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December 27, 2005

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December 27, 2005 (3:02pm)

Honorable Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Attention: Rulemakings and Adjudications Staff

Re: Comments on Proposed Rule on Fitness for Duty Programs (RIN 3150-AF12)

Dear Ms. Vietti-Cook:

On behalf of the Nuclear Regulatory Services Group (NRSRG), we submit the following comments on the proposed rule to revise the Fitness for Duty (FFD) requirements of 10 C.F.R. Part 26 (70 Fed. Reg. 50442).¹ Our comments are limited to the proposed new requirements on managing fatigue and work hours controls in Subpart I. In general, we support the Commission's policy of improving the management of fatigue and generally agree with key elements of the new requirements, including the proposed individual work hour limits, which are consistent with licensee practice today. However, the proposed Subpart I goes too far by mandating overly prescriptive requirements, particularly collective work hour limits for job groups, that will hinder management flexibility and efficiency and in some situations have an adverse effect on work scheduling and plant operational needs.

We endorse the comments on proposed Subpart I submitted by the Nuclear Energy Institute (NEI) on behalf of the nuclear industry. We offer the following specific comments on particular aspects of the proposed rule.

1. More flexible break period requirements should be provided.

We support NEI's comments regarding the impact of the proposed break periods and the need for a more flexible approach to break requirements. We would emphasize two areas of

¹ The NRSRG is a consortium of power reactor licensees represented by the law firm of Ballard Spahr Andrews & Ingersoll, LLP.

needed flexibility. First, there is a significant need to provide an exception in the rule from the requirement for a 24-hour break in any 7-day period to allow for periods of high work activity such as the first two weeks of an outage. Proposed Section 26.199(d)(2)(ii) requires a 24-hour break in any 7-day period without exception. Because fuel movement typically occurs during the first two weeks of a refueling outage, workers understand the need for increased vigilance, attention and site presence during this period. In fact, experience shows that workers generally have no difficulty working up to 14 days during an outage without a 24-hour break period, especially when they know that the outage is scheduled to last no more than a total of three to four weeks. Workers will actually prefer to keep working straight through to complete the outage and get back to a normal schedule. Accordingly, we recommend that proposed Section 26.199(d)(2)(ii) be revised to include an exception for the first 14 days of any plant outage or during periods of high work activity at power (e.g., major equipment repair or modification).

Second, the proposed rule would allow licensees to grant a waiver of the individual work hour controls where needed "to mitigate or prevent a condition adverse to safety" (or maintain security) and a qualified supervisor assesses the individual face to face (see proposed 10 C.F.R. 26.199(d)(3)). The rule should recognize that, in some cases, it is possible that a particular individual will be the only subject matter expert capable of handling a particular work activity or problem. Management, of course, would prefer to have more than one person with the necessary expertise. However, due to circumstances beyond the licensee's control, such as job changes, family emergencies, illness or injury, a licensee may temporarily have to rely on the "one key worker" until it can hire or train a replacement. In these situations, a licensee should have flexibility to grant a waiver to specific workers based on operational needs.

Accordingly, we recommend that proposed Section 26.199(d)(3) be modified as follows (addition in bold):

An operations shift manager determines that the waiver is necessary to mitigate or prevent a condition adverse to safety or to **support plant operational needs**

2. The proposed collective work hour limits are overly restrictive and have not been adequately justified under the Backfit Rule.

The need for controls on collective work hours, and the benefit of this proposed requirement, are not adequately justified. The collective work hour limitations for job duty groups of proposed 10 C.F.R. 26.199(f) (not to exceed an average of 48 hours per person per week in any 13-week averaging period (for non-security personnel)) would be more restrictive than the sum of the individual hours limitations for those workers in a given group. Within a job duty group, effective management will result in work, including overtime, being assigned to those individuals who desire the overtime or whose presence is necessary for plant safety or operational reasons (e.g., a subject matter expert as described above). This type of flexibility is missing in the rigid collective work hour limits that would be established by the proposed rule.

Moreover, the proposed requirement of Section 26.199(f)(5) for prior NRC approval of a written request by a licensee to exceed any collective work hour limits for any job group is

overly restrictive and could have unintended consequences. Such a requirement has the potential to interfere with or delay site response to an emerging issue or hinder the licensee's ability to take immediate corrective actions to address a problem. In addition, this prior approval process will be time consuming and could interfere with the pre-established sequence of tasks for an outage.

The maximum limits for group work hour averages may not be consistent with existing collective bargaining agreements (CBAs). The proposed rule would be likely to result in variations among work groups at a site, a situation that may conflict with provisions of CBAs or create a potential for complaints by bargaining unit employees.

For these reasons, we urge the NRC not to adopt the collective work hour limits as reflected in the proposed rule. Instead, the NRC should focus on developing a performance-based rulemaking approach that better recognizes the complexity of work scheduling practices at nuclear power plants and allows for the needed management flexibility.

