

September 6, 2006

MEMORANDUM TO: Chairman Klein
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons

FROM: Luis A. Reyes */RA/*
Executive Director for Operations

SUBJECT: NUCLEAR REGULATORY COMMISSION (NRC) DRUG-FREE
WORKPLACE PLAN - RECOMMENDED CHANGES TO DRUG
TESTING POOL

The purpose of this memorandum is to seek Commission approval of the staff's recommendation to include all NRC employees in its random drug testing pool.

BACKGROUND:

On September 15, 1986, President Reagan signed Executive Order 12564 (EO) to establish standards to achieve a Drug-Free Federal Workplace and require that the head of each Executive agency establish a program to test for the use of illegal drugs by employees in "sensitive" positions. The Department of Health and Human Services (HHS), as a member of the Interagency Coordinating Group (ICG) Executive Committee, was given the authority to review and approve Federal agencies' drug testing programs. HHS approved NRC's Drug Testing Plan that was implemented, in December 1988. In 1989, HHS issued the "Model Plan for a Comprehensive Drug Free Workplace Program" to all Federal agencies to guide their programs. NRC revised its Drug Testing Plan in March 1990 to comply with these new guidelines. In November 1997, NRC's Drug Testing Plan was superseded by the "NRC's Drug-Free Workplace Plan" (the Plan), NUREG/BR-0134, Revision 1, which is currently in effect.

Revision 1 of the Plan was developed based on NRC's understanding and interpretation of the EO requirements, along with guidance received from HHS and the Department of Justice (DOJ), at the time regarding which positions in an agency should be included in the random drug testing pool. A position included in the pool is termed a "testing designated position" (TDP). Guidance from HHS and DOJ defined criteria for presumptive, preferred, discretionary, and specifically disfavored TDPs. It required agencies to include all positions defined as presumptive in their random drug testing pools. In order to ensure reasonable uniformity among

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Federal agencies, it required agencies to provide explanation for not testing positions defined as preferred. Agencies needed to justify including preferred or discretionary positions and provide exceptional justifications to include specifically disfavored positions in their random drug testing pools.

On March 23, 1992, the staff recommended to the Commission in SECY-92-105 to modify NRC's criteria for identifying TDPs. Changes included the addition of "motor vehicle operators carrying passengers," a "presumptive" category, and modifying the criteria to include employees who have access to "truly sensitive information," a "preferable" category. DOJ informally advised NRC at the time that existing case law did not offer a high level of support for including positions which required access to classified information no more than once or twice a year.

By approving these changes for identifying TDPs, staff believed NRC's TDP criteria would be in line with the January 24, 1992, guidance. On April 15, 1992, the Commission approved the following four TDP categories:

1. Regional and Headquarters employees who have unescorted access to vital or protected areas of nuclear power plants, Category 1 fuel cycle facilities, or uranium enrichment facilities.
2. Employees who have assigned responsibilities or are on call for Regional or Headquarters incident response centers.
3. Employees with access to Sensitive Compartmented Information (SCI) and/or Foreign Intelligence Information (FII), or who require access more than once or twice a year to classified information (i.e., National Security Information or Restricted Data).
4. Employees who are operators of motor vehicles carrying passengers.

Subsequent to the issuance of Revision 1 of the Plan in 1997, the ICG Executive Committee, through HHS, issued "Guidance for Selection of Testing Designated Positions," dated August 2, 1999, (Enclosure 1). This guidance supplements and, to the extent there is a conflict, supersedes the previous guidance on TDPs.

As described in Enclosure 1, the well-developed law and clear public interest applicable to drug testing make it evident that TDPs meeting the preferred criteria represent strong government interests for drug testing. Agencies choosing to exclude functions defined as preferred by the ICG are required to explain the decision not to designate them as TDPs to the ICG Executive Committee (note that decisions to include them as TDPs are also to be submitted to members of the ICG for a consultative uniformity review).

At the time the 1999 revised ICG TDP guidance was issued, the staff did not provide HHS with the explanation for excluding preferred positions from NRC's random drug testing pool. These positions were those that required a security clearance, pursuant to Section 145 of the Atomic Energy Act of 1954, but in reality incumbents of these positions rarely, if ever, saw classified documents. The reason for not including such positions was simply their lack of actual access to classified information.

