

## Draft Part 26, Subpart(s) I and K Final Rule Language as of August 17, 2006

The NRC is making some provisions of 10 CFR Part 26 Fitness-for-Duty (FFD) final rule language available for public viewing only, specifically Subpart I, "Managing Fatigue," and Subpart K, "Modified FFD Programs for Construction Sites." These provisions are intended to inform stakeholders of the current status of the NRC's activities on 10 CFR Part 26 FFD final rulemaking. This early draft final rule language may be incomplete in one or more respects and may be subject to significant revisions during the final rulemaking process. The NRC is not soliciting formal public comments on these draft final rule language provisions. No stakeholder requests for a comment period will be granted at this stage in the rulemaking process.

Note that the NRC is considering removing references to manufacturing licensees from the scope and applicability of FFD requirements. However, if the NRC is made aware of any entities who may submit an application for a manufacturing license, a future rule making may be appropriate to address this issue. In addition, the NRC will either be defining the term *construction site* or providing guidance on its definition in the final rule Statements of Consideration. The NRC is also considering the approach and language for delineating the persons who must be subject to the FFD program.

The information herein includes draft final rule text for Subpart(s) I and K – Managing Fatigue and narrative description of changes and summary rationales, and Modified FFD Programs for Construction Sites, respectively. The published information reflects NRC's consideration of stakeholder comments at the March 2006 meeting at NRC headquarters and subsequent written comments received in April 2006.

Subpart I related information –

### § 26.5 Definitions

*Acute fatigue* means fatigue from causes (e.g., restricted sleep, sustained wakefulness, task demands) occurring within the past 24 hours.

*Alertness* means the ability to remain awake and sustain attention.

*Circadian variation in alertness and performance* means the increases and decreases in alertness and cognitive/motor functioning caused by human physiological processes (e.g., body temperature, release of hormones) that vary on an approximately 24-hour cycle.

*Cumulative fatigue* means the increase in fatigue over consecutive sleep-wake periods resulting from inadequate rest.

*Directing* means the exercise of control over a work activity by an individual who is directly involved in the execution of the work activity, and either makes technical decisions for that activity without subsequent technical review, or is ultimately responsible for the correct performance of that work activity.

*Eight(8)-hour shift schedule* means a schedule that averages not more than 9 hours per

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workday over the entire shift cycle.

*Fatigue* means the degradation in an individual's cognitive and motor functioning resulting from inadequate rest.

*Increased threat condition* means an increase in protective measure level, relative to the lowest protective measure level applicable to the site during the previous 60 days, as promulgated by an NRC advisory.

*Unit outage* means, for the purposes of this part, that the reactor unit is disconnected from the electrical grid.

*Shift cycle* means a series of consecutive work shifts and days off that is planned by the licensee to repeat regularly, thereby constituting a continuous shift schedule.

*Ten(10)-hour shift schedule* means a schedule that averages more than 9 hours, but not more than 11 hours, per workday over the entire shift cycle.

*Twelve(12)-hour shift schedule* means a schedule that averages more than 11 hours, but not more than 12 hours, per workday over the entire shift cycle.

### Subpart I—Managing Fatigue

#### § 26.201 Applicability.

The requirements in this subpart apply to the licensees and other entities identified in § 26.3(a), and, if applicable, § 26.3(d). The requirements in §§ 26.203 and 26.207 through 26.111 apply to the individuals identified in § 26.4(a) through (c). In addition, the requirements in § 26.205 apply to the individuals identified in § 26.4(a).

#### § 26.203 General provisions.

(a) *Policy*. Licensees shall establish a policy for the management of fatigue for all individuals who are subject to the licensee's FFD program and incorporate it into the written policy required in § 26.27(b).

(b) *Procedures*. In addition to the procedures required in § 26.27(c), licensees shall develop, implement, and maintain procedures that—

(1) Describe the process to be followed when any individual identified in § 26.4(a) through (c) makes a self-declaration that he or she is not fit to safely and competently perform his or her duties for any part of a working tour as a result of fatigue. The procedure must—

(i) Describe the individual's and licensee's rights and responsibilities related to self-declaration;

(ii) Describe requirements for establishing controls and conditions under which an individual may be permitted or required to perform work after that individual declares that he or she is not fit due to fatigue; and

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(iii) Describe the process to be followed if the individual disagrees with the results of a fatigue assessment that is required under § 26.211(a)(2);

(2) Describe the process for implementing the controls required under § 26.205 for the individuals who are performing the duties listed in § 26.4(a);

(3) Describe the process to be followed in conducting fatigue assessments under § 26.211; and

(4) Describe the sanctions that the licensee may impose on an individual following a fatigue assessment, and the conditions and considerations for taking those sanctions.

(c) *Training and examinations.* Licensees shall add the following KAs to the content of the training that is required in § 26.29(a) and the comprehensive examination required in § 26.29(b):

(1) Knowledge of the contributors to worker fatigue, circadian variations in alertness and performance, indications and risk factors for common sleep disorders, shiftwork strategies for obtaining adequate rest, and the effective use of fatigue countermeasures; and

(2) Ability to identify symptoms of worker fatigue and contributors to decreased alertness in the workplace.

(d) *Recordkeeping.* Licensees shall retain the following records for at least 3 years or until the completion of all related legal proceedings, whichever is later:

(1) Records of work hours for individuals who are subject to the work hour controls in § 26.205;

(2) Records of shift schedules and shift cycles of individuals who are subject to the work hour controls in § 26.205;

(3) The documentation of waivers that is required in § 26.205(d)(5)(v), including the bases for granting the waivers;

(4) The documentation of work hour reviews that is required in § 26.205(h); and

(5) The documentation of fatigue assessments that is required in § 26.211(f).

(e) *Reporting.* Licensees shall include the following information in a standard format in the annual FFD program performance report required under § 26.717:

(1) A summary for each nuclear power plant site of all instances during the previous calendar year in which the licensee waived the work hour controls specified in § 26.205(d)(1) through (d)(4) for individuals described in § 26.4(a). The summary must include only those waivers under which work was performed. If it was necessary to waive more than one work hour control during any single extended work period, the summary of instances must include each of the work hour controls that were waived during the period. For each category of individuals specified in § 26.4(a), the licensee shall report—

(i) The number of instances in which each work hour control specified in § 26.205(d)(1)(i) through (d)(1)(iii), (d)(2)(i) and (d)(2)(ii), and (d)(3)(i) through (d)(3)(iv) was waived for individuals not working on outage activities;

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(ii) The number of instances in which each work hour control specified in § 26.205(d)(1)(i) through (d)(1)(iii), (d)(2)(i) and (d)(2)(ii), (d)(3)(i) through (d)(3)(iv), and (d)(4)(i) and (d)(4)(ii) was waived for individuals working on outage activities; and

(iii) A summary that shows the distribution of waiver use among the individuals within each category of individuals identified in § 26.4(a) (e.g., a table that shows the number of individuals that received only one waiver during the reporting period, the number of individuals that received a total of two waivers during the reporting period, etc.).

