APPENDIX B

TVA NUCLEAR POWER CALL-IN SHEET

Person Calling: _____ Date: _____

Department: _____

Name	Time Called	Time Needed to Report	Alcohol 5 Hrs. Prior to Report (Y/N)	Fit for Duty (Y/N)	Duty Official Comments

APPENDIX C (Continued)

3. Employees at TVA nuclear plants who have escort responsibilities.

4. Employees who are required to report to emergency response centers.

5. Those who, by the nature of their jobs, as determined by the Senior Vice President, Nuclear Power, could affect the safe operation of TVA's nuclear plants.

6. Vendor and contractor employees assigned to Nuclear Power or TVA nuclear sites or projects.

II. Initial Training Content

A. Supervisory Training

The initial supervisory training program will be updated, as necessary, in order to include the most current policy changes and in accordance with 10 CFR Part 26.

The initial supervisory training will be a four-hour training course consisting of the following information per 10 CFR Part 26 and TVA policy:

1. The supervisor's role and responsibilities in implementing the program;

2. The roles and responsibilities of others in the program such as Nuclear Human Resources, Medical, Employee Assistance Program, and Personnel Security;

3. Techniques for recognizing drugs and indications of the use, sale, or possession of drugs;

4. Behavioral observation techniques for detecting degradation in performance, impairment, or changes in employee behavior;

5. Procedures for initiating appropriate corrective action based on behavioral observation or reports from subordinates. This includes handling, reporting, and documenting the misuse of drugs and/or alcohol, or other fitness-for-duty issues and referral to Medical or the Employee Assistance Program as appropriate.

APPENDIX C (Continued)

i) "Call-in" procedure for unscheduled work and responsibility to report fitness-for-duty issues including the consumption of alcoholic beverages.

3. Employee Training requires participants to pass a written examination with a score of seventy percent or greater. Failure to achieve a passing score will be handled under the provisions outlined in the General Employee Training Failure Policy (STD-2.1.999, Rev. 0-Interim p 46).

III. Refresher Training

A. Refresher training will be provided on a twelve-month basis expiring at the end of the quarter in which it comes due for all persons covered by this Standard. If refresher training is not completed, as prescribed, access authorization or other activities under 10 CFR Part 26 will be denied. Others will be referred for appropriate management action.

B. Supervisory and employee refresher training will be given concurrently and will consist of the following in accordance with 10 CFR Part 26 and TVA Policy:

1. The policy, procedures, and methods used to implement the Fitness for Duty Program;

2. The supervisor's role and responsibilities in implementing the program;

3. The roles and responsibilities of others in the program such as Nuclear Human Resources, Medical, Employee Assistance Program, and Security;

4. The personnel and public health and safety hazards associated with the abuse of drugs and misuse of alcohol;

5. Techniques for recognizing drugs and indications of the use, sale, or possession of drugs;

6. Techniques for recognizing aberrant behavior and procedure for escorts to reporting problems to supervisors or Security;

APPENDIX D

CRITERIA USED IN DETERMINING A NEED FOR "FOR-CAUSE" TESTING

All "For-Cause" testing must be approved by the site director/vice president, organizational manager, or his/her designee.

For-cause testing must be conducted when there is reasonable suspicion that the worker's behavior involved a failure of performance that contributed to:

1. Radiation releases or exposure of radioactivity in excess of regulatory limits.

2. Actual or potential substantial degradations of the level of safety of the plant.

3. A lost-time accident.

For-cause testing may also be conducted under the following conditions:

4. When aberrant behavior is exhibited. (See Appendix E.)

5. When a person is reasonably suspected of:

   a. Recent use of controlled substance(s) or alcohol.
   b. Engaged in illegal drug activities.
   c. Possession of illegal drugs or alcohol.

6. Credible allegations of drug/alcohol use against:

   a. An individual.
   b. A work unit determined to be a critical nuclear employment area when:

      - The number or proportion of positive results is found to be significant, and
      - When activities are confirmed by testing or otherwise (i.e., Inspector General's investigations) for a number of employees.

7. As part of an investigation involving an accident (vehicle or personal) in which safety precautions were violated or unusually careless acts were performed.

8. When an employee's work record indicates a history of accidents or "near misses" or accidents which are the fault of the employee.

9. When an excessively high accident rate is observed in a particular location.

APPENDIX E (Continued)

B. Supervisor - If the supervisor observes behavior and determines it to be aberrant and believes immediate action is not warranted, he/she should take the following action:

1. The individual should be interviewed by his/her immediate supervisor and, subsequently, by that supervisor's superior, if practical. If not practical, the supervisor in charge of the area where the individual is located and that supervisor's superior should conduct the interview.

2. If, after these interviews, nonalcohol or nondrug related impairment is still suspected as the reason for the observed behavior, the supervisor should discuss the situation with the site director/vice president/organization manager or his/her designee to determine the appropriate course of action.

3. If alcohol or drug use is reasonably suspected as causing or contributing to the observed behavior, the supervisor should refer the matter to the site director/vice president/organization manager or his/her designee who shall be responsible under Subsection 3.2.4 for determining whether the employee should be required to take an alcohol and drug test.

