DOCKET NUMBER
PROPOSED RULE PR 26
(70FR 50442)

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December 27, 2005

DOCKETED
USNRC

December 27, 2005 (4:17pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Attn: Rulemakings and Adjudication Staff

Re: Comments on Nuclear Regulatory Commission Proposed Rule on Fitness for Duty Programs

Gentlemen:

On August 26, 2005, the U.S. Nuclear Regulatory Commission ("NRC") issued a proposed rule (70 Fed. Reg. 50442) to amend its regulations relating to fitness for duty programs contained in 10 C.F.R. Part 26. This letter comments on one aspect of the proposed rule relating to "for-cause testing of individuals subject to drug and alcohol testing." Winston & Strawn is a law firm whose clients are licensees or applicants for various NRC licenses, permits and approvals. As such, they are affected by the subject Commission proposed rule. Winston & Strawn supports the comments being submitted by the Nuclear Energy Institute ("NEI") and these comments should be read consistently with NEI's comments.

The NRC proposes to amend the portion of current Section 26.24(a)(3) that requires drug and alcohol testing of an individual where there is a failure in individual performance which leads to significant consequences. The NRC asserts that the current provision, Section 26.24(a)(3), "has been subject to misinterpretation and numerous questions from licensees." The NRC's explanation is as follows:

> The phrase, "if there is reasonable suspicion that the worker's behavior contributed to the event," in current § 26.24(a)(3) has been subject to misinterpretation. The location of this phrase at the end of the list of conditions under which post-event testing must be performed has led some licensees to conclude that this phrase applies only to events involving actual or

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> potential substantial degradations of the level of safety of the plant.[1]

Moreover, the NRC states that the proposed rule "would eliminate the phrase 'if there is reasonable suspicion that the worker's behavior contributed to the event.'"[2]

The NRC recently issued a Regulatory Issue Summary 2005-28 espousing the same view. However, both RIS 2005-28 and the characterization in the proposed rule (*see* 70 Fed. Reg. 50,489) present incorrect interpretation of the meaning of the present regulation. A discussion of the fallacy in the NRC's argument is contained in a December 22, 2005 letter from Winston & Strawn to Robert C. Pierson and Christopher I. Grimes of the Nuclear Regulatory Commission which for the sake of brevity is incorporated herein and a copy attached. Basically, the phrase "if there is reasonable suspicion that the workers behavior contributed to the event" clearly modifies not only the direct antecedent but the other types of incidents potentially requiring for cause testing. This is clearly mandated by the only interpretation which would give this section a meaning which would carry out the purposes of drug and alcohol testing contained in 10 C.F.R. Part 26. The term "reasonable suspicion" as contained in the present regulation is a low bar to a requirement for testing. Workers and supervisors are trained in observing the fitness for duty of individuals having unescorted access. Merely because an injury or an incident may have occurred, there is no automatic reason to conduct drug and alcohol testing. The NRC must analyze the data underlying historical fitness-for-duty program performance results, *e.g.*, NRC Information Notice 2005-18, to determine whether the number of positive tests for cause related to tests following accidents or actual or potential substantial degradation of the level of the safety (*i.e.*, without the categories of "observed behavior indicating possible substance abuse" or "credible information that an individual is abusing drugs or alcohol") supports its proposed change to eliminate the "reasonable suspicion" requirement.[3]

Moreover, the newly proposed language raises as many or more implementation questions than the present language. The definition of a "human error" in proposed § 26.31(c)(3) is too all encompassing. There are also no limits in defining human error which "may have caused or contributed to the event." For example, a licensee is likely to be second guessed by the NRC for not testing individuals "who were affected by the event but whose actions likely did not cause or contribute to the event." It is submitted that the proposed language would have the unintended consequence of causing individuals not to report medical conditions or delay in

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1 70 Fed. Reg. 50489.

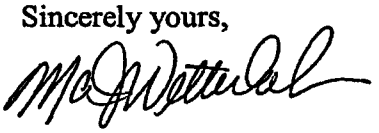
2 *Id.*

3 This category is not reported separately in published results.

seeking treatment to avoid going through the drug and alcohol testing procedures.[4] *See* proposed 10 C.F.R. § 26.31(c)(3)(i).