(2) A summary for each nuclear power plant site of instances of fatigue assessments that were conducted during the previous calendar year for any individual identified in § 26.4(a) through (c). The summary must include—

(i) The conditions under which each fatigue assessment was conducted (i.e., self-declaration, for cause, post-event, followup);

(ii) A statement of whether or not the individual was working on outage activities at the time of the self-declaration or condition resulting in the fatigue assessment;

(iii) The category of duties the individual was performing, if the individual was performing the duties described in § 26.4(a)(1) through (a)(5) at the time of the self-declaration or condition resulting in the fatigue assessment; and

(iv) The management actions, if any, resulting from each fatigue assessment.

(f) *Audits.* Licensees shall audit the management of worker fatigue as required by § 26.41.

### § 26.205 Work hours.

(a) *Individuals subject to work hour controls.* Any individual who performs duties identified in § 26.4(a)(1) through (a)(5) shall be subject to the requirements of this section.

(b) *Calculating work hours.* For the purposes of this section, a licensee shall calculate the work hours of individuals subject to this section as the amount of time the individuals perform duties for the licensee. Except as permitted by paragraphs (b)(1) through (b)(5) of this section, the calculated work hours must include all time performing duties for the licensee, including all within-shift break times and rest periods during which there are no reasonable opportunities or accommodations appropriate for restorative sleep.

(1) *Shift turnover.* Licensees may exclude shift turnover from the calculation of an individual's work hours. Shift turnover includes only those activities that are necessary to safely transfer information and responsibilities between two or more individuals between shifts. Shift turnover activities may include, but are not limited to, discussions of the status of plant equipment, and the status of ongoing activities, such as extended tests of safety systems and components. Licensees may not exclude work hours worked during turnovers between individuals within a shift period due to rotations or relief within a shift. Activities that licensees may not exclude from work hours calculations also include, but are not limited to, shift holdovers to cover for late arrivals of incoming shift members; early arrivals of individuals for

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meetings, training, or pre-shift briefings for special evolutions; and holdovers for interviews needed for event investigations.

(2) *Within-shift break and rest periods.* Licensees may exclude from the calculation of an individual's work hours only that portion of a break or rest period during which there is a reasonable opportunity and accommodations for restorative sleep (e.g., a nap).

(3) *Beginning or resuming duties subject to work hour controls.* If an individual begins or resumes performing for the licensee any of the duties listed in § 26.4(a) during the calculation period, the licensee shall include in the calculation of the individual's work hours all work hours worked for the licensee, including hours worked performing duties that are not listed in § 26.4(a), and control the individual's work hours in accordance with the requirements of paragraph (d) of this section.

(4) *Unannounced emergency preparedness exercises and drills.* Licensees may exclude from the calculation of an individual's work hours the time the individual works unscheduled work hours for the purpose of participating in the actual conduct of an unannounced emergency preparedness exercise or drill.

(5) *Incidental duties performed off-site.* Licensees may exclude from the calculation of an individual's work hours unscheduled work performed off-site (e.g., technical assistance provided by telephone from an individual's home) provided the total duration of the work does not exceed a nominal 30 minutes during any single break period. For the purposes of compliance with the minimum break requirements of paragraph (d)(2) of this section and the minimum day off requirements of paragraph (d)(3) of this section, such duties do not constitute work periods or work shifts.

(c) *Work hours scheduling.* Licensees shall schedule the work hours of individuals who are subject to this section consistent with the objective of preventing impairment from fatigue due to the duration, frequency, or sequencing of successive shifts.

(d) *Work hour controls.* Licensees shall control the work hours of individuals who are subject to this section.

(1) Except as permitted in § 26.207, licensees shall ensure that any individual's work hours do not exceed the following limits:

- (i) 16 work hours in any 24-hour period;
- (ii) 26 work hours in any 48-hour period; and
- (iii) 72 work hours in any 7-day period.

(2) Licensees shall ensure that individuals have, at a minimum, the rest breaks specified in this paragraph. For the purposes of this subpart, a break is defined as an interval of time that falls between successive work periods, during which the individual does not perform any duties for the licensee other than one period of shift turnover at either the beginning or end of a shift but not both. Except as permitted in § 26.207, licensees shall ensure that individuals have, at a minimum,—

- (i) A 10-hour break between successive work periods, or an 8-hour break between

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successive work periods when a break of less than 10 hours is necessary to accommodate a crew's scheduled transition between work schedules or shifts; and

(ii) A 34-hour break in any 9-day period.

(3) Licensees shall ensure that individuals have, at a minimum, the number of days off specified in this paragraph. For the purposes of this subpart, a day off is defined as a calendar day in which an individual does not start a work shift. For the purposes of calculating the average number of days off required in this paragraph, the duration of the shift cycle may not exceed 6 weeks.

(i) Individuals who are working 8-hour shift schedules shall have at least 1 day off per week, averaged over the shift cycle;

(ii) Individuals who are working 10-hour shift schedules shall have at least 2 days off per week, averaged over the shift cycle;

(iii) Individuals who are working 12-hour shift schedules while performing the duties described in § 26.4(a)(1) through (a)(4) shall have at least 2.5 days off per week, averaged over the shift cycle; and

(iv) Individuals who are working 12-hour shift schedules while performing the duties described in § 26.4(a)(5), shall have at least 3 days off per week, averaged over the shift cycle.

(4) During the first 60 days of a unit outage, licensees need not meet the requirements of paragraph (d)(3) of this section for individuals specified in § 26.4(a)(1) through (a)(4), while those individuals are working on unit outage activities. During the first 60 days of a unit outage, security system outage, or increased threat condition, licensees need not meet the requirements of paragraph (d)(3) of this section for individuals specified in § 26.4(a)(5). In order to provide assurance during these periods that individuals have adequate days off to prevent fatigue, licensees shall ensure that—

(i) During the first 60 days of a unit outage, the individuals specified in § 26.4(a)(1) through (a)(4) have at least 3 days off in each successive (i.e., non-rolling) 15-day period;

(ii) During the first 60 days of a unit outage, security system outage, or increased threat condition, the individuals specified in § 26.4(a)(5) have at least 4 days off in each successive (i.e., non-rolling) 15-day period;

(iii) The 60-day periods in paragraph (d)(4) of this section may be extended for each individual in 7-day increments for each non-overlapping 7-day period in which the individual has worked not more than 48 hours during the unit or security system outage or increased threat condition, as applicable; and

(iv) When an individual works for a licensee during two or more unit outages and the interval(s) between successive outages is less than 2 weeks, the requirements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section must be based upon the number of days that have elapsed since the first unit outage in the series began.

(e) *Reviews.* Licensees shall evaluate the effectiveness of their control of work hours of individuals who are subject to this section. At a minimum, licensees shall conduct the reviews

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twice per calendar year. The two reviews need not cover periods of equal duration but must collectively cover the entire calendar year. If any plant or security system outages or increased threat conditions occurred since the licensee completed the most recent review, the licensee shall include in the review an evaluation of the control of work hours during the outages or increased threat conditions. Licensees shall complete the review within 30 days of the end of the review period. Licensees shall—

(1) Review the actual work hours and performance of individuals who are subject to this section for consistency with the requirements of § 29.205(c). At a minimum, this review must address—

(i) Individuals whose actual hours worked during the review period exceeded an average of 54 hours per week in any shift cycle while the individuals' work hours are subject to the requirements of § 26.205(d)(3);

(ii) Individuals who were granted more than one waiver during the review period; and

(iii) Individuals who were assessed for fatigue in accordance with § 26.211 during the review period;

(2) Review individuals' hours worked and the waivers under which work was performed to evaluate staffing adequacy for all jobs subject to the work hour controls of this section;

(3) Document the methods used to conduct these reviews and the results of the reviews; and

(4) Record, trend, and correct, under the licensee's corrective action program, any problems identified in maintaining control of work hours consistent with the specific requirements and performance objectives of this part.