APPENDIX F (Continued)

Failure to list reasons for removal or revocation of unescorted access shall be sufficient cause for denial of unescorted access.

9. If a suitable inquiry reveals that a person has violated a Fitness for Duty Program or Policy, prior to granting unescorted access, Personnel Screening and Badging shall notify Nuclear Human Resources and Medical Services for a determination of fitness for duty and appropriate follow-up testing providing the individual has not been previously determined ineligible.

10. If unescorted access clearance is approved after a three year or more denial of unescorted access for a fitness for duty violation, follow-up testing as described in Subsection 3.3.6 of this Standard shall be required.

II. Fitness for Duty Security Background Updates

A. A security clearance update in accordance with TVA's Physical Security Plan must be performed on individuals who have their clearance suspended by Personnel Security based on a confirmed positive test or offsite arrest associated with possession, use, or sale of illegal drugs. An update may be performed for any other fitness-for-duty concern.

B. The Supervisor, Personnel Security, evaluates the results of the investigation for reinstatement or denial of the clearance after the S-1 medical clearance has been reinstated.

III. Outside Inquiries from Licensee, Contractor, Vendor, and Industry Groups

Information for Release

A. Personnel Security shall release fitness-for-duty information to other licensees, contractors, vendors, and industry groups only when a release acceptable to TVA and signed by the individual is provided.

B. The following information shall be released by Personnel Security to other licensees, contractors, vendors, and industry groups:

1. Confirmed positive test results for drugs or use of alcohol or the use, sale, or possession of illegal drugs.

APPENDIX G

APPROVED CONTRACTOR FITNESS FOR DUTY PROGRAMS

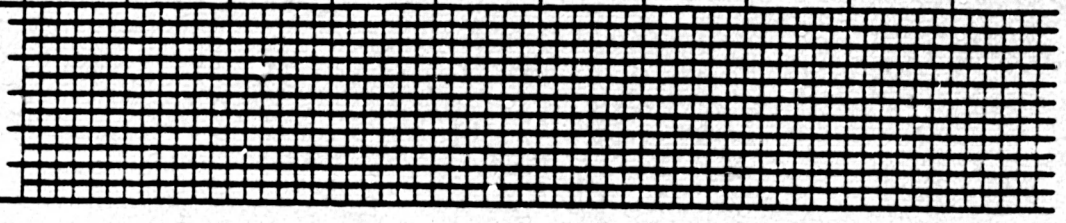
(None at this time.)

APPENDIX H
(Continued)

RANDOM TESTING PROGRAM RESULTS

INDIVIDUALS TESTED	1989		1990		1991		1992		1993	
# POSITIVE / # TESTED										
% POSITIVE										

GRAPH OF % POSITIVE



CONFIRMED POSITIVE TESTS FOR SPECIFIC SUBSTANCES

MARIJUANA										
COCAINE										
OPIATES										
AMPHETAMINES										
PHENCYCLIDINE										
ALCOHOL										

ENCLOSURE 5

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

MAR 2 0 1990

MEMORANDUM FOR: Suzanne Black, Assistant Director for TVA Projects Division, NRR

FROM: Robert L. Fonner, Special Counsel for Fuel Cycle and Safeguards Regulation, OGC

SUBJECT: TVA FITNESS FOR DUTY PROGRAM

A recent exchange of correspondence with the Tennessee Valley Authority (TVA) (see letters of January 3, 1990 TVA to NRC; January 29, 1990 NRC to TVA; and March 2, 1990 TVA to NRC) has raised a question of TVA compliance with 10 CFR Part 26, Fitness for Duty. Briefly, TVA maintains an "onsite" testing laboratory which screens urine specimens from the random testing program at TVA nuclear plants. Specimens that screen positive are forwarded to a certified contractor laboratory for confirmation. The procedure is described in rigorous detail in TVA's NP Standard-2.1.11. If, however, the preliminary screening shows evidence of cannabinoids, cocaine, or alcohol the preliminary positive is also reported orally to the Fitness for Duty (FFD) program manager. The FFD program manager in turn notifies the site Human Resources manager to place the tested employee in nonwork pay status. The employee is then escorted by his supervisor to the medical review officer who explains the test result to the employee. Neither the Human Resources manager nor the supervisor is informed of the positive screening test result. The employee's plant access is suspended. (See NP STD-2.1.11, Section 3.4.1).

The NRC staff views the TVA procedure of placing an employee in a nonwork pay status based upon the preliminary screening test as not in accord with 10 CFR Part 26. The staff concludes from the restriction on giving preliminary screening test results to licensee management that management may not take any action against the employee based on such test results. TVA contends that its actions are within the terms of the rule.

Several provisions of the rule must be considered in resolving this dispute. Section 26.24(d) allows initial screening of specimens in a licensee's laboratory before sending presumptive positives to a certified laboratory. The last sentence of this paragraph states, "Access to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer, the Fitness-For-Duty Program Manager, and employee assistance program staff when appropriate." The TVA program appears to be in literal compliance with this sentence. Access to the results of the test is indeed limited to the medical review officer and the FFD program manager. Although TVA admits that co-workers and supervisors may make assumptions about why a worker has been put into nonwork pay status, the assumption is not based on access to test results.