For the foregoing reasons, the rule should not be adopted as proposed. The rule relating to for cause testing for post-event situations should require at least a suspicion that the individual's actions were affected by drug or alcohol considerations.

Sincerely yours,



Mark J. Wetterhahn

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[4] Should the change be adopted as proposed by the NRC, Winston & Strawn does support the change to proposed § 26.31(c)(3)(i) to include "within four hours after the event" to describe with reference to recordable personal injuries and illnesses that would trigger post-event testing. This is a reasonable time period for requiring testing.

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December 22, 2005

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Christopher I. Grimes, Director
Division of Policy and Rulemaking
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Re: NRC Regulatory Issue Summary 2005-28

Gentlemen:

Introduction

On November 22, 2005, the U.S. Nuclear Regulatory Commission ("NRC") issued NRC Regulatory Issue Summary 2005-28, Scope of For-Cause Fitness-for-Duty Testing Required by 10 CFR 26.24(a)(3), addressed to all licensees authorized to operate a nuclear power reactor, possess or use formula quantities of strategic special nuclear material, or transport formula quantities of strategic special nuclear material. The stated purpose in issuing this Regulatory Issue Summary ("RIS") was to convey the NRC's position on circumstances under which for-cause fitness-for-duty ("FFD") testing is required after an accident and to provide the basis for enforcement guidance on the type and severity of personal injury accidents for which this testing must be performed. 10 CFR 26.24(a)(3) sets forth the requirements that licensees must implement for for-cause testing. Only the second clause of that regulation is discussed in the RIS. The second clause specifies three conditions for for-cause testing after an accident involving a failure in individual performance. The NRC describes these conditions as separated "by commas." These three criteria are described in the RIS as follows:

> Criterion (i) is that the accident involves a failure in individual performance resulting in personal injury, Criterion (ii) is that the accident involves a radiation exposure or release of radioactivity in excess of regulatory limits, and Criterion (iii) that the accident involves an actual or potential substantial degradation of the level of safety of the plant and there is reasonable suspicion that a worker's behavior contributed to the event.

The NRC states that inspections of licensees' FFD testing programs have revealed inconsistencies in the circumstances under which licensees perform for-cause testing under the second clause of 10 CFR 26.24(a)(3), and that the inconsistencies result from different interpretations of the phrase "if there is reasonable suspicion that a worker's behavior contributed to the event." The NRC attributes this phrase as modifying the language only in Criterion (iii). The NRC's reasoning is that the phrase "if there is reasonable suspicion that the worker's behavior contributed to the event" applies only to the phrase "which is grammatically connected," *i.e.*, Criterion (iii), and it does not apply to Criteria (i) and (ii). The result of this interpretation is that if a worker is involved in an accident (event) involving a failure in individual performance resulting in any of the conditions specified in Criterion (i) and (ii), the worker is subject to for-cause testing regardless of the worker's observed behavior or any licensee suspicion of substance abuse.

As a separate matter, the NRC states that it is "currently revising 10 CFR Part 26 and is considering the use of the following OSHA standard in determining the scope of "for cause" testing:

> ... a significant injury or illness that results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or other significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness ....

The RIS states that prior to the promulgation of the revised Part 26, the NRC "encourages" licensees to perform for-cause testing after accidents involving not only a failure in individual performance (human error) that results in a significant personal injury" as required by Criterion (ii), but also following "an illness that is recordable at the time of the event, or reasonably could ultimately be recordable under the Department of Labor Occupational Safety and Health Administration (OSHA) standard in 29 CFR 1907.4 and subsequent amendments," *i.e.*, fulfilling the standard set forth immediately above.