### **§ 26.207 Waivers and exceptions.**

(a) Licensees may grant a waiver of the work hour controls in paragraphs § 26.205(d)(1) through (d)(4), as follows:

(1) In order to grant a waiver, the licensee shall meet both of the following requirements:

(i) An operations shift manager determines that the waiver is necessary to mitigate or prevent a condition adverse to safety, or a security shift manager determines that the waiver is necessary to maintain site security, or a site senior-level manager with requisite signature authority makes either determination; and

(ii) A supervisor assesses the individual face to face and determines that there is reasonable assurance that the individual will be able to safely and competently perform his or her duties during the additional work period for which the waiver will be granted. The supervisor performing the assessment shall be trained in accordance with the requirements of §§ 26.29 and 26.203(c) and shall be qualified to direct the work to be performed by the individual. If there is no supervisor on site who is qualified to direct the work, the assessment may be performed by a supervisor who is qualified to provide oversight of the work to be performed by the individual. At a minimum, the assessment must address the potential for

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acute and cumulative fatigue considering the individual's work history for at least the past 14 days, the potential for circadian degradations in alertness and performance considering the time of day for which the waiver will be granted, the potential for fatigue-related degradations in alertness and performance to affect risk-significant functions, and whether any controls and conditions must be established under which the individual will be permitted to perform work;

(2) To the extent practicable, licensees shall rely upon the granting of waivers only to address circumstances that could not have been reasonably controlled;

(3) Licensees shall ensure that the timing of the face-to-face supervisory assessment that is required by paragraph (a)(1)(ii) of this section supports a valid assessment of the potential for worker fatigue during the time the individual will be performing work under the waiver. Licensees may not perform the face-to-face assessment more than four hours before the individual begins performing any work under the waiver; and

(4) Licensees shall document the bases for individual waivers. The documented basis for a waiver must include a description of the circumstances that necessitate the waiver, a statement of the scope of work and time period for which the waiver is approved, and the bases for the determinations required in paragraph (a)(1)(i) and (a)(1)(ii) of this section.

(b) *Force-on-force tactical exercises.* For the purposes of compliance with the minimum day off requirements of paragraph § 26.205(d)(3), licensees may exclude shifts worked by security personnel during the actual conduct of force-on-force tactical exercises when calculating the individual's number of days off.

(c) *Common defense and security.* Licensees need not meet the requirements of § 26.205 when informed in writing by the NRC that these requirements, or any subset thereof, are waived for security personnel in order to assure the common defense and security, for the duration of the period defined by the NRC.

(d) *Plant emergencies.* Licensees need not meet the requirements of paragraphs § 26.205(c) and (d) during declared emergencies, as defined in the licensee's emergency plan.

### § 26.209 Self-declarations.

(a) *Self-declarations during extended work hours.* If an individual is performing, or being assessed for, work under a waiver of the requirements contained in paragraphs § 26.205(d)(1) through (d)(4) and declares that, due to fatigue, he or she is unable to safely and competently perform his or her duties, the licensee shall immediately stop the individual from performing any duties listed in § 26.4(a), except if the individual is required to continue performing those duties under other requirements of this chapter. If the subject individual must continue performing the duties listed in § 26.4(a) until relieved, the licensee shall immediately take action to relieve the individual. Following the self-declaration or relief from performing the duties listed in § 26.4(a), as applicable, the licensee—

(1) May reassign the individual to duties other than those listed in § 26.4(a), but only if the results of a fatigue assessment, conducted in accordance with the requirements of § 26.211, indicate that the individual is fit to safely and competently perform those other duties;

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and

(2) Shall permit or require the individual to take a break of at least 10 hours before the individual returns to performing any duties listed in § 26.4(a).

**§ 26.211 Fatigue assessments.**

(a) Licensees shall ensure that fatigue assessments are conducted under the following conditions:

(1) For-cause. In addition to any other test or determination of fitness that may be required under §§ 26.319(c) and 26.77, a fatigue assessment must be conducted in response to an observed condition of impaired individual alertness creating a reasonable suspicion that an individual is not fit to safely and competently perform his or her duties, except if the condition is observed during an individual's break period. If the observed condition is impaired alertness with no other behaviors or physical conditions creating a reasonable suspicion of possible substance abuse, then the licensee need only conduct a fatigue assessment. If the licensee has reason to believe that the observed condition is not due to fatigue, the licensee need not conduct a fatigue assessment;

(2) Self-declaration. A fatigue assessment must be conducted in response to an individual's self-declaration to his or her supervisor that he or she is not fit to safely and competently perform his or her duties for any part of a working tour because of fatigue, except if, following the self-declaration, the licensee permits or requires the individual to take a break of at least 10 hours before the individual returns to duty;

(3) Post-event. A fatigue assessment must be conducted in response to events requiring post-event drug and alcohol testing as specified in § 26.31(c). Licensees may not delay necessary medical treatment in order to conduct a fatigue assessment; and

(4) Followup. If a fatigue assessment was conducted for cause or in response to a self-declaration, and the licensee returns the individual to duty following a break of less than 10 hours in duration, the licensee shall reassess the individual for fatigue as well as the need to implement controls and conditions before permitting the individual to resume performing any duties.

(b) Either a supervisor or a staff member of the FFD program, who is trained in accordance with the requirements of §§ 26.29 and 26.203(c), shall conduct the fatigue assessment face to face with the individual whose alertness may be impaired.

(1) In the case of a fatigue assessment conducted for cause, the individual who observed the condition of impaired alertness may not conduct the fatigue assessment.

(2) In the case of a post-event fatigue assessment, the individual who conducts the fatigue assessment may not have—

(i) Performed or directed (on-site) the work activities during which the event occurred;

(ii) Performed, within 24 hours before the event occurred, a fatigue assessment of the

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individuals who were performing or directing (on-site) the work activities during which the event occurred; and

(iii) Evaluated or approved a waiver of the limits specified in § 26.205(d)(1) through (d)(4) for any of the individuals who were performing or directing (on-site) the work activities during which the event occurred, if the event occurred while such individuals were performing work under that waiver.

(c) A fatigue assessment must provide the information necessary for management decisions and actions in response to the circumstance that initiated the assessment.

(1) At a minimum, the fatigue assessment must address the following factors:

(i) Acute fatigue;

(ii) Cumulative fatigue; and

(iii) Circadian variations in alertness and performance.

(2) Individuals shall provide complete and accurate information that may be required by the licensee to address the factors listed in paragraph (c)(1) of this section. Licensees shall limit any inquiries to obtaining from the subject individual only the personal information that may be necessary to assess the factors listed in paragraph (c)(1) of this section.

(d) The licensee may not conclude that fatigue has not or will not degrade the individual's ability to safely and competently perform his or her duties solely on the basis that the individual's work hours have not exceeded any of the limits specified in § 26.205(d)(1) or that the individual has had the minimum breaks required in § 26.205(d)(2) or minimum days off required in § 26.205(d)(3) or (d)(4), as applicable.

