# NOTATION VOTE

## RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER SVINICKI

SUBJECT: SECY-11-0028 – OPTIONS FOR IMPLEMENTING AN ALTERNATIVE INTERIM REGULATORY APPROACH TO THE MINIMUM DAYS OFF PROVISIONS OF 10 CFR PART 26, SUBPART I, "MANAGING FATIGUE"

Approved __XX__ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached _XX_ None ___

SIGNATURE

03/4/11
DATE

Entered on "STARS" Yes _✓_ No ___

**Commissioner Svinicki's Comments on**
**SECY-11-0028: Options for Implementing an Alternative Interim Regulatory Approach to the Minimum Days Off Provisions of 10 CFR Part 26, Subpart I, "Managing Fatigue"**

**and on**

**SECY-11-0003: Status of Enforcement Discretion Request and Rulemaking Activities Related to 10 CFR Part 26, Subpart I, "Managing Fatigue"**

I approve staff's recommended Option 4, to implement enforcement discretion for licensees failing to meet the requirements of 10 CFR 26.205(d)(3) and to publish the draft notice (Enclosure to SECY-11-0028), as edited in the attached, in the *Federal Register* as immediately effective. I approve the staff's plan to bundle the petitions for rulemaking (PRMs) related to 10 CFR Part 26, Subpart I, received from the Professional Reactor Operator Society, the Nuclear Energy Institute, and Security Officers of the Nine Mile Point Nuclear Station, into the staff's ongoing quality control/quality verification rulemaking as outlined in SECY-11-0003. Through these approvals, and as further discussed below, I advance my disposition of these, and interrelated matters, raised in SECY-11-0003 and SECY-11-0028.

The framing of the issue before us as a choice *between* rulemaking and enforcement discretion is a false one. A fulsome rulemaking process to scrutinize the full range of petitions received, which will include stakeholder input and interaction, is already planned by the staff. That NRC will receive significant adverse comments on any proposed revisions to Subpart I is a near certainty (invalidating, for this and a host of other reasons, the chimera of proceeding to a direct final rule in this case). Let me also be clear that I have made no prejudgment on the outcome of the issues to be addressed through that rulemaking process; rather, I will weigh the regulatory basis for any proposed revision to Subpart I and public comment on it, at the appropriate point in that process. I support that rulemaking process, which is estimated to take approximately 28 months to complete, fully. It is the appropriate venue for permanent revisions to the rule itself.

What I cannot support are attempts to de-legitimize or sensationalize the granting of enforcement discretion in a case such as this, which, in my view, so clearly fits its regulatory purpose. The staff has concluded that an interim alternative to the requirements of 10 CFR 26.205(d)(3), related to minimum days off for normal, non-outage operations, is appropriate while the staff is working on the related rulemaking in order to provide licensees access to immediate restoration of beneficial safety practices that have been curtailed under the existing regulation. The staff has narrowly crafted a functionally equivalent alternative approach to the minimum days off requirement, using the same weekly average of 54 hours worked, but calculated based on a rolling window of up to six weeks. The staff has concluded that this alternative requirement will limit work hours to levels comparable to current requirements while adding simplicity and flexibility, allowing the re-institution of certain safety practices. The staff concludes that enforcement discretion exists for applications such as this, is "well-established," and its use is recommended in this case. I agree. Moreover, the NRC's Principles of Good Regulation require that regulatory activities should be consistent with the degree of risk reduction they achieve and, *where several effective alternatives are available*, the option which minimizes the use of resources should be adopted. In this case, the regulated community has asked for interim flexibility in meeting one of our requirements through alternate means while a rulemaking process is undertaken to analyze a possible revision. I find that I can support this request with no jeopardy to my or the agency's "honest" approach to this issue.