Discussion

Winston & Strawn is a law firm whose clients are licensees or applicants for various NRC licenses, permits and approvals. As such, they are among the recipients of the subject RIS and would be affected by any Commission interpretation of its regulations. Winston & Strawn believes that the NRC's interpretation is incorrect and contrary to the intent of the regulation and would introduce a significant inconsistency in the interpretation of the subject regulation. In addition, the "encouragement" of the NRC to adopt its interpretation of events that need reporting prior to the completion of rulemaking constitutes improper notice and comment rulemaking. Therefore, Winston & Strawn believes that the subject RIS should be withdrawn and the interpretations contained therein should be promulgated only after notice and comment rulemaking.

The RIS cites no rules of statutory or regulatory interpretation which would require or even suggest that the interpretation advanced by the Staff is mandated by the wording of the subject regulation. The absence of a comma in the third clause raises at most an ambiguity as to the meaning of the entire regulation. In this regard, *American Jurisprudence* states on the effect of the absence of a comma that:

> [Q]ualifying words may, notwithstanding the absence of a comma after the words which immediately precede them, properly be construed as modifying the earlier portion of the statute as well as the clause immediately preceding them, where such construction accords with the evident purpose of the statute.[1]

What the NRC totally fails to do is to look at the final phrase following clause (iii) in the context of the meaning and purpose of the entire regulation and Part 26. As interpreted by the Staff, an entity covered by the rule would only have to test an individual following an accident that involves "an actual or potential substantial degradation of the level of the safety" (emphasis supplied) if there were reasonable suspicion that a worker's behavior contributed to the event. If an accident involves an actual or potential substantial degradation of the level of safety, it may be viewed as serious and certainly involves regulatory implications. In this case, testing is only required if there is reasonable suspicion that a worker's behavior contributed to the event. On the other hand, even for a trivial accident involving personal injury, but not necessarily any relationship to an issue involving nuclear safety, the NRC advocates the position that testing is required whether or not reasonable suspicion exists. Such an interpretation leads to an absurd result: reasonable suspicion for testing is not needed for a trivial event, but is required for an actual or potential substantial degradation of the level of safety. The reasonable suspicion standard gives some protection to workers and screens against unnecessary testing. It is not too high a bar as all those on a supervisor level have been trained in looking for signs of drug or

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[1] 73 Am. Jur. 2d *Statutes* § 139 (2001).

alcohol use. The subject rule is applicable to a population which is already subject to random tests and which has been trained in the negative effects of alcohol and drugs in the workplace.

The NRC has also failed to demonstrate that its interpretation is required by the regulation and its backfit is therefore impermissible under 10 CFR 50.109.

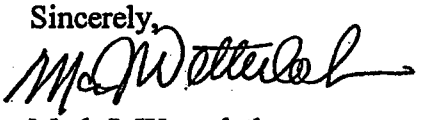
Likewise, the NRC's use of the word "encourages" combined with a limited enforcement discretion is tantamount to rulemaking. Such modification to a regulation via interpretation as contained in a RIS is, at a minimum, heavy-handed and also improper rulemaking. This is particularly egregious given the pendency of a rulemaking to comprehensively modify 10 CFR Part 26.

Finally, the interpretation embodied in the RIS could have consequences not contemplated by its authors. For example, it could have a chilling effect on employees with respect to reporting safety issues (like a twisted ankle) that could be recordable if they are going to cause them to be drug screened. It is important for industrial safety programs to have employees report all injuries (even first aid type problems). This is one of the issues that should have been explored more thoroughly with affected parties before the interpretation embodied in the RIS was implemented.

Conclusion

For the foregoing reasons, the NRC's interpretation of clause (iii) is without basis and contrary to the clear meaning and intent of the regulation. For these reasons, RIS 2005-28 should be withdrawn.

Sincerely,



Mark J. Wetterhahn

MJW:sdd
cc: James Canady, III, NSIR

From: "Wetterhahn, Mark" <MWetterhahn@winston.com>
To: <SECY@nrc.gov>
Date: Tue, Dec 27, 2005 3:35 PM
Subject: Comments on proposed rule revising 10 CFR Part 26

<<Comments.pdf>>
Gentlemen,

Enclosed for filing are the attached comments of Winston & Strawn LLP concerning the proposed rule relating to Fitness for Duty Programs as published in the Federal Register on August 26, 2005(70 Fed. Reg. 50442).

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