(e) Following a fatigue assessment, the licensee shall determine and implement the controls and conditions, if any, that are necessary to permit the individual to resume performing duties for the licensee, including the need for a break.

(f) Licensees shall document the results of any fatigue assessments conducted, the circumstances that necessitated the fatigue assessment, and any controls and conditions that were implemented.

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**NARRATIVE DESCRIPTION OF SIGNIFICANT CHANGES TO § 26.5, DEFINITIONS, FOR TERMS APPEARING IN SUBPART I, MANAGING FATIGUE**

1. Change: Added definition of the term *unit outage*.

Considerations: Clarity. During the public comment period a stakeholder at a public meeting raised the question of whether, for purposes of implementing the work hour controls, a unit was considered to be in an outage if reactor power was reduced for repair or maintenance of a system or component, but the reactor was not shutdown. Consequently, the NRC defined *unit outage* as the reactor being disconnected from the electrical grid.

2. Change: Added a definition of the term *shift cycle*.

Considerations: Clarity. The NRC revised Subpart I to include requirements for individuals to have a minimum number of days off per week, calculated as an average over a shift cycle. The definition is intended to ensure consistent interpretation and implementation of the minimum day off requirements of § 26.205(d)(3) of the revised rule text.

3. Change: Added definitions of the terms *8-hour shift schedule*, *10-hour shift schedule*, and *12-hour shift schedule*.

Considerations: Clarity. The minimum number of days off required by § 26.205(d)(3) of the revised rule text depend on whether an individual is working an 8-, 10-, or 12-hour shift schedule. Shift schedules may be comprised of individual shifts that differ in duration (e.g., a schedule may be comprised of 8-hour shifts on weekdays and 12-hour shifts on weekends). To eliminate uncertainty regarding which minimum day off requirements of § 26.205(d)(3) apply to any given schedule, the NRC has quantitatively defined the shift duration terms used in the rule in terms of the average duration of the shifts in the schedule.

4. Change: Revised the definition of the term *directing*.

Considerations: Public comment regarding the lack of clarity of the term “directing” as used in Subpart I and public comment regarding the scope of personnel that should be subject to work hour controls, including comments regarding the scope of engineering

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functions that should and should not be subject to work hour controls. The revised definition clarifies NRC's expectations that a limited scope of personnel providing technical input would be subject to the requirements of § 26.205. The definition was revised to explicitly state the criteria that the individual is directly involved "in the execution of the work activity," as opposed to, for example, the planning, development or scheduling of the activity, and that the technical input does not receive "subsequent technical review." The NRC believes that the revised definition more clearly focuses on activities that have the potential to substantively and immediately affect safety.

### NARRATIVE DESCRIPTION OF SIGNIFICANT CHANGES TO SUBPART I, MANAGING FATIGUE

1. Change: Revised the numbering of provisions within Subpart I.

Considerations: The revised numbering accommodates changes to numbering of other provisions of Part 26 and improves the readability of Subpart I by restructuring § 26.199 into three smaller sections.

2. Revised the numbering of and cross references within § 26.195, *Applicability*, of the proposed rule. The revised text is § 26.201 of this draft of the final rule text for Subpart I.

Considerations: Conforming changes necessary to accommodate the revised structure and numbering of the draft final rule text for Part 26.

3. Change: Revised § 26.197(a) of the proposed rule text to explicitly state the scope of personnel subject to the licensee's policy for management of fatigue. The revised text appears in § 26.203(a) of this draft of the final rule text for Subpart I.

Considerations: Clarity. The objective is to be clear that the NRC intends the policy required by § 26.203(a) to apply to all individuals subject to the licensee's fitness-for-duty program, not just those individuals subject to work hour controls.

4. Change: Revised text in § 26.197(b)(1)(i) of the proposed rule to require that the procedure describing the individual's and licensee's responsibilities related to self-declaration also describe the individual's and licensee's rights. The revised text appears in § 26.203(b)(1)(i) of this draft of the final rule text for Subpart I.

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Considerations: Experience with individuals reporting that they are not fit-for-duty for reasons related to fatigue indicate that the individuals involved may not have fully understood the relevant regulatory requirements and protections. Adding the requirement for the procedure to describe the individual's and licensee's rights related to self-declaration will help ensure that all parties involved in the self-declaration process not only understand the process and responsibilities, but also understand the extent and limitations of their rights related to self-declaration. The NRC believes clarity in this regard will reduce the potential for "surprise" outcomes that can undermine worker confidence in the process and willingness to report fitness-for-duty concerns.

5. Change: Revised § 26.197(b)(4) of the proposed rule text to require that in addition to describing sanctions that the licensee may impose on an individual following a fatigue assessment, the procedure shall also describe the conditions and considerations for imposing those sanctions. The revised text appears in § 26.203(b)(4) of this draft of the final rule text for Subpart I.

Considerations: The NRC believes clarity in this regard will reduce the potential for "surprise" outcomes that can undermine worker confidence in the process and willingness to report fitness-for-duty concerns.

6. Change: Revised § 26.197(d) of the proposed rule text to add a requirement for licensees to retain records of shift schedules and shift cycles of individuals subject to the work hour controls. The revised text appears in § 26.203(d) of this draft of the final rule text for Subpart I. Deleted a requirement to retain records of collective work hours of each job duty group.

Considerations: This is a conforming change necessary to accommodate change from collective work hour controls to work hour controls based on shift cycles.

7. Change: Revised § 26.197(e) of the proposed rule text to specify that the required reports be provided in a standard format. The revised text appears in § 26.203(e) of this draft of the final rule text for Subpart I.

Considerations: Efficiency of NRC review of reported data.

8. Change: Deleted the reporting requirements in § 26.197(e)(2) of the proposed rule text that were related to collective work hour controls.

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Considerations: This is a conforming change resulting from elimination of collective work hour controls.

9. Change: Revised § 26.197(e) of the proposed rule text to clarify that the number of waivers should be reported for each work hour control. The revised text appears in § 26.203(e) of this draft of the final rule text for Subpart I.

Considerations: Proposed rule text could have been interpreted to require a sum total of all waivers which was not the NRC's intent.

10. Change: Revised § 26.197(e) of the proposed rule text to add requirements to report waivers and fatigue assessments according to whether or not individuals are working on outage activities. The revised text appears in § 26.203(e) of this draft of the final rule text for Subpart I.

Considerations: Public comment that the data required to be reported should be considered in context.

11. Change: Revised § 26.197(e) of the proposed rule text to add requirement for reporting the distribution of waiver use among individuals within each job duty group. The revised text appears in § 26.203(e) of this draft of the final rule text for Subpart I.

Considerations: Public comment that the reporting requirements of the proposed rule would not provide NRC meaningful information. The revised reporting requirement will enable NRC to determine the extent to which waivers are concentrated among a few individuals or distributed more broadly within a job duty group.

12. Change: Added § 26.203(f) to make explicit the NRC's expectation that the management of worker fatigue would be audited as part of the overall FFD program audits required by § 26.41.

Considerations: Clarity.

13. Change: Revised and renumbered § 26.199(a) of the proposed rule. The revised text appears in § 26.205(a) of this draft of the final rule text for Subpart I. The text of the provision was revised to delete the list of individuals subject to the requirements of 26.205, *Work hours*, and instead reference 26.4(a) of the draft final rule text which

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contains the same list as § 26.199(a) of the proposed rule.