The staff cites Sections 2.7(g)(1) and (2), and Sections 2.9(a) and (c) of Appendix A to Part 26 in support of its position. The key sentence in Section 2.7(g)(2) reads as follows, "Presumptive positive results of preliminary testing at the licensee's testing facility will not be reported to licensee management." Section 2.9(c) requires the medical review officer to interview the tested individual prior to his decision to verify a positive test result. Following verification the medical review officer notifies the employee assistance program and the management official empowered to take administrative action.

TVA also cites Section 26.27(b) and (b)(1) as supporting its practice. Section 26.27(b) expressly states that management actions required by the rule are a minimum, and there is nothing in the rule to prohibit the licensee from taking more stringent measures. Section 26.27(b)(1) states that impaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of the rule, and may be returned to duty only after determined to be fit to safely and competently perform duties within the scope of the rule.

Comments and a response in the Statement of Considerations for the rule address this issue. Commenters expressed concern about the inappropriate disclosure of preliminary test results prior to confirmation by the certified laboratory. (Sec. 11.1.3 of the Statement of Considerations). The Statement of Considerations noted that the Commission concurred that there is a potential for abuse, and that the final rule would limit access to the preliminary test results to the licensee's testing personnel. Unfortunately, the rule itself does not reflect the response. As promulgated, Section 26.24(d) expanded access to preliminary test results beyond testing personnel to the medical review officer, the FFD program manager, and employee assistance program staff when appropriate. In this case, one cannot legally rely upon the Statement of Considerations to resolve an area of vagueness or ambiguity in the rule itself. The last sentence of Section 26.24(d) is not vague or ambiguous as to who may have access to preliminary test results.

The central issue in this dispute, although not articulated by either staff or TVA, is the status and function of the the fitness for duty program manager. If this individual is considered to be part of licensee management then his position and function highlights a problem with the NRC rule. If this individual is not considered part of the TVA management, then there is no stated bar to access to the results of preliminary testing, and the consequences of placing the employee in nonwork pay status is not precluded by the rule as long as the test result is not further divulged.

According to the materials submitted by TVA, the actual person receiving notification of preliminary test results from the medical review officer (I have assumed that the medical review officer is part of the testing staff) is the Alternate FFD Program Manager. This person is in the Human Resources Division and is primarily an information analyst, but also administers the day to day operation and maintenance of the program, and manages the reporting and

tracking function for the entire fitness for duty program. It is not clear from the job description what is the real management scope of Alternate FFD Program Manager. It is clear, however, that this person receives the test result orally and instructs the site Human Resources Officer to escort the employee to the medical review officer.

If it is assumed that the Alternate FFD Program Manager is part of the TVA management structure, it highlights a problem with the NRC rule. On the one hand, "licensee management" is precluded from knowing preliminary test results (Section 2.7(g)(2) of Appendix A). On the other hand, the FFD Program Manager is expressly authorized to receive the results of preliminary tests (Section 26.24(d)). It is difficult to rationalize these two provisions on a generic basis. It may be possible to do so in a specific case, like TVA, if the person designated as Fitness for Duty Program Manager is simply a messenger. If the staff intent is to absolutely preclude the use of onsite testing for any purpose other than screening specimens for forwarding to a certified laboratory for confirmation, it will be necessary to revise the rule to make that intent patent. The present rule does not state that intent with sufficient clarity to make a case against the TVA use of preliminary test results.

Robert L. Fonner

Robert L. Fonner
Special Counsel for Fuel Cycle and
Safeguards Regulation

ENCLOSURE 6

PROPOSED REVISION TO 10 CFR PART 26

Section 26.24

(d) add:

No individual may be removed or temporarily suspended from unescorted access based solely on the results of any test other than a confirmed positive test result which has been reviewed by the MRO. Licensee management may act on being notified pursuant to paragraph (e) below.

(e) Modify to read:

The MRO's review and reporting of the test results, as described in Section 2.9 of the NRC Guidelines, must be completed as soon as possible. Should the individual not be available to discuss the test results, any interviews must be completed as soon after the individual is available as possible. Licensee management must be notified of the results of any positive test whenever the MRO's review of a confirmatory test has not been completed by 10 days after the initial presumptive positive screening test.

ENCLOSURE 2

RULEMAKING ISSUE
(Notation Vote)

July 11, 1990 SECY-90-240

For: The Commissioners

From: James M. Taylor
Executive Director for Operations

SUBJECT: AMENDMENT TO THE FITNESS-FOR-DUTY RULE

Purpose: To amend the Fitness-for-Duty (FFD) rule to correct an inconsistency which permits licensees to take action against an individual on the basis of preliminary test results.

