

NUCLEAR REGULATORY COMMISSION

[NRC-2011-0084]

10 CFR Part 26

RIN 3150-AI94

Interim Enforcement Policy for Minimum Days Off Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement; revision.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is revising its Enforcement Policy to include a provision allowing licensees enforcement discretion if they implement an alternative approach to meet the NRC's requirements for managing worker fatigue at operating nuclear power plants. This interim policy affects licensees subject to the minimum days off (MDO) requirements of the NRC's fitness for duty regulations and will remain in place until the NRC publishes a revised rule associated with the MDO requirements for managing fatigue.

DATES: This revision is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The NRC is not requesting comments on this revision to its Enforcement Policy at this time.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

- **NRC's Public Document Room (PDR):** The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. The Enforcement Policy is also accessible via ADAMS accession number ML093480037. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

- **Federal Rulemaking Web site:** This revision to the NRC's Enforcement Policy can be found at <http://www.regulations.gov> by searching on Docket ID **NRC-2011-0084**. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668, email: Carol.Gallagher@nrc.gov.

The NRC also maintains the Enforcement Policy on its Web site at <http://www.nrc.gov>; select **Public Meetings and Involvement**, then **Enforcement**, and then **Enforcement Policy**.

FOR FURTHER INFORMATION CONTACT: Gerry Gulla, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2872; e-mail: Gerald.Gulla@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

On March 31, 2008 (73 FR 17176), the NRC published a final rule in the *Federal Register* amending Title 10 of the *Code of Federal Regulations*, Part 26, "Fitness for Duty Programs." The Commission updated the requirements in 10 CFR Part 26 by reorganizing the rule and adding Subpart I, "Managing Fatigue." Subpart I establishes requirements for managing worker fatigue at operating nuclear power plants, which was in response to a need for clear and enforceable requirements for the management of worker fatigue. Although the rule was effective on April 30, 2008, the NRC permitted an 18-month implementation period for Subpart I.

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 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, the NEI submitted a request for enforcement discretion regarding the MDO provisions of 10 CFR Part 26 (ML102710208). The request reiterates the NEI's opinion that the regulations that 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 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 that 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 10 CFR Part 26 MDO requirements, except that the alternative approach provides for greater simplicity and flexibility. This alternative is only applicable to § 26.205(d)(3) and covered workers described in § 26.4(a). Neither the 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 current 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 in every nine days off 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.

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.

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.*). Existing requirements were approved by the Office of Management and Budget (OMB), Approval Number 3150–0136.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

Accordingly, the NRC Enforcement Policy is revised to read as follows:

NRC Enforcement Policy

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9.2 Enforcement Discretion for the Minimum Days Off Requirements of § 26.205(d)(3)

This section sets forth the interim policy that the NRC will follow to exercise enforcement discretion for licensees who pursue the alternative approach to the minimum days off (MDO) requirements of § 26.205(d)(3). This alternative approach is consistent with the bases and objectives of 10 CFR Part 26, specifically managing cumulative fatigue, and provides licensees improved simplicity and flexibility for work scheduling.

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 individuals¹ 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.

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 §

¹ The term “covered workers” refers to those individuals identified in § 26.4(a) who are subject to the requirements in § 26.205.

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 § 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 § 26.205(d)(3), or enforcement action 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 has this option only 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 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, Maryland, this 19th day of April 2011.

For the Nuclear Regulatory Commission.

/RA/

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