Considerations: Conforming change to accommodate restructuring and numbering of the §§ 26.3 and 26.25 of the proposed rule text.

14. Change: Revised § 26.199(b) of the proposed rule text to itemize duties that may be excluded from the calculation of individual work hours. The revised text appears in § 26.205(b) of this draft of the final rule text for Subpart I.

Considerations: Clarity.

15. Change: Added an exception that permits certain work hours during emergency preparedness exercises to be excluded from the calculation of work hours. The text of this provision appears in § 26.205(b)(4) of this draft of the final rule text for Subpart I.

Considerations: Stakeholder comment at March 29, 2006 public meeting on proposed Part 26 Rulemaking. The unannounced nature of these exercises precludes licensees from effectively preventing unintended instances of violating the work hour control provisions of § 26.205(d).

16. Change: Added an exception that permits certain work hours for incidental duties performed off-site to be excluded from the calculation of work hours. The text of this provision appears in § 26.205(b)(5) of this draft of the final rule text for Subpart I.

Considerations: Public comment requesting that the definition of shift turnover allow for the possibility that post-turnover technical assistance may be necessary. The commenter noted that turnovers do not capture every detail and a question can arise after the turnover that could make it necessary for an individual on-shift to contact an individual after he or she has been relieved of duty if additional information is needed for a complete turnover.

17. Change: Revised § 26.199(d)(2) of the proposed rule text to clarify that one period of shift turnover, either at the beginning or end of a shift, may be excluded from work hour calculations. The revised text appears in § 26.205(d)(2) of this draft of the final rule text for Subpart I.

Considerations: Public comment that the proposed rule language appeared to allow

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both on-coming and off-going crews to exclude turnover time and thereby double the intended period.

18. Change: Revised § 26.199(d)(2)(ii) of the proposed rule text to replace the requirement for a 24-hour break in any 7-days with a 34-hour break in any 9-days. The revised text appears in § 26.205(d)(2)(ii) of this draft of the final rule text for Subpart I.

Considerations: Public comment that the proposed rule break requirement would substantially reduce licensee flexibility in scheduling 8-hour shifts in a manner that met both operational and fatigue management objectives. The revised minimum break frequency (i.e., 9 days) limits consecutive work days for 8-hour shifts without causing excessive rotations between day, evening and night shifts. The revised break duration (i.e., 34 hours) ensures the opportunity for 2 sleep periods without an intervening work period and supports forward rotation of work schedules.

19. Change: Deleted the requirement for a 48-hour break in any 14-days that would have been required by § 26.199(d)(2)(iii) of the proposed rule.

Considerations: Public comment that the proposed rule break requirement would substantially reduce licensee flexibility in scheduling 8-hour shifts in a manner that met both operational and fatigue management objectives. The NRC also considered the addition of the requirement for a minimum number of days off per shift cycle as an alternative, more flexible, requirement that largely achieved the objective of the requirement for a 48-hour break in any 14-days.

20. Change: Added § 26.205(d)(3) to require a minimum number of days off per shift cycle. The requirement is specified as a minimum weekly average for 8-, 10-, and 12-hour shift durations. Defined the term *day off* as a calendar day in which and individual does not begin a work shift. Deleted the requirement for collective work hour controls that would have been required by § 26.199(f) of the proposed rule.

Considerations: Public comment that the objective of the collective work hour controls could be met through less burdensome alternative requirements that would require a minimum number of days off per week, averaged over a shift cycle. In defining *day off* the NRC considered stakeholder comment at a public meeting. The stakeholder noted that schedules which included frequent shift rotations could maximize the calculation of time off but were adverse to fatigue management. The NRC believes the definition included in the revised rule text eliminates the incentive to comply with the minimum day off requirements through scheduling methods that may be adverse to fatigue

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management.

21. Change: Added § 26.205(d)(4) to allow an exception from the requirements for minimum days off that would be required by § 26.205(d)(3). The exception would be allowed during the first 60 days of a unit outage, security outage, or increased threat condition. During these periods, § 26.205(d)(4)(i) and (ii) would require that individuals have a minimum number of days off in each successive (non-rolling) 15-day block of the outage. The exception was also reworded to specify the scope of personnel and activities subject to the exception.

Considerations: Public comment that the requirements for a minimum 24-hour break in any 7-day period and a minimum 48-hour break in any 14-day period during plant outages did not provide licensees adequate scheduling flexibility and could disrupt the circadian adjustment of individuals assigned to fixed night shifts. The revised requirements allow greater scheduling flexibility, allow licensees to establish consistent, predictable schedules, and eliminate the requirement for consecutive shifts off that were considered most disruptive to the circadian adjustment of night shift workers. Limiting the scope of the exception to only individuals working on outage activities for the period while they are working on outage activities clarifies NRC's intent that this exception may not be used to extend the work hours of individuals working solely on an operating unit.

22. Change: Added § 26.205(d)(4)(iii) to limit the exception from the minimum day off requirement of § 26.205(d)(3) to a period of not more than 60 days, unless an individual works 48 hours or fewer during a period of 7 or more days during a unit or security system outage or increased threat condition. In these circumstances the work hour control exception can be extended for an individual for each non-overlapping 7-day period the individual has worked not more than 48 hours.

Considerations: Public comment on the proposed rule that the exception for outage periods should be extended to 10 weeks. In addition, during public meetings stakeholders have commented that during extended outages individuals do not always work an outage schedule for the entire period but may have periods of reduced activity that provides opportunity for individuals to recover from cumulative fatigue. The break requirements exception allowed by § 26.205(d)(4)(iii) acknowledges this circumstance, and accommodates longer outages without increasing the risk of worker fatigue, by allowing licensees to extend outage schedules by taking credit for these periods of reduced work hours.

23. Change: Revised § 26.199(g) of the proposed rule. The proposed requirement would have established requirements pertaining to the control of work hours during successive

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unit outages at a licensee site separated by an interval of less than 2 weeks. The revision changes the requirement to apply to individuals working in consecutive outages for a licensee, rather than at a single licensee site. The revised requirements are in § 26.205(d)(4)(iv) of this draft of the final rule text for Subpart I.

Considerations: Public comment on the proposed rule noted that several companies own and operate reactors at multiple sites, and it is not uncommon for these companies to develop specialty work groups and deploy these work groups to all of their sites. The revised requirements provide greater assurance that individuals working successive unit outages will have adequate opportunity for rest to prevent cumulative fatigue from sustained periods of extended work hours associated with outage work schedules.

24. Change: Revised § 26.199(d)(3)(i)(B) of the proposed rule to allow an exception from the requirement that in order for a licensee to grant a waiver of the work hour controls the supervisor assessing the individual face-to-face must be qualified to direct the work of that individual. The exception allows the assessment to be performed by a supervisor who is qualified to provide oversight of the work if there is no supervisor on site who is qualified to direct the work that is to be performed under the waiver. The exception is permitted by § 26.207(a)(1)(ii) of this draft final rule text for Subpart I.

Considerations: Public comment on the proposed rule noting that it defines the term “directing” and asserting that there may be times, such as night shifts, when there is no individual on-site that is qualified to “direct” specialized tasks such as instrument calibrations. The revision allows a supervisor who is qualified to provide oversight of the task to perform the assessment in these instances. This exception eliminates the burden of requiring a supervisor who is qualified to direct the activity to report to the site to perform the face-to-face assessment.