Background: SECY-90-136 informed the Commission that the Tennessee Valley Authority has implemented a fitness-for-duty program that permits the Alternate FFD Program Manager at each site to place individuals in a non-work pay status after a preliminary positive drug test result indicates the presence of cannabinoids, cocaine, or alcohol. The Office of the General Counsel (OGC) noted that the rule contained inconsistent provisions regarding the dissemination and use of preliminary positive test results and that a case could not be made, in view of the inconsistency, that TVA had violated the rule. Since the staff believed that the Commission intended to preclude any licensee management action based on unconfirmed and unreviewed preliminary test results, unless the individual's condition constitutes a hazard to himself or others, the staff recommended that the rule be amended to clarify the Commission's intent.

A Staff Requirements Amendment Memorandum, dated May 8, 1990, directed the staff to prepare a Federal Register notice to solicit public comments on the proposed amendment to 10 CFR Part 26.

Discussion: During its consideration of 10 CFR Part 26, the Commission determined that the rule achieved a proper balance between safeguarding individual rights and the Commission's responsibility to protect public health and safety. Among the many measures that were prescribed to protect individual rights was a prohibition against disclosure of presumptive positive results of preliminary testing to licensee manage-

Contact:
Loren L. Bush, NRR
492-0942

NOTE: TO BE MADE PUBLICLY AVAILABLE WHEN THE FINAL SRM IS MADE AVAILABLE

~~9007170014~~ 17pp.

ment. During the development of the rule, the staff did not recommend that the rule contain a specific prohibition against management action in this regard because the staff believed the prohibition against disclosure of presumptive positive results of preliminary testing to management provided the same level of protection. Furthermore, if a worker was impaired or suspected of being impaired, the rule required removal and permitted return only after the worker is determined to be fit to safely and competently perform activities covered by the rule.

At meetings with the nuclear power industry since publication of the rule, the attendees strongly expressed their opinion that in the interest of safety they should be permitted to take action to temporarily remove a worker based on preliminary test results, particularly where psychoactive drugs have been taken or where there is no legitimate medical basis for use of the drug. In this regard, TVA's program does not include removal for presumptive positives for the use of opiates (commonly found in many medications, primarily for colds) and amphetamines (commonly found in over-the-counter diet medications). Preliminary presumptive positive test results for these drugs are most commonly declared negative by the Medical Review Officer after reviewing all pertinent information.

The enclosed Notice of Proposed Rulemaking seeks public comment on a proposed amendment to 10 CFR Part 26 that would prohibit any individual from being removed or temporarily suspended from unescorted access based solely on unconfirmed positive initial screening test results. The enclosed notice contains a brief discussion of the related issue of the reporting of unreviewed test results to management.

The Office of General Counsel has no legal objections to publishing this amendment as a proposed rule.

Recommendation: That the Commission:

1. Approve publication of the proposed amendment to 10 CFR Part 26 as set forth in the enclosed Federal Register notice.

2. Certify, in order to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule would not have a significant economic impact on a substantial number of small entities. This certification is included in the enclosed FRN.

3. Note:

a. That the notice of proposed rulemaking in Enclosure "1" will be published in the Federal Register allowing 60 days for public comment.

b. That, in accordance with 10 CFR Part 51, the staff has prepared an environmental assessment and a finding of no significant impact which is included in the FRN. The proposed rule is insignificant from the standpoint of environmental impact.

c. This proposed rule does not contain new information collection requirements that are subject to review by the Office of Management and Budget. OMB has approved the information collection requirements through March 31, 1993; approval number 3150-0146.

d. That a public announcement will be issued (Enclosure 2).

e. That the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, and the Subcommittee on Environment, Energy, and Natural Resources of the House Government Operations Committee will be informed (Enclosure 3).

f. That the Office of Information and Resources Management will send copies of the proposed rule to all affected licensees and other interested persons following Commission approval for publication of the proposed rule.

g. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it as required by the Regulatory Flexibility Act.

James M. Taylor
Executive Director
for Operations

Enclosures:
1. Notice of Proposed Rulemaking
2. Draft Public Announcement
3. Draft Congressional Letter

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Wednesday, July 25, 1990.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, July 18, 1990, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:
Commissioners
OGC
CIC
GPA
REGIONAL OFFICES
EDO
ACRS
ACNW
ASLBP
ASLAP
SECY

ENCLOSURE 1

NOTICE OF PROPOSED RULEMAKING

NUCLEAR REGULATORY COMMISSION

10 CFR PART 26

RIN 3150-AD61

FITNESS-FOR-DUTY PROGRAMS

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed rule

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations applicable to licensees authorized to construct or operate nuclear power reactors to clarify its intent concerning the unacceptability of taking action against an individual based solely on preliminary test results. The amendment would prohibit management actions based upon an unconfirmed positive initial screening test when there is an absence of any other evidence of impairment or an indication that the individual might otherwise pose a safety hazard.

DATES: Comments should be submitted by (60 days after publication). Comments received after this date will be considered if it is practical to do so; however, the Commission is able to assure consideration only for comments filed on or before that date.