Kristine L. Svinicki 03/ 4 /11

On September 3, 2010, the Nuclear Energy Institute (NEI) submitted a petition for rulemaking (PRM-26-5) (ML102590440). The NEI stated that "the new rule has resulted in consequences not originally envisioned when the rule was developed and that these consequences have diminished the safety benefits of the rule." The NEI has stated that the unintended consequences stem from the minimum days off requirements, specifically § 26.205(d)(3) through § 26.205(d)(6), which create an undue level of complexity and inflexibility in managing worker fatigue. The NEI requested, among other changes, that 10 CFR Part 26, Subpart I, be amended to replace the MDO requirements in § 26.205(d) with a performance-based objective, consisting of an average of 54-hours worked per week, averaged over a calendar quarter rather than over each shift cycle. The NEI also proposed changing the annual assessment in § 26.205(e)(1) to a quarterly assessment to provide a more frequent review of hours worked. The NEI proposed to eliminate the MDO requirements addressed at § 26.205(d)(3) through § 26.205(d)(6) while ~~and apply~~ the work hour limits and break requirements (§ 26.205(d)(1)(i), § 26.205(d)(1)(ii), § 26.205(d)(1)(iii), § 26.205(d)(2)(i), and § 26.205(d)(2)(ii)), would remain unchanged and apply during on-line and outage periods.

Separate from PRM-26-5, on September 23, 2010, NEI submitted a request for enforcement discretion regarding the MDO provisions of Part 26 (ML102710208). The request reiterates NEI's opinion that the regulations that ~~which~~ govern fatigue management impede "many safety-beneficial practices at plant sites, adversely [impact] the quality of life of covered workers, and [result] in conflicts between rule requirements and represented bargaining unit agreements." The letter requests that the NRC "exercise enforcement discretion from the [MDO] provisions of the rule" until the final disposition of PRM-26-5.

The NRC held three public meetings (November 18, 2010, January 6, 2011, and January 25, 2011), during which the staff and stakeholders discussed alternatives to the MDO requirements. Although some of the stakeholders were comfortable with the MDO requirements, most focused their discussion on the unintended consequences, which they claim have diminished the safety benefits of the rule, along with ~~needing~~ the need for an alternative that is simpler and would provide greater scheduling flexibility. The staff's goal was to develop an alternative approach that was responsive to the needs of stakeholders, would maintain clear and enforceable requirements, and would ensure that the effects of cumulative fatigue are appropriately managed by licensees.

## Discussion

Cumulative fatigue is caused by consecutive days of restricted or poor quality sleep caused by such things as shift-work, extended work days, and extended work weeks. Currently, Subpart I requires licensees to manage cumulative fatigue primarily by providing workers with a minimum number of days off over the course of a period not to exceed 6 weeks. The distribution of the days off during the 6-week period act to either prevent or mitigate fatigue. An alternative method for managing cumulative fatigue is to establish a requirement to limit actual hours worked. A limit on actual hours worked, when applied to schedules that require regular shift coverage, limits the number of work hours that can contribute to cumulative fatigue and provides indirect assurance of periodic days off for recovery rest. A schedule resulting in a weekly average of 54 hours worked, calculated using a rolling window of up to 6 weeks is such a schedule. In general, most individuals that work their normal shift duration and receive only the minimum number of days off required under the current MDO requirements could average up to 54 hours per week. However, the NEI has indicated that implementation of the MDO

requirements has reduced licensee scheduling flexibility and imposed a substantial administrative burden. By comparison, limiting work hours to an average of not more than 54 hours per week by using a rolling window of up to 6 weeks limits the number of consecutive weeks of extended work hours that an individual can work by using a comparable but simpler and more flexible requirement. In addition, this alternative eliminates the burden of tracking the number of days off an individual receives in each shift cycle.

In summary, the maximum hours that can be worked under the alternative approach is comparable to the maximum hours worked under the current Part 26 MDO requirements, except that the alternative approach provides the simplicity and flexibility desired by the industry. This alternative is only applicable to § 26.205(d)(3) and covered workers described in § 26.4(a). Neither NEI's PRM-26-5 nor its enforcement discretion request offered any comparably effective alternatives for § 26.205(d)(4), § 26.205(d)(5), and § 26.205(d)(6), nor were any identified during the public meetings; therefore, the staff is taking no action in regard to those regulations.