25. Change: Added a provision that allows shifts worked by a member of the security force during force-on-force tactical exercises to be excluded from the calculation of the individual’s work days for the purposes of compliance with the minimum day off requirements of § 26.205(d)(3) of this draft final rule text for Subpart I. The new provision is § 26.207(b).

Considerations: Consistency with Order EA-03-038 limiting work hours of security personnel. The Order provides a similar exception for force-on-force tactical exercises from the group average work hour limits required by the Order.

26. Change: Revised and renumbered § 26.199(j) *Reviews*, of the proposed rule text. The

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revised review requirements are detailed in § 26.205(e) of this draft final rule text for Subpart I. The revision changes the review frequency from “each averaging period” to “twice per calendar year.”

Considerations: Replacement of the collective work hour controls required by § 26.199(f) of the proposed rule with § 26.205(d)(3) of the revised rule text. The revised work hour controls require a minimum average number of days off per week for each individual subject to the work hour controls. The change from controls focused on the average work hours of groups of individuals over periods up to 13 weeks to controls that ensure each individual receives a minimum number of days off over a maximum period of 6 weeks reduced the need to rely on frequent reviews to identify individuals who may be experiencing excessive fatigue due to working an amount of work hours that is disproportionate to that of others in the job duty group.

27. Change: Revised § 26.199(j)(1) of the proposed rule text to require a review of the actual work hours and performance of individuals for consistency with the requirements of § 26.205(c). The revised review requirement is renumbered as § 26.205(e) of this draft of the final rule text for Subpart I.

Considerations: The change is consistent with public comment that § 26.199(c) of the proposed rule is a performance based requirement. The revision establishes a review requirement specific to § 26.205(c) and clarifies expectations for the scope of the review (i.e., reviewing work hours and performance to identify schedules that may have caused impairment from fatigue due to the duration, frequency, or sequencing of successive shifts).

28. Change: Eliminated the requirements of § 26.199(j)(1)(iii) and (iv) of the proposed rule text. These would have required licensees to review the work hours and performance of specified individuals whose average work hours per week exceeded 54 hours during any averaging period for which the collective work hour limit was 48 hours per person per week or exceeded 66 hours in any averaging periods for which the collective work hours were 60 hours per person per week.

Considerations: Elimination of the collective work hour controls of § 26.199(f) of the proposed rule. Elimination of the review requirements in § 26.199(j)(1)(iii) and (iv) of the proposed rule text is a conforming change.

29. Change: Added a requirement for licensees to review the work hours and performance of individuals whose actual hours worked during the review period exceeded an average

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of 54 hours per week in any shift cycle while subject to the work hour controls of § 26.205(d)(3). The new requirement is § 26.205(e)(1)(i) of this draft final rule text for Subpart I.

Considerations: The new requirement replaces § 26.199(j)(1)(iii) of the proposed rule which would have required licensees to review the work hours of individuals that exceeded an average of 54 hours per week during any averaging period for which the collective work hour limit was 48 hours per person per week. Although the work hour controls of § 26.205(d)(3) of this draft final rule text establish controls that are important to preventing excessive fatigue, they do not prevent individuals from working an average of more than 54 hours per week. Individuals who work such hours for sustained periods are at increased risk of cumulative fatigue.

30. Change: Revised § 26.201(d) of the proposed rule text to restrict licensees from concluding that fatigue has not or will not degrade the individual's ability to safely and competently perform his or her duties solely on the basis that the individual has had the minimum days off required in § 26.205(d)(3) or (d)(4) of this draft final rule text for Subpart I.

Considerations: This draft final rule text replaces two of the break requirements referenced in the proposed rule (i.e., the requirements of § 26.199(d)(2) for a minimum 24-hour break in any 7-day period and a minimum 48-hour break in any 14-days) with requirements for minimum days off. The revision of § 26.201(d) of the proposed rule text is a conforming change to reference the equivalent day off requirements of the draft final rule text which now appear in §§ 26.205(d)(3) and (d)(4).

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Subpart K related information --

### § 26.3 Scope.

(a) Licensees who are authorized to operate a nuclear power reactor under 10 CFR 50.57, and holders of a combined license under 10 CFR part 52 after the Commission has made the finding under 10 CFR 52.103(g) shall comply with the requirements of this part, except for Subpart K. The FFD program must be implemented before the receipt of special nuclear material in the form of fuel assemblies.

(b) Licensees who are authorized to possess, use, or transport formula quantities of strategic special nuclear material (SSNM) under part 70 of this chapter; and any corporation, firm, partnership, limited liability company, association, or other organization who obtains a certificate of compliance or an approved compliance plan under Part 76 of this chapter, only if the entity elects to engage in activities involving formula quantities of SSNM shall comply with the requirements of this part, except for Subparts I and K.

(c) Combined license holders (under Part 52 of this chapter) before the Commission has made the finding under § 52.103(g) of this chapter; combined license applicants who have received the authorization to construct under § 50.10(e)(3) of this chapter; construction permit holders (under part 50 of this chapter); and construction permit applicants who have received the authorization to construct under § 50.10(e)(3) shall comply with the requirements of this part, except Subpart I.

(d) Contractor/vendors (C/Vs) who implement FFD programs or program elements, to the extent that the licensees and other entities specified in paragraphs (a) through (c) of this section rely upon those C/V FFD programs or program elements to meet the requirements of this part, shall comply with the requirements of this part.

(e) This part does not apply to either spent fuel storage facility licensees or non-power reactor licensees who possess, use, or transport formula quantities of irradiated SSNM.

### § 26.4 FFD program applicability to categories of individuals.

(a) All persons who are granted unescorted access to nuclear power reactor protected areas by the licensees in § 26.3(a) and perform the following duties shall be subject to an FFD program that meets all of the requirements of this part, except Subpart K:

(1) Operating or on-site directing of the operation of systems and components that a risk-informed evaluation process has shown to be significant to public health and safety;

(2) Performing maintenance or on-site directing of the maintenance of structures, systems, and components (SSCs) that a risk-informed evaluation process has shown to be significant to public health and safety;

(3) Performing Health Physics or Chemistry duties required as a member of the on-site emergency response organization minimum shift complement;

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(4) Performing the duties of a Fire Brigade member who is responsible for understanding the effects of fire and fire suppressants on safe shutdown capability; and

(5) Performing security duties as an armed security force officer, alarm station operator, response team leader, or watchperson, hereinafter referred to as security personnel.

(b) All persons who are granted unescorted access to nuclear power reactor protected areas by the licensees in § 26.3(a) and who do not perform the duties described in paragraph (a) of this section shall be subject to an FFD program that meets all of the requirements of this part, except § 26.205 and Subpart K.

(c) All persons who are required by a licensee in § 26.3(a) to physically report to the licensee's Technical Support Center or Emergency Operations Facility, in accordance with licensee emergency plans and procedures shall be subject to an FFD program that meets all of the requirement of this part, except § 26.205 and Subpart K;

(d) Any individual whose duties for the licensees and other entities in § 26.3(b) require him or her to have the following types of access or perform the following activities shall be subject to an FFD program that meets all of the requirements of this part, except Subparts I and K:

(1) All persons who are granted unescorted access to Category IA Material;

(2) All persons who create or have access to procedures or records for safeguarding SSNM;

(3) All persons who measure Category IA Material;

(4) All persons who transport or escort Category IA Material; and

(5) All persons who guard Category IA Material.