ADDRESSEES: Submit written comments to: Secretary, U. S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Docketing and Services Branch. Comments may be hand delivered to: 11555 Rockville Pike, Rockville, Maryland between 7:45 am and 4:15 pm on Federal workdays. The comments received may be examined at: The NRC Public Document Room at 2120 L Street, NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Loren Bush, Reactor Safeguards Branch, Division of Reactor Inspection and Safeguards, Office of Nuclear Reactor Regulation, U. S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-0944.

SUPPLEMENTARY INFORMATION:

Background

On June 7, 1989, the Nuclear Regulatory Commission published in the Federal Register (54 FR 24468) a new 10 CFR Part 26 to require licensees authorized to construct or operate nuclear power reactors to implement a fitness-for-duty program. On January 3, 1990, a licensee informed the Commission that it had implemented its fitness-for-duty program that included a provision for placing individuals in a non-work pay status based upon preliminary drug test results pending confirmation of these results through further testing and review.

The NRC staff determined that there appeared to be an inconsistency between the licensee's program and 10 CFR Part 26. The licensee contended that its action was based upon a need to assure safety, an objective of the rule.

The Office of the General Counsel (OGC), advised the staff that the requirement in the rule to prohibit the disclosure of presumptive positive results of preliminary testing to licensee management did not prohibit the licensee from permitting non-management personnel from taking action. OGC noted that the intent to preclude the use of onsite testing for any purpose other than screening specimens for forwarding to a certified laboratory was not stated in the present rule with sufficient clarity to make a case against the licensee's use of preliminary test results.

Discussion

During its consideration of 10 CFR Part 26, the Commission determined that the rule achieved a proper balance between individual rights, the assurance of public health and safety, and protecting the safety of fellow workers. Among the many measures that were prescribed to protect individual rights was a prohibition against disclosure of presumptive positive results of preliminary testing to licensee management. Under its procedures, the licensee in question removes persons from nuclear power property and places them in a non-work pay status after a preliminary positive test result indicates the presence of cannabinoids, cocaine, or alcohol. The Commission concludes that the licensee's practice is contrary to the Commission's intent, which is set forth in the responses to public comments accompanying the final rule (paragraphs 11.1.3 and 11.2.3 at 54 FR 24481). Therefore, the Commission is proposing to amend 10 CFR Part 26 to make clear that preliminary test results not be used as a basis for management action absent corraborative evidence of impairment or safety hazard.

In certain unusual circumstances, the reporting of unreviewed test results to management may be required by 10 CFR 26.24(e). In those rare cases when the Medical Review Officer's (MRO) review of final test results cannot be completed in time to meet the requirement to report the test results to licensee management within 10 days after the initial presumptive positive screening test, the Commission expects the MRO to exercise prudent judgment. The MRO should be informed of initial presumptive positive onsite screening test results if the HHS-certified laboratory has not reported within the expected time. If the MRO cannot complete the review within the 10 day period because of the unavailability of HHS test results or unavailability of the individual, the report to management should be based on available information.

Any individual who is impaired, or whose fitness for duty may be questionable because of a basis other than the result of any drug test, must be removed from unescorted status under the provisions of 10 CFR Part 26.27(b)(1).

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C.

3501 et seq). Existing requirements were approved by the Office of Management and Budget; approval number 3150-0146.

Regulatory Analysis

The regulations in 10 CFR Part 26 establish requirements for licensees authorized to construct or operate nuclear power reactors to implement a fitness-for-duty program.

This proposed amendment to 10 CFR Part 26 clarifies the Commission's previous position that no action be taken based solely on unconfirmed positive initial screening test results in the absence of other evidence that the individual is impaired or that the individual might otherwise pose a safety hazard.

Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act of 1980, [5 U.S.C. 605(b)], the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards issued by the Small Business Administration in 13 CFR Part 121.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule, and therefore, that a backfit analysis is not

required for this proposed rule, because these amendments clarify a previous Commission position and do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(4)(iii). In addition, this is a minor modification to a final rule, already published, for which a backfit analysis was already performed. The indirect costs to workers in this matter was covered by the responses in the final rule to public comments on the backfit analysis in paragraph 19.2.15 at 54 FR 24492.

List of Subjects in 10 CFR Part 26

Alcohol abuse, Alcohol testing, Appeals, Chemical testing, Drug abuse, Drug testing, Employee assistance programs, Fitness for duty, Management actions, Nuclear power reactors, Protection of information, Reporting and recordkeeping requirements, and Sanctions.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendment to 10 CFR Part 26.

Part 26 - Fitness-For-Duty Programs

1. The authority citation for Part 26 continues to read as follows:

Authority: Secs. 53, 81, 103, 104, 107, 161, 68 Stat. 930, 935, 936, 937, 939, 948, as amended (42 U.S.C. 2073, 2111, 2112, 2133, 2134, 2137, 2201); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 26.20, 26.21, 26.22, 26.23, 26.24, 26.25, 26.27, 26.28, 26.29 and 26.80 are issued under sec. 161b and i, 68 Stat. 948, and 949, as amended (42 U.S.C. 2201(b) and (i); §§ 26.70, 26.71, and 26.73 are issued under sec. 161, 68 Stat. 950, as amended [42 U.S.C. 2201(o)].