To validate Categories 1 and 3 of the TDP criteria, each Office Director and Regional Administrator was asked to review and confirm the level of access to classified information required by each of their employees and if their employees were expected to require unescorted access to vital or protected areas of nuclear power plants, Category 1 fuel cycle facilities, or uranium enrichment facilities. The staff reviewed responses, re-evaluated the ICG TDP criteria and determined that the NRC TDP criteria should be revised. Subsequently, the Office of Inspector General (OIG) conducted an audit of the drug testing program (OIG-05-A-05) and recommended that the NRC re-evaluate the TDP criteria.

DISCUSSION:

The environment and guidance applicable to NRC's Drug Testing Program have changed to emphasize the inclusion of individuals that require security clearances. The ICG guidance issued in 1999 instructs agencies to include personnel with security clearances in drug testing pools or provide an explanation why this is not warranted. Conversely, the guidance requires agencies to justify inclusion of these positions, to ensure government uniformity. While all NRC employees are required by Section 145 of the Energy Policy Act of 1954, as amended, to hold security clearances, in reality many of them have had little or no access to classified information. This could fairly be viewed as a legitimate basis for including in TDPs only those positions that would provide access to classified information with some reasonable degree of frequency. However, since September 11, 2001, many NRC employees who never had access to classified information now have access to it on a regular or intermittent basis (as in the case of cleared secretaries who are asked to receive, hold and/or deliver classified information). In addition, the terrorist attacks on September 11, 2001, and the subsequent increase in the threat of additional attacks against the United States, have placed the NRC into a more visible and critical national security role.

The EO states:

“The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law...”

The EO also states, “The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions” and defines the term “employees in sensitive positions,” in part, as employees who have been granted, or may be granted, access to classified information or employees who perform functions requiring a high degree of trust and confidence. While ICG guidance does not designate as presumptive, every position that requires a clearance, all cleared NRC employees in fact, are within the plain meaning of the EO’s definition of “employees in sensitive positions.” Since the EO was issued, TDP selection rationales at Federal agencies have been examined by the court system through litigation and judicial opinions, and the EO has been legally upheld, thereby further strengthening the basis for designating all NRC cleared employees as TDPs in accordance with the plain language of the EO.

Including all NRC employees in the random drug testing pool resolves HHS concerns regarding complexity of the current TDP criteria. Other Federal agencies which require security clearances for their employees include all cleared employees in random drug testing pools (i.e., National Nuclear Security Administration; Bureau of Alcohol, Tobacco, Firearms, and Explosives; Defense Security Service; and the Defense Nuclear Facilities Safety Board).

The current criteria results in approximately one-half of the current NRC employees being included in the random drug testing pool, or approximately 1,800 employees. The testing rate target is 50 percent, or approximately 900 random drug tests, to be performed on an annual basis.

OPTIONS:

The staff has examined three options for revising the NRC TDP criteria (pros and cons for each option are included in Enclosure 2). The options are:

1. Designate all NRC positions as sensitive TDPs, consistent with the plain language of the EO and put all NRC employees in the drug testing pool.
2. Revise the current TDP criteria to include NRC employees who carry firearms, those employees authorized to carry firearms, and employees who have drug rehabilitation program duties (i.e., Employee Assistance Program employees).
3. Revise the current TDP Category 3 to include employees who are in critical-sensitive positions requiring a “Q” or top secret security clearance, employees who are in positions of high public trust requiring an “L(H)” security clearance, and employees who are in other sensitive positions that may require access to classified information two or more times a year. Also revise the TDP criteria to include NRC employees who have drug rehabilitation program duties (i.e., Employee Assistance Program employees).

ANALYSIS:

Only Option 1 is certain to be viewed as consistent with the plain language of the EO that all sensitive positions be designated as TDPs. Since the ICG's guidance requires a justification to HHS for including all NRC positions, without regard to the extent of actual access to classified information, such justification will be provided and is virtually certain to be approved.

Option 1 will bring NRC's TDP criteria in-line with the plain language of the EO, the current ICG guidance, and HHS comments and recommendations. The cost to implement the program would remain essentially the same if a 25% testing rate were selected. The administrative burden and associated potential for errors when employees are moved in and out of the pool will be reduced. This option provides a greater deterrent to drug use for the agency since all employees would be in the pool. It is also consistent with NRC's zero tolerance policy, i.e., that the use of illegal drugs by NRC employees is unacceptable and will not be tolerated. The Office of Administration and the Office of Human Resources, who have responsibilities under the Plan, support Option 1 as it would result in more effective use of resources while providing a stronger drug testing program. As stated in the EO, placing all NRC employees in the random drug testing pool would provide a higher assurance of employee reliability, stability, and good judgement and reduce the possibility of coercion. Option 1 would resolve Recommendations 1 (include individuals with incident response duties and with annual access to classified information) and 4 (include computer system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons) of OIG audit OIG-05-A-05.