(e) All FFD program personnel who are involved in the day-to-day operations of the program, as defined by the procedures of the licensees and other entities in § 26.3(a), (b), and, as applicable, (c) and (d), and whose duties require them to have the following types of access or perform the following activities shall be subject to an FFD program that meets all of the requirements of this part, except Subparts I and K, and, at the licensee's or other entity's discretion, Subpart C:

(1) All persons who can link test results with the individual who was tested before an FFD policy violation determination is made, including, but not limited to the MRO;

(2) All persons who make determinations of fitness;

(3) All persons who make authorization decisions;

(4) All persons involved in selecting or notifying individuals for testing; and

(5) All persons involved in the collection or on-site testing of specimens.

(f) Any individual whose duties for the licensees and other entities in § 26.3(c) require him or her to perform the following activities shall be subject to an FFD program that meets all of the requirements of this part, except Subparts I and K:

(1) Serves as an unarmed security officer in those portions of a construction site at which SSCs that are required to be described in the final safety analysis report (FSAR) are received, evaluated, assembled, installed, or constructed;

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(2) Is designated by the licensee or other entity to perform the suitability and fitness evaluations required under § 26.419; or

(3) Performs quality assurance activities, as specified in Appendix B to Part 50, of SSCs that are required to be described in the FSAR.

(g) At the discretion of the licensees and other entities in § 26.3(c), any individual whose duties require him or her to perform the following activities shall be subject to an FFD program that meets the requirements of Subpart K, unless the licensee or other entity subjects these individuals to an FFD program that meets all of the requirements of this part, except Subparts I and K:

(1) All persons who perform work in those portions of a construction site at which SSCs that are required to be described in the FSAR are received, evaluated, assembled, installed, or constructed, and who are actively involved in such receiving, evaluating, assembling, installation, or construction;

(2) All persons who direct, as defined in § 26.5, the receipt, evaluation, assembly, installation, or construction of the SSCs that are required to be described in the FSAR; and

(3) All persons who are assigned escort duties in those portions of a construction site at which SSCs that are required to be described in the FSAR are received, evaluated, assembled, installed, or constructed.

(h) Individuals who have applied for authorization to have the types of access or perform the activities described in paragraphs (a) through (d) of this section shall be subject to §§ 26.31(c)(1), 26.37, 26.39, and the applicable requirements of Subparts C, and E through H.

(i) The following individuals are not subject to a licensee's or other entity's FFD program:

(1) Individuals who are not employed by a licensee's or other entity's FFD program, who do not routinely provide FFD program services, and whose normal workplace is not at the licensee's or other entity's facility, but who may be called upon to provide an FFD program service, including, but not limited to, collecting specimens for drug and alcohol testing, performing behavioral observation, or providing input to a determination of fitness. Such individuals may include, but are not limited to, hospital, employee assistance program (EAP) or substance abuse treatment facility personnel, or other medical professionals;

(2) NRC employees, law enforcement personnel, or offsite emergency fire and medical response personnel while responding on site;

(3) SSNM transporter personnel who are subject to U.S. Department of Transportation drug and alcohol FFD programs that require random testing for drugs and alcohol; and

(4) The FFD program personnel of a program that is regulated by another Federal agency or State upon which a licensee or other entity relies to meet the requirements of this part, as permitted in paragraph (h) of this section, and §§ 26.31(b)(2), and 26.405(e), if the FFD program personnel are not employed by the licensee or other entity and their normal workplace is not at the licensee's or other entity's facility.

(j) Individuals who are subject to this part and who are also subject to a program regulated by another Federal agency or State need be covered by only those elements of an FFD program that are not included in the Federal agency or State program, as long as all of the

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following conditions are met:

(1) The individuals are subject to pre-access (or pre-employment), random, for-cause, and post-event testing for the drugs and drug metabolites specified in § 26.31(d)(1) at or below the cutoff levels specified in § 26.163(a)(1) for initial drug testing and in § 26.163(b)(1) for confirmatory drug testing;

(2) The individuals are subject to pre-access (or pre-employment), random, for-cause, and post-event testing for alcohol at or below the cutoff levels specified in § 26.103(a) and breath specimens are subject to confirmatory testing, if required, with an evidential breath testing device that meets the requirements specified in § 26.91;

(3) Urine specimens are tested for validity and the presence of drugs and drug metabolites at a laboratory certified by HHS;

(4) Training is provided to address the knowledge and abilities listed in § 26.29(a)(1) through (10);

(5) An impartial and objective procedure is provided for the review and reversal of any findings of an FFD policy violation; and

(6) Provisions are made to ensure that the testing agency or organization notifies the licensee or other entity granting authorization of any FFD policy violation.

### Subpart K - FFD Program for Construction Sites<sup>1</sup>

#### § 26.401 General.

(a) At the licensee's or other entity's discretion, a licensee or other entity in § 26.3(c) may establish, implement, and maintain an FFD program that meets the requirements of this subpart to apply to the individuals specified in § 26.4(g). If a licensee or other entity in § 26.3(c) does not elect to implement an FFD program that meets the requirements of this subpart, the individuals specified in § 26.4(g) shall be subject to an FFD program that meets the requirements of Subparts B through H of this part.

(b) An FFD program established under this subpart shall be implemented when construction activities that have been approved by a limited work authorization, combined license, or construction permit are initiated.

(c) Nothing in this subpart prohibits the licensees and other entities in § 26.3(c) from subjecting the individuals in § 26.4(g) to an FFD program that meets all of the requirements of this part or FFD program elements that meet all of the applicable requirements of this part.

#### § 26.403 Written policy and procedures.

(a) FFD programs under this subpart shall ensure that a clear, concise, written FFD policy statement is provided to individuals who are subject to the program. The policy

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<sup>1</sup>The NRC will either be defining the term *construction site* or providing guidance on its definition in the final rule Statements of Consideration.

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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.

(b) FFD programs under this subpart shall develop, implement, and maintain written procedures that address the following topics:

(1) The methods and techniques to be used in testing for drugs and alcohol, including procedures for protecting the privacy of an individual who provides a specimen, procedures for protecting the integrity of the specimen, and procedures used to ensure that the test results are valid and attributable to the correct individual;

(2) The immediate and followup actions that will be taken, and the procedures to be used, in those cases in which individuals who are subject to the FFD program are determined to have—

(i) Been involved in the use, sale, or possession of illegal drugs;

(ii) Consumed alcohol to excess before or while on duty, as determined by a test that accurately measures BAC;

(iii) Attempted to subvert the testing process by adulterating or diluting specimens (in vivo or in vitro), substituting specimens, or by any other means;

(iv) Refused to provide a specimen for analysis; or

(v) Had legal action taken relating to drug or alcohol use; and

(3) The process to be followed if an individual's behavior raises a concern regarding the possible use, sale, or possession of illegal drugs on or off site; the possible possession or consumption of alcohol on site; or impairment from any cause which in any way could adversely affect the individual's ability to safely and competently perform his or her duties.

### **§ 26.405 Drug and alcohol testing.**

(a) To provide a means to deter and detect substance abuse, FFD programs shall include drug and alcohol testing which complies with the requirements of this section.