* * * * *

2. In § 26.24, Paragraph (d) is revised to read as follows:

§ 26.24 Chemical testing.

* * * * *

(d) Licensees may conduct initial screening tests of an aliquot prior to forwarding selected specimens to a laboratory certified by the Department of Health and Human Services, provided the licensee's staff possesses the necessary training and skills for the tasks assigned, their qualifications are documented, and adequate quality controls are implemented. Quality control procedures for initial screening tests by a licensee's testing facility must include the processing of blind performance test specimens and the submission to the HHS-certified laboratory of a sampling of specimens initially tested as negative. Access to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer, the Fitness-For-Duty Program Manager, and employee assistance program staff when appropriate. No individual may be removed or temporarily suspended from unescorted access based solely on unconfirmed positive initial screening test

results in the absence of other evidence that the individual is impaired or that the individual might otherwise pose a safety hazard.

* * * * *

Dated at Rockville, Maryland, this day of , 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission

ENCLOSURE 2

DRAFT PUBLIC ANNOUNCEMENT

NRC PROPOSES TO CLARIFY FITNESS-FOR-DUTY REQUIREMENTS

The Nuclear Regulatory Commission is proposing to amend its requirements governing fitness-for-duty at licensed nuclear power plants.

The amendment would clarify the Commission's intent that no individual may be removed or temporarily suspended from unescorted access based solely on the unconfirmed positive results of a drug screening test.

The amendment also would make it clear that, even in the absence of an unconfirmed positive tests, an individual may be removed or temporarily suspended from unescorted access if there is evidence that the individual is impaired or might otherwise pose a safety hazard.

The clarifying amendment is being proposed after one licensee advised the NRC, earlier this year, that it had implemented a fitness-for-duty program that included a provision for placing individuals in a non-work pay status on the basis of a positive but unconfirmed drug test.

Written comments on the proposed amendment to Part 26 of the Commission's regulations should be received by (date). They should be addressed to the Secretary of the Commission, Nuclear Regulatory Commission, Washington, D.C. 20585, Attention: Docketing and Service Branch.

ENCLOSURE 3

DRAFT CONGRESSIONAL LETTER

DRAFT

IDENTICAL LETTERS TO
Chairman Bob Graham, Senate
Subcommittee on Nuclear Regulation
cc: Alan K. Simpson
Chairman Philip R. Sharp, House
Subcommittee on Energy and Power
cc: Carlos J. Moorhead

The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The NRC has sent to the Office of the Federal Register for publication the enclosed proposed amendment to the fitness-for-duty rule to clarify its intent concerning the unacceptability of taking action against an individual based solely on preliminary test results. The amendment would prohibit management actions based upon an unconfirmed positive initial screening test when there is an absence of any other evidence of impairment or an indication that the individual might otherwise pose a safety hazard. The Commission's rule for establishing Fitness-for-Duty programs at nuclear power plants was previously published on June 17, 1989 (54 FR 24468). The notice provides for a 60-day public comment period.

Sincerely,

Eric S. Beckjord, Director
Office of Nuclear Regulatory Research

cc: Representative James V. Hansen

Proposed Rules

Federal Register
Vol. 55, No. 170
Friday, August 31, 1990

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules

NUCLEAR REGULATORY COMMISSION

10 CFR Part 26

RIN 3150-AD61

Fitness-for-Duty Programs; Nuclear Power Plant Personnel

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations applicable to licensees authorized to construct or operate nuclear power reactors to clarify its intent concerning the unacceptability of taking action against an individual based solely on preliminary test results. The amendment would prohibit management actions based upon an unconfirmed positive initial screening test when there is an absence of any other evidence of impairment or an indication that the individual might otherwise pose a safety hazard.

DATES: Comments should be submitted by October 30, 1990. Comments received after this date will be considered if it is practical to do so; however, the Commission is able to assure consideration only for comments filed on or before that date.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Docketing and Services Branch. Comments may be hand delivered to: 11555 Rockville Pike, Rockville, Maryland between 7:45 am and 4:15 pm on Federal workdays. The comments received may be examined at: The NRC Public Document Room at 2120 L Street, NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Loren Bush, Reactor Safeguards Branch, Division of Reactor Inspection and Safeguards, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-0944.

SUPPLEMENTARY INFORMATION:

Background

On June 7, 1989, the Nuclear Regulatory Commission published in the Federal Register (54 FR 24468) a new 10 CFR part 26 to require licensees authorized to construct or operate nuclear power reactors to implement a fitness-for-duty program. On January 3, 1990, a licensee informed the Commission that it had implemented its fitness-for-duty program that included a provision for placing individuals in a non-work pay status based upon preliminary drug test results pending confirmation of these results through further testing and review.

The NRC staff determined that there appeared to be an inconsistency between the licensee's program and 10 CFR part 26. The licensee contended that its action was based upon a need to assure safety, an objective of the rule.