Options 2 and 3 would resolve Recommendation 4 of OIG audit OIG-05-A-05, however neither of these options would bring the TDP criteria in line with the plain language of the EO. Further, Options 2 and 3 would require re-submission and HHS acceptance of NRC explanations to exclude preferred positions from the drug testing pool thereby increasing the risk that HHS would not approve NRC's Drug-Free Workplace Plan, Revision 2. Options 2 and 3 do not provide the same high level of assurance that NRC has a drug-free workplace as provided by Option 1.

RECOMMENDATION:

The staff recommends that the Commission approve Option 1, to put all NRC employees in the drug testing pool.

The staff will develop an implementation plan for Commission consideration within 45 days of receiving Commission approval.

The Commissioners

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COORDINATION:

The Office of General Counsel has reviewed this paper and has no legal objections.

SECY, please track.

Enclosures:
As stated (2)

cc: SECY
OGC
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DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS

Option 1:

Designate all NRC positions as “sensitive” and put all NRC employees in the drug testing pool. NRC would not have to provide an explanation to HHS for not including preferred TDPs in the random drug testing pool, but would have to provide this information to members of the ICG in the form of a justification, for a consultative uniformity review.

Pros

1. Consistent with the plain language of the EO, to include NRC cleared individuals in the drug testing pool. In accordance with Section 145 of the Atomic Energy Act of 1954 (as amended) all NRC employees shall obtain at least a Secret, or L, security clearance. Therefore, any NRC employee, if they have a need-to-know, can have access to classified information. This satisfies the HHS preferred criteria of Personnel Having Access to “Truly Sensitive Information.”
2. Resolves Recommendations 1 and 4 in OIG Audit OIG-05-A-05.
3. Is consistent with the intent of NRC’s drug testing policy statement as reflected in Agency Announcement number 94, dated July 9, 1987. Given the nature of NRC’s responsibilities, and the importance of public trust and confidence in NRC’s ability to carry out its mission effectively, the Commission emphasizes that the use of illegal drugs by NRC employees is unacceptable and will not be tolerated by the agency.
4. Places greater emphasis on maintaining a drug-free workplace in a post-September 11, 2001, environment. Putting all NRC employees in the random drug testing pool will assist in ensuring that NRC is indeed a drug-free workplace, especially in light of recent positive drug test results for four NRC employees. If employees who are in the pool have been found to use illegal drugs, the probability is high that some individuals who are not in the pool are also using illegal drugs. This can place the agency at additional risk.
5. Establishes and maintains an effective deterrent factor for a larger pool of individuals as compared to the current practice. The cost of almost doubling the number of individuals in the pool now could be offset by reducing the testing rate to 25 percent. The ICG states that cost alone is not a sufficient criterion to decide whether or not a position is a TDP. In-line with this position, staff may consider testing rate options.
6. Satisfies HHS concerns regarding complexity of Category 3 criteria (i.e., "Category 3 remains unnecessarily complex...This section could be edited and summarized: Consistent with guidance, the NRC TDP pool is:...(3) Employees with Secret and above clearances...").

Enclosure 2

DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS

7. Eliminates potential errors that are introduced when individuals are moved in and out of TDPs since all employees would be in the pool. Allows staff to focus efforts on managing the testing process and not employee movement in and out of TDPs. The Office of Human Resources (HR) estimates spending 312 hours a year on this effort and the Office of Administration (ADM) estimates spending 416 hours. This savings in staff time offsets the increased program costs to test all applicants for NRC employment. In spite of the effort expended by both offices, it has not been possible to maintain a 100 percent accurate pool. NRC's random drug testing pool is dynamic by nature.
8. Aligns NRC's program with other Federal agencies that require employees to hold a security clearance, although some link TDP criteria to position sensitivity and/or agency mission rather than to the actual security clearance. The following agencies are at or very near 100 percent TDPs: National Nuclear Security Administration; Bureau of Alcohol, Tobacco, Firearms, and Explosives; Defense Security Service; National Geospatial-Intelligence Agency; Department of Defense-Office of the Inspector General; Federal Bureau of Investigation; United States Secret Service; U.S. Agency for International Development; Drug Enforcement Administration; and Defense Nuclear Facilities Safety Board. The Department of Energy randomly tests all employees with a top secret security clearance and some other positions, i.e., couriers handling special nuclear materials and trainers who are part of the Human Reliability Program (they have access to weapons).
9. Reduces risk of hiring current drug users since 100 percent of all applicants would be tested.
10. Eliminates risk that HHS would not approve NRC's Drug-Free Workplace Program, Revision 2.