(b) The individuals identified in § 26.4(g) shall be subject to random testing for drugs and alcohol. Random testing must—

(1) Be administered in a manner that provides reasonable assurance that individuals are unable to predict the time periods during which specimens will be collected;

(2) Require individuals who are selected for random testing to report to the collection site as soon as reasonably practicable after notification, within the time period specified in the FFD program policy;

(3) Ensure that all individuals in the population that is subject to testing on a given day have an equal probability of being selected and tested; and

(4) Provide that an individual completing a test is immediately eligible for another unannounced test.

(c) The individuals identified in § 26.4(g) shall also be subject to drug and alcohol testing

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under the following conditions:

- (1) Pre-assignment. Before assignment to perform the duties in § 26.3(g);
- (2) For-cause. In response to an individual's observed behavior or physical condition indicating possible substance abuse or after receiving credible information that an individual is engaging in substance abuse, as defined in § 26.5;
- (3) Post-accident. As soon as practical after an event involving a human error that was committed by an individual specified in § 26.4(g), where the human error may have caused or contributed to the accident. The licensee or other entity shall test the individual(s) who committed the error(s), and need not test individuals who were affected by the event but whose actions likely did not cause or contribute to the event. The individual(s) who committed the human error(s) shall be tested if the event resulted in—
  - (i) A significant illness or personal injury to the individual to be tested or another individual, which within 4 hours after the event is recordable under the Department of Labor standards contained in 29 CFR 1904.7, and subsequent amendments thereto, and results in death, days away from work, restricted work, transfer to another job, medical treatment beyond first aid, loss of consciousness, or other significant illness or injury as 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; or
  - (ii) Significant damage to SSCs that are required to be described in the FSAR; and
- (4) Followup. As part of a followup plan to verify an individual's continued abstinence from substance abuse.
  - (d) At a minimum, FFD programs under this subpart shall test for marijuana metabolite, cocaine metabolite, opiates (codeine, morphine, 6-acetylmorphine), amphetamines (amphetamine, methamphetamine), phencyclidine, adulterants, and alcohol, at the cutoff levels specified in this part. Urine specimens collected for drug testing must be subject to validity testing.
  - (e) The specimen collection and drug and alcohol testing procedures of FFD programs under this subpart must protect the donor's privacy and the integrity of the specimen, and implement stringent quality controls to ensure that test results are valid and attributable to the correct individual. At the licensee's or other entity's discretion, specimen collections and alcohol testing may be conducted at a local hospital or other facility in accordance with the specimen collection and alcohol testing requirements of 49 CFR Part 40, "Procedures for Department of Transportation Workplace Drug and Alcohol Testing Programs" (65 FR 41944; August 9, 2001) and subsequent amendments thereto;
  - (f) Testing of urine specimens for drugs and validity, except validity screening and initial drug and validity tests that may be performed by licensee testing facilities, must be performed in a laboratory that is certified by HHS for that purpose, consistent with its standards and procedures for certification. Specimens must be subject to initial validity and drug testing by the laboratory. Specimens that yield positive, adulterated, substituted, or invalid initial validity or drug test results must be subject to confirmatory testing by the laboratory, except for invalid specimens that cannot be tested.

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(g) FFD programs under this subpart must provide for an MRO review of positive, adulterated, substituted, and invalid drug and validity test results from the HHS-certified laboratory to determine whether the donor has violated the FFD policy, before reporting the results to the individual designated by the licensee or other entity to perform the suitability and fitness evaluations required under § 26.419.

### **§ 26.407 Behavioral Observation.**

(a) FFD programs under this subpart shall ensure that individuals who are performing work or are under escort in those portions of a construction site at which SSCs that are required to be described in the FSAR are received, evaluated, assembled, installed, or constructed shall be subject to behavioral observation.

(b) The individuals identified in § 26.4(g)(2) and (g)(3) shall be trained in performing behavioral observation and the procedures for reporting problems to the personnel designated in FFD program procedures.

### **§ 26.409 Sanctions.**

FFD programs under this subpart shall establish sanctions for FFD policy violations that, at a minimum, prohibit the individuals specified in § 26.4(g) from being assigned to or performing the duties specified in that paragraph until the licensee or other entity determines that the individual's behavior does not pose a risk to public health and safety or the common defense and security.

### **§ 26.411 Protection of information.**

(a) FFD programs that collect personal information about an individual for the purpose of complying with this subpart, shall establish and maintain a system of files and procedures to protect the personal information. FFD programs 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 subpart before disclosing the personal information, except for disclosures to the individuals and entities specified in § 26.37(b)(1) through (b)(6), (b)(8), and persons deciding matters under review in § 26.413.

### **§ 26.413 Review process.**

FFD programs shall establish and implement procedures for the review of a determination that an individual in § 26.4(g) 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.

### **§ 26.415 Audits.**

## **Draft Part 26, Subpart(s) I and K Final Rule Language as of August 17, 2006**

(a) Licensees and other entities shall ensure that audits are performed to assure the continuing effectiveness of the FFD program, including FFD program elements that are provided by C/Vs, and the FFD programs of C/Vs that are accepted by the licensee or other entity.

(b) Each licensee and other entity who implements an FFD program under this subpart shall ensure that these programs are audited at a frequency that assures their continuing effectiveness and that corrective actions are taken to resolve any problems identified. Licensees and entities may conduct joint audits, or accept audits of C/Vs conducted by others, so long as the audit addresses the relevant C/Vs' services.

(c) Licensees and other entities who implement FFD programs under this subpart need not audit the HHS-certified laboratories or specimen collection and alcohol testing services that meet the requirements of 49 CFR Part 40, "Procedures for Department of Transportation Workplace Drug and Alcohol Testing Programs" (65 FR 41944; August 9, 2001), upon which licensees and other entities may rely to meet the drug and alcohol testing requirements of this subpart.

### **§ 26.417 Recordkeeping and reporting.**

(a) FFD programs shall ensure that records pertaining to the administration of the program, which may be stored and archived electronically, are maintained so that they are available for NRC inspection purposes and for any legal proceedings resulting from the administration of the program.

(b) Licensees and other entities who implement FFD programs under this subpart shall make the following reports:

(1) Reports to the NRC Operations Center by telephone within 24 hours after the licensee or other entity discovers any intentional act that casts doubt on the integrity of the FFD program and any programmatic failure, degradation, or discovered vulnerability of the FFD program that may permit undetected drug or alcohol use or abuse by individuals who are subject to this subpart. These events must be reported under this subpart, rather than under the provisions of 10 CFR 73.71; and

(2) Annual program performance reports for the FFD program.

### **§ 26.419 Suitability and fitness evaluations.**

Licensees and other entities who implement FFD programs under this subpart shall develop, implement, and maintain procedures for evaluating whether to assign individuals to the duties specified in § 26.4(g). These procedures must provide reasonable assurance that such individuals are fit to safely and competently perform their duties, and are trustworthy and reliable, as demonstrated by the avoidance of substance abuse.

**Draft Part 26, Subpart(s) I and K Final Rule Language as of August 17, 2006**

**Subpart L - FFD Program for Manufacturing Licensees<sup>2</sup> [Reserved]**

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<sup>2</sup>References to manufacturing licensees that were included in the proposed rule have been removed from this draft. The NRC is considering deferring rulemaking to establish FFD requirements for these licensees. However, if the NRC becomes aware of any entities who may submit an application for a manufacturing license, a future rulemaking may be necessary.