The Office of the General Counsel (OGC), advised the staff that the requirement in the rule to prohibit the disclosure of presumptive positive results of preliminary testing to licensee management did not prohibit the licensee from permitting non-management personnel from taking action against an employee on the basis of unconfirmed positive initial screening test results. OGC noted that the intent to preclude the use of onsite testing for any purpose other than screening specimens for forwarding to a certified laboratory was not stated in the present rule with sufficient clarity to make a case against the licensee's use of preliminary test results.

Discussion

During its consideration of 10 CFR part 26, the Commission determined that the rule achieved a proper balance between individual rights, the assurance of public health and safety, and protecting the safety of fellow workers. Among the many measures that were prescribed to protect individual rights was a prohibition against disclosure of presumptive positive results of preliminary testing to licensee management. Under its procedures, the licensee in question removes persons from nuclear power property and places them in a non-work pay status after a preliminary positive test result indicates the presence of cannabinoids, cocaine, or alcohol. The Commission concludes that the licensee's practice is contrary to the Commission's intent, which is set forth in the responses to public comments accompanying the final rule (paragraphs 11.1.3 and 11.2.3 at 54 FR 24481). Therefore, the Commission is proposing to amend 10 CFR part 26 to make clear that preliminary test results should not be used as a basis for management action in the absence of corroborative evidence of impairment or safety hazard.

In certain unusual circumstances, the reporting of unreviewed test results to management may be required by 10 CFR 26.24(e). In those rare cases when the Medical Review Officer's (MRO) review of final test results cannot be completed in time to meet the requirement to report the test results to licensee management within 10 days after the initial presumptive positive screening test, the Commission expects the MRO to exercise prudent judgment. The MRO could be informed of initial presumptive postive onsite screening test results if the HHS-certified laboratory has not reported within the expected time. If the MRO cannot complete the review within the 10 day period because of the unavailability of HHS test results or unavailability of the individual, the report to management should be based on available information and should make it clear whether or not the screening test results have been confirmed by the HHS-certified laboratory.

Licensees are reminded that any individual who is impaired, or whose fitness for duty may be questionable for reasons independent of or in addition to drug testing, must be removed from unescorted status pursuant to the provisions of 10 CFR 26.27(b)(1).

Separate Views of Chairman Carr on Proposed Amendment to Part 26

I believe this proposed amendment to part 26 will unduly restrict plant licensees from taking prudent action in those cases in which an initial screening test is positive for proscribed substances.

10 CFR 26.27(b)(1) currently requires licensee action to remove individuals from activities within the scope of part 26 in those cases in which the individual's fitness may be questionable. Given that it may take up to 10 days to receive confirmatory test results and to complete evaluation by a Medical

Review Officer, it is not inappropriate, in my view, for licensees to temporarily remove personnel from activities within the power plant pending confirmation. This is the prudent course of action which better addresses the goal of protecting public health and safety and, as our Office of the General Counsel has advised, it is a practice that is not prohibited by the rule initially adopted by the Commission.

I, therefore, do not support this amendment which would prohibit the option of temporarily removing an individual from activities in the power plant in the event a screening test for proscribed substances is positive. This option is permitted under the current part 26 and I believe it should remain.

Separate Views Of Commissioner Remick On Proposed Amendment To Part 26

I agree with Chairman Carr's separate views to the extent that I believe that this proposed amendment to part 26 could unduly restrict plant licensees from taking action where they consider it prudent to do so in those cases in which an initial screening test is positive for proscribed substances. In my earlier vote on this matter, I indicated that I do not believe that the NRC should intrude into this area of management prerogative. However, inasmuch as the Commission majority decided to develop this proposed amendment to part 26, I support its issuance for public comment in order to obtain broader points of view on the matter.

Separate Views Of Commissioner Rogers On Proposed Amendment To Part 26

I believe the amendment is necessary because of the appreciable number of positive indications that already have been produced in initial tests by (1) the ingestion of some ordinary food products and (2) the use of certain over-the-counter medications, or may arise in the future from a testing practice error, and because the damage done to an individual's reputation and career future resulting from immediate removal from normal duties often lingers long after the individual has been exonerated and returned to duty.

It is important to recognize that the random testing program which this amendment addresses is not testing-for-cause, which is based on some evidence of chemical impairment. The results of randomly administered tests in general are not available immediately but only after a day or more, and therefore by themselves are not useful in identifying and immediately excluding from the work place individuals who are chemically impaired. Random tests discourage even the casual use of substances which can impair one's physical and mental performance, and provide a mechanism for identifying probable users of prohibited substances who can then be either positively identified or cleared. Individuals positively identified are then subject to immediate exclusion from the work place.

I also note that, from some drugs, for example certain opium-related drugs, part 26 does not permit even a positive confirmatory test result to be used as the sole determinant for taking action against an individual. Other evidence of drug use is required to support a positive indication, even from a confirmatory test.

Finally, I believe this amendment is sufficiently prudent because it does not absolutely prohibit the option of temporarily removing an individual from activities in the power plant. The revision, in § 26.24(d), explicitly states: "No individual may be removed or temporarily suspended from unescorted access based *solely* on unconfirmed positive initial screening tests results *in the absence of other evidence that the individual is impaired or that the individual might otherwise pose a safety hazard*" (emphasis added). The rule does not limit the type of evidence that may be used to make this determination, and evidence can include behavior observations, physical evidence, or other corroborating information.