Cons

1. Reduces the number of times the agency actually tests individuals in higher risk positions if the testing rate is the same for all TDPs.
2. The drug testing program tracking system would need to be modified if the testing rate were modified. Although this would expend staff and financial resources, staff does not consider this a significant negative since this would be covered in the cost of annual software application maintenance. The existing tracking system is out of date and has not been modified since 1999. Staff is looking into replacing the existing system.
3. Increases the burden on drug testing program staff by requiring testing of all applicants.

DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS

Option 2:

Revise the current TDP criteria to include NRC employees who carry firearms, those authorized to carry firearms, and those NRC employees who have drug rehabilitation program duties (i.e., Employee Assistance Program (EAP) employees), which is a preferred testing category. As stated by the ICG, individuals with EAP duties are so inimical to illegal drug use that such employees can expect inquiry regarding their fitness. This option would meet the ICG presumptive criteria pertinent to NRC. NRC would be required to provide an explanation for not including all pertinent preferred positions in the random drug testing pool (i.e., Personnel Having Access to "Truly Sensitive Information").

Pros

1. Resolves Recommendation 4 in OIG Audit OIG-05-A-05, and would not result in a significant increase to the number of individuals in the random drug testing pool since most of these individuals have been identified as being in TDPs for other reasons (i.e., they satisfy current Category 1, 2, or 3 criteria).
2. Meets current ICG guidance since employees who carry firearms are included in the ICG's presumptive TDP category and employees who are authorized to carry firearms are included in the preferred TDP category.
3. Meets the ICG preferred TDP criteria since employees who have employee assistance duties would be included in the pool.
4. Poses no impact to most employees who are currently in non-TDP positions.

Cons

1. May not be viewed by HHS as compliant with the plain language of the EO to include all NRC cleared individuals in the drug testing pool, and therefore may not be approved by HHS.
2. Requires explanation for preferred positions not included in the random drug testing pool (i.e., "Personnel Having Access to "Truly Sensitive Information"), which results in increased risk of HHS not approving NRC's Plan.
3. Does not satisfy HHS concerns regarding complexity of Category 3 criteria (i.e., "Category 3 remains unnecessarily complex...This section could be edited and summarized: Consistent with guidance, the NRC TDP pool is:...(3) Employees with Secret and above clearances...").
4. Potential for errors is introduced when individuals move in and out of TDPs, as they do each pay period.

DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS

5. Does not allow staff to focus efforts on managing the testing process. Expends staff resources (estimated at approximately 728 hours per year) to track movement of employees in and out of the testing pool at the expense of managing the agency's Drug-Free Workplace Program. This effort does not effectively utilize NRC resources.
6. Expends staff effort in collecting information from Office Directors and Regional Administrators regarding individuals in their organizations who meet the Plan criteria does not effectively utilize NRC resources.
7. Treats employees inconsistently, which could lead to disparate treatment claims.

Option 3:

Revise the current TDP Category 3 to include employees who are in critical-sensitive positions requiring a "Q" or Top Secret security clearance, employees who are in positions of high public trust requiring an "L(H)" security clearance, employees who are in other sensitive positions that may require access to classified information two or more times a year, and those NRC employees who have drug rehabilitation program duties (i.e., Employee Assistance Program employees), which is a preferred testing category. As stated by the ICG, individuals with EAP duties are so inimical to illegal drug use that such employees can expect inquiry regarding their fitness. This option would also resolve Recommendation 4 of OIG audit OIG-05-A-05.

Pros

1. Resolves Recommendation 4 in OIG Audit OIG-05-A-05.
2. Brings NRC's TDP criteria closer in-line with the ICG's revised TDP guidance.
3. Poses no impact to most employees who are currently in non-TDP positions.

Cons

1. May not be viewed by HHS as compliant with the plain language of the EO to include all NRC cleared individuals in the drug testing pool, and therefore may not be approved by HHS.
2. Requires explanation for preferred positions not included in the random drug testing pool (i.e., "Personnel Having Access to "Truly Sensitive Information"), which results in increased risk of HHS not approving NRC's Plan.
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