The collective work hour limits should not be adopted for the further reason that the NRC's backfitting analysis does not adequately justify imposing this new requirement. The NRC recognizes that the proposed rule is a significant backfit and has performed a backfitting analysis for the rule under the NRC Backfit Rule, 10 C.F.R. 50.109. See 70 Fed. Reg. at 50620-21. As the NRC notes, however, it performed an "aggregate" backfitting analysis that grouped all the new backfit requirements of the proposed rule together for purposes of the analysis rather than analyzing particular major backfits separately. The NRC also notes that it analyzed the safety benefit of the proposed rule only "qualitatively." 70 Fed. Reg. at 50621.

In our view, the collective work hour limits of the proposed rule should have been subjected to a separate backfitting analysis to assess whether this aspect of the rule would produce a cost-justified substantial increase in safety as required by the NRC's Backfit Rule. The collective work hour limits are a separable part of the rule and could have been subjected to a separate analysis. Moreover, this aspect of the rule has the potential for adverse impacts on work scheduling and extension of outages, which would add substantially to the cost of implementing the new requirements. Note that 10 C.F.R. 50.109(c) requires a backfitting analysis to consider the potential impact of new requirements on plant "operational complexity" and the cost of facility downtime. Because of the "aggregate" backfitting analysis performed for the entire rule, it is not clear that the full impact of the collective work hour limits was considered. Accordingly, this portion of the rule has not been properly shown to meet the standards of 10 C.F.R. 50.109.

3. The proposed requirement for detailed procedures to govern worker self-declarations of fatigue is unnecessary and intrudes on employer-employee relations.

Proposed 10 C.F.R. 26.197 would require licensees to establish policies, procedures and training on fatigue management and behavioral observation regarding fatigue. The training and procedures would be designed to help workers manage the risk of fatigue and provide techniques to assist them in obtaining adequate rest. Training of shift workers and others as part of a fatigue

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management program is a sound approach. We are concerned, however, that the proposed rule would mandate prescriptive requirements for the content of licensee procedures with respect to worker self-declarations of fatigue. The Statement of Considerations indicates that licensees would need to develop a detailed "self-declaration procedure" to address, among other things, the responsibilities of individuals and licensees, controls on work activities following a self-declaration of fatigue, and potential sanctions. 70 Fed. Reg. at 50576-78.

The proposed rule, in this regard, appears to intrude unnecessarily into the employer-employee relationship and may have the effect of establishing new responsibilities and procedural rights beyond existing collective bargaining agreements. In our view, the rule should not rely on self-declarations as the primary means of identifying fatigue. Mandating that workers self-identify their own fatigue is not likely to be a workable solution to the problem. In addition, the NRC should recognize that it is possible for the self-declaration process to be abused by one or more workers who habitually come in with inadequate sleep. Workers are free to make a self-declaration of fatigue now, and management would certainly support worker self-declarations. But attempting to micro-manage the issue through detailed self-declaration procedures will just add unnecessary formality and complexity to the work scheduling process.

The training of shift workers that would be required as part of the fatigue management program under proposed 10 C.F.R. 26.197(c) should be sufficient. Training can address the safety risks of fatigue and provide techniques to help workers obtain adequate rest and maintain alertness, particularly during changes in shift schedules or following days off. In view of the adequacy of training, we recommend that the NRC drop the requirement for a detailed self-declaration process.

4. The NRC should clarify the fatigue assessment requirement.

Proposed 10 C.F.R. 26.201 would require a licensee to perform a "fatigue assessment" when an individual makes a self-declaration of fatigue or is found to be in a state of "impaired alertness." We recommend that the NRC work with stakeholders to develop appropriate guidance on the conduct of a fatigue assessment and the particular circumstances that warrant such an assessment. In this regard, a clear definition of "impaired alertness" within the meaning of proposed Section 26.201(a)(1) should be provided to bound the conditions that trigger the need for initiating a fatigue assessment. We assume that if a covered employee is found to be in a state of impaired alertness, including unintentionally falling asleep on duty (e.g., nodding off), a fatigue assessment should be performed to identify the root cause before management actions are taken such as disciplinary action. This point should be clarified in the final rule.

* * * *

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December 27, 2005

The NRSG appreciates the opportunity to comment on this important rulemaking initiative by the NRC. Should you have any questions regarding our comments or need additional information, please feel free to contact us.

Sincerely,

A handwritten signature in black ink that reads "Daniel F. Stenger". The signature is written in a cursive style with a large initial "D".

Daniel F. Stenger
Counsel to the Nuclear Regulatory
Services Group

From: "Bridgett, Wanda (DC)" <Bridgett@ballardspahr.com>
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Date: Tue, Dec 27, 2005 9:29 AM
Subject: Comments on Proposed Rule on Fitness for Duty Programs (RIN 3150-AF12)

On behalf of Daniel Stenger, I have attached a copy of his comments on the proposed rule on fitness for duty programs.

Please feel free to contact us should you have any questions.

Thank you.

<<Comments.pdf.PDF>>

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