I support the issuance for public comment of this proposed amendment to part 26, which I believe provides sufficient opportunity for taking the action necessary to protect public health and safety, while at the same time offering better protection of individuals against the serious possible consequences of a false accusation of drug use.

Additional Views of Commissioner Curtiss On Proposed Amendment to Part 26

Our fitness-for-duty rules require that intial positive screening test results be confirmed prior to their being provided to licensee management for action against the individual who tested positive. This requirement was imposed so that the Commission's rules comply with U.S. Department of Health and Human Services guidelines to this effect and to provide a safeguard for individuals who are required to undergo random drug testing pursuant to our fitness-for-duty regulations. Despite this requirement, licensees are free—indeed, in my view, are required—to remove or temporarily suspend an individual where there is other evidence that the individual is impaired or might pose a safety hazard. The proposed changes to part 26 make this clear. For that reason, I disagree with Chairman Carr's and Commissioner Remick's views that the proposed amendment "could unduly restrict plant licensees from taking action where they consider it prudent to do so." I believe that the proposed amendment will, in fact, help us clarify when health and safety considerations require early action against an individual.

I also concur in the remarks of Commissioner Rogers.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CDR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq*). Existing requirements were approved by the Office of Management and Budget; approval number 3150-0146.

Regulatory Analysis

The regulations in 10 CFR part 26 establish requirements for licensees authorized to construct or operate nuclear power reactors to implement a fitness-for-duty program.

This proposed amendment to 10 CFR part 26 clarifies the Commission's previous position that no action should be taken against an individual based solely on unconfirmed positive initial screening test results in the absence of other evidence that the individual is impaired or that the individual might otherwise pose a safety hazard.

Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act of 1980, (5 U.S.C. 605(b)), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards issued by the Small Business Administration in 13 CFR part 121.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to its proposed rule, and therefor, that a backfit analysis is not required for this proposed rule, because these amendments clarify a previous Commission position and do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(4)(iii). In addition, this is a minor modification to a final rule, already published, for which a backfit analysis was already performed. The indirect costs to workers in this matter was covered by the responses in the final rule to public comments on the backfit analysis in paragraph 19.2.15 at 54 FR 24492.

List of Subjects in 10 CFR Part 26

Alcohol abuse, Alcohol testing, Appeals, Chemical testing, Drug abuse, Drug testing, Employee assistance programs, Fitness for duty, Management actions, Nuclear power reactors, protection of information, Reporting and recordkeeping requirements, Sanctions.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendment to 10 CFR part 26.

PART 26—FITNESS-FOR-DUTY PROGRAMS

1. The authority citation for part 26 continues to read as follows:

Authority: Secs. 53, 81, 103, 104, 107, 161, 68 Stat. 930, 935, 936, 937, 939, 948, as amended (42 U.S.C. 2073, 2111, 2112, 2133, 2134, 2137, 2201); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 26.20, 26.21, 26.22, 26.23, 26.24, 26.25, 26.27, 26.28, 26.29 and 26.80 are issued under sec. 161b and i, 68 Stat. 948, and 949, as amended (42 U.S.C. 2201(b) and (i)). §§ 26.70, 26.71, and 26.73 are issued under sec. 161, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

* * * * * * *

2. In § 2624, Paragraph (d) is revised to read as follows:

§ 26.24 Chemical testing.

* * * * * * *

(d) Licensees may conduct initial screening tests of an aliquot prior to forwarding selected specimens to a laboratory certified by the Department of Health and Human Services, provided the licensee's staff possesses the necessary training and skills for the tasks assigned, their qualifications are documented, and adequate quality controls are implemented. Quality control procedures for initial screening tests by a licensee's testing facility must include the processing of blind performance test specimens and the submission to the HHS-certified laboratory of a sampling of specimens initially tested as negative. Access to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer, the Fitness-For-Duty Program Manager, and employee assistance program staff when appropriate. No individual may be removed or temporarily suspended from unescorted access based solely on unconfirmed positive initial screening test results in the absence of other evidence that the individual is impaired or that the individual might otherwise pose a safety hazard.

* * * * * * *

Dated at Rockville, Maryland, this 27th day of August, 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 90-20610 Filed 8-30-90; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 75

[Airspace Docket No. 90-AWA-10]

Proposed Establishment of Jet Route J-569; MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish new Jet Route J-569 located in the vicinity of Great Falls, MT. The proposed establishment of this jet route is the result of a request from Transport Canada and coincides with changes in the Canadian airspace structure. This action would improve traffic flow during transborder operations and supports the Canadian request.

DATES: Comments must be received on or before October 15, 1990.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Airspace Docket No. 90-AWA-10, 800 Independence Avenue, SW., Washington, DC 20591.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, room 916, 800 Independence Avenue, SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT:

Alton D. Scott, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9252.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 90-AWA-10." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the