The staff determined that replacing the MDO requirements and requiring all licensees to adopt this interim alternative approach has the potential for introducing adverse consequences if those licensees satisfied with MDO requirements were forced to change. As a result, the interim enforcement policy would allow licensees to choose whether or not to implement this alternative approach. Licensees who properly implement this alternative approach will receive enforcement discretion for failing to meet the requirements of 10 CFR 26.205(d)(3).

Although the rolling schedule required under the alternative approach limits the number of consecutive extended work weeks and thereby limits the potential for cumulative fatigue, there are unusual potential circumstances where the average can be met and the schedule may

be fatiguing; however the industry has stated that these unusual schedules are improbable. Such schedules include having only one day off in every nine or consistently working the maximum allowable hours, which would likely result in cumulative fatigue. Nevertheless, the staff believes that this alternative approach, together with other aspects of the rule that will remain unchanged, will provide reasonable assurance that licensees manage cumulative fatigue consistent with the protection of public health, safety, and security. The staff will engage licensees during regularly scheduled public meetings in the coming months to identify problems and lessons learned from implementation of the alternative approach.

Licensees must inform the NRC of their intent to adopt the alternative approach, and must comply with all requirements of Subpart I, as applicable. The interim policy will remain in place until the NRC publishes a new final rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue."

The NRC is not requesting public comment on this alternative approach at this time; instead, the NRC will seek public comment on the effectiveness of this approach during the comment period for a proposed rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue."

## PROCEDURAL REQUIREMENTS

### Paperwork Reduction Act

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

This interim policy is only applicable to licensees who inform the NRC of their intent to adopt the alternative approach. Licensees shall comply with all requirements of Subpart I, as applicable, unless explicitly replaced or amended in this interim policy. The alternative approach to the MDO requirements applies to the work hours of covered individuals[1] during normal (e.g., non-outage/emergency) plant operations. This interim policy will remain in place until the implementation date of a revised final rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue."

A licensee who informs the NRC of its intent to transition to the alternative approach will receive enforcement discretion, and no enforcement action will be taken for the violation of 10 CFR 26.205(d)(3). If at any time while the licensee is implementing this alternate approach it does not meet the requirements, as stated in this interim policy, the licensee may be in violation of 10 CFR 26.205(d)(3) and subject to enforcement action. Once a licensee has transitioned to the alternate approach, it has the option to revert back to the requirement of § 26.205(d)(3), however the licensee is only allowed one opportunity to do so.

A. Actions and Requirements for Transition

A licensee must inform the NRC of its intent to transition to the alternative approach. Notification shall be made via a letter to the respective Regional Administrator and shall identify the implementation date which will be set by the licensee. The hours worked prior to the implementation date must meet the requirement of 10 CFR 26.205(d)(3), or enforcement action

[1] The term "covered workers" refers to those individuals indentified in § 26.4(a) who are subject to the requirements in § 26.205.

may be taken. Once the NRC has been notified of the implementation date, the licensee can commence its transition to the alternate approach.

In order to receive continuous enforcement discretion once the alternate approach is implemented, each covered worker is limited to a weekly average of 54 hours worked, calculated using a rolling window of up to 6 weeks. This alternative is not applicable to unit outages or security system outages. Any instance of an individual's average weekly work hours exceeding the requirements for enforcement discretion may result in a violation of the MDO requirements. Typically an instance of an isolated occurrence or occurrences with limited duration would generally be considered either a minor violation or a non-cited violation.

B. Required Actions for Transition Back to the MDO Requirement

At any time prior to the implementation date of a revised final rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue," the licensee has the option to transition back to the MDO requirements. However, the licensee only has this option once. The licensee must submit a written notification to the respective Regional Administrator stating that it is reverting back to compliance with the MDO requirements as specified under § 26.205(d)(3), and shall give the NRC advance notice of its transition date. There will be no enforcement

action taken on any MDO violations ~~which~~ that occurred while the licensee was implementing the alternate approach, unless the licensee failed to meet the requirements as stated in Section 9.2 A of this policy.

Dated at Rockville, MD, this day of 2011.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.