 29, 2004

Purpose: To provide added observations on the draft FFD rule.

Issue:

1. Random Testing program:

26.31 provides a general requirement that individuals with authorization be in a random testing pool without getting into the implementation issue of exactly when to put them into a database. 26.67, for preaccess conditions states that random testing must start "the day that the licensee or other entity collects the specimens..."

This level of specificity is not a problem as long as compliance is based on everyone being in the pool at the time that a selection is conducted. In other words, "Ensure that all individuals in the population subject to testing have an equal probability of being selected and tested." The concern is that if an individual has a drug test on Saturday and name is not entered into the database until Monday some inspectors would consider it a violation even though no random draw had been conducted.

Do we need the level of detail?

> **§26.31 Drug and alcohol testing.**
>
> (c) Conditions for testing. Licensees and other entities who are subject to this part shall administer such drug and alcohol tests under the following conditions:
>
> (5) Random. On a statistically random and unannounced basis, so that all individuals in the population subject to testing have an equal probability of being selected and tested.
>
> **§26.67 Random drug and alcohol testing of individuals who have applied for authorization.**
>
> (a) ~~Beginning on the day that~~When the licensee or other entity collects specimens from an individual for any pre-access testing that may be required under §§26.65 or 26.69, and thereafter, the licensee or other entity shall subject the individual to random testing in accordance with §26.31(d)(2), except if —

2. EBT Calibration:

If an EBT fails an external check, we believe that there is no need to cancel all positive tests that were conducted with that machine. The number of checks and cross references during the procedure are adequate.

29.91(e)(3) If an EBT fails an external check of calibration, the licensee or other entity shall take the EBT out of service~~ and cancel every non-negative test result that was obtained using the EBT from any tests that were conducted after the EBT passed the last external calibration check~~. The EBT may not be used again for alcohol testing under this part until it is repaired and passes an external calibration check.

3. Confirmed non-negative test results:

In a recent industry workshop there were several presentations made on the draft fitness-for-duty rule. The concept of non-negative test results generated significant confusion in the discussion. In general the participants would prefer to see the concept of a positive test being a FFD violation.

During the July 7 public meeting the industry asked the NRC to carefully review the use and context, throughout the rule, of terms positive, confirmed positive, negative, invalid, non-negative, and confirmed non-negative. Although the term non-negative may have to remain to be consistent with other Federal agencies, it is not a natural term and any lack of clarity will generate significant implementation issues. Somehow the use of a double negative is unnatural. Even in algebra some people have trouble with the concept of (-)(-).