

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Part 26**

**RIN 3150-AI94**

**[NRC-2011-0058]**

**Alternative to Minimum Days Off Requirements**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC or the Commission) is proposing to amend its regulations governing the fitness for duty of workers at nuclear power plants. These amendments would allow holders of nuclear power plant operating licenses the option to use a different method from the one currently prescribed in the NRC's regulations for determining when certain nuclear power plant workers must be afforded time off from work to ensure that such workers are not impaired due to cumulative fatigue caused by work schedules.

**DATES:** Submit comments by **[Insert date 30 days after the date of publication in the Federal Register]**. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date. Requests for extension of the comment period will not be granted.

**ADDRESSES:** Please include Docket ID NRC-2011-0058 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document.

You may submit comments by any one of the following methods.

- **Federal rulemaking Web site:** Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2011-0058. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668, e-mail: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov).
- **Mail comments to:** Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.
- **E-mail comments to:** [Rulemaking.Comments@nrc.gov](mailto:Rulemaking.Comments@nrc.gov). If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301-415-1677.
- **Hand-deliver comments to:** 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays (telephone: 301-415-1677).
- **Fax comments to:** Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

**FOR FURTHER INFORMATION CONTACT:** Howard Benowitz, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington DC 20555; telephone: 301-415-4060; e-mail: [Howard.Benowitz@nrc.gov](mailto:Howard.Benowitz@nrc.gov).

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### **I. Submitting Comments and Accessing Information**

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to

remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available information 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, Room O-1F21, 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. 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, or 301-415-4737, or by e-mail to [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov).
- **Federal Rulemaking Web Site:** Public comments and supporting materials related to this proposed rulemaking can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2011-0058.

## II. Background

### A. NRC's Current Regulations

On March 31, 2008, the NRC adopted a final rule which substantially revised its regulations for fitness for duty (FFD) in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26 (73 FR 16966; March 31, 2008). The revised regulations updated the NRC's FFD requirements and made them more consistent with other relevant Federal rules, guidelines,

and drug and alcohol testing programs that impose similar requirements on the private sector. In addition, by establishing clear and enforceable requirements for the management of worker fatigue, the 2008 amendments require nuclear power plant licensees to ensure that worker fatigue does not adversely affect public health and safety and the common defense and security. Among these fatigue management requirements is a minimum days off requirement, which requires licensees to manage cumulative fatigue by providing workers with a minimum number of days off over the course of a period not to exceed 6 weeks.

#### B. Stakeholder Reaction to the Current Fitness for Duty Requirements

On September 3, 2010, the Nuclear Energy Institute (NEI) submitted a petition for rulemaking (PRM-26-5). In PRM-26-5, the NEI states 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 states that the unintended consequences stem from the minimum days off requirements, specifically § 26.205(d)(3) through § 26.205(d)(6), because they create an undue level of complexity and inflexibility in managing worker fatigue. These regulations mandate a specified minimum average number of days off per week, averaged over a fixed time period. The minimum average number of days off depends on the duties the individual performs and, for § 26.205(d)(3), the length of an individual’s shift schedule (i.e., whether the individual is working 8-, 10- or 12-hour shifts).

The NEI requests, among other changes, that 10 CFR Part 26, Subpart I, be amended to replace the minimum days off 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. The NEI also proposes changing the § 26.205(e)(1) annual assessment of actual hours worked and performance of individuals subject to the work hour controls to a quarterly assessment to provide a more frequent review of hours worked. The NEI proposes to eliminate

the minimum days off requirements in § 26.205(d)(3) through § 26.205(d)(6), while the work hour limits and break requirements in § 26.205(d)(1)(i)-(iii) and (d)(2)(i)-(ii), respectively, would remain unchanged.

Separately from PRM-26-5, on September 23, 2010, the NEI submitted a request for enforcement discretion regarding the minimum days off provisions of Part 26. 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 [minimum days off] provisions of the rule" until the final disposition of PRM-26-5.

Mr. Erik Erb, a nuclear security officer at the Nine Mile Point Nuclear Station, submitted a petition for rulemaking (PRM-26-6) on August 17, 2010. Mr. Erb requests that the NRC amend 10 CFR Part 26, Subpart I, to decrease the minimum days off requirement for security officers working 12-hour shifts from an average of 3 days per week to an average of 2.5 or 2 days per week. This petition was endorsed by 91 security officers.

### C. Public Meetings and Commission Direction

The NRC held a public meeting on November 18, 2010, to learn, directly from the affected stakeholders, more details about the unintended consequences of the minimum days off requirements. Although some of the stakeholders are comfortable with the current minimum days off requirements, the stakeholders at this public meeting claimed that the unintended consequences have diminished the safety benefits of the fatigue management provisions of 10 CFR Part 26 and expressed the need for an alternative that is simpler and would provide greater scheduling flexibility. Additional public meetings were held on January 6, 2011, and January 25, 2011, to provide opportunities for stakeholders and the NRC to discuss alternatives to the minimum days off requirements.

In a February 8, 2011, public meeting, the NRC staff and stakeholders briefed the Commission on the implementation of the 10 CFR Part 26 fatigue management requirements. The nuclear power industry stakeholders conveyed many of the same concerns raised in the three public meetings. The NRC staff presented the scientific and technical bases for the current requirements for managing cumulative fatigue and a proposal to address the concerns raised by the industry stakeholders. The NRC staff proposed a maximum average 54-hour work week, averaged over a 6-week rolling period, as an alternative to the § 26.205(d)(3) minimum days off requirements. The NRC staff and industry stakeholders generally agreed that this proposal could provide the relief sought by the industry while meeting the objectives of the minimum days off requirements. Other stakeholders were less certain that the NRC should consider proposals to change the current requirements.

On March 24, 2011, the Commission issued a Staff Requirements Memorandum that directed the NRC staff to conduct a rulemaking to provide an alternative to the minimum days off requirements that would be consistent with the proposal presented by the NRC staff at the February 8, 2011, briefing. The Commission limited the scope of the rulemaking to the alternative to the minimum days off requirements and instructed the NRC staff to consider other issues related to the petitions for rulemaking, other changes to 10 CFR Part 26, and comments received in this rulemaking proceeding that are outside the limited scope of this rulemaking, in a separate rulemaking effort. The Commission also directed the staff to expedite this rulemaking and provide a 30-day public comment period for this proposed rule instead of the typical 75-day public comment period.

### **III. Description of the Proposed Rule**

#### **A. Maximum Weekly Average of 54 Hours Worked Over a 6-week Rolling Window**

One cause of cumulative fatigue is consecutive days of restricted or poor quality sleep. In turn, consecutive days of restricted or poor quality sleep may be caused by such things as shift-work, extended work days, and extended work weeks. Currently, Subpart I of 10 CFR Part 26 requires nuclear power plant licensees to manage cumulative fatigue primarily by providing individuals 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 acts to either prevent or mitigate cumulative fatigue.

An alternative method for managing cumulative fatigue would be to establish a requirement to limit actual hours worked instead of mandating the number of days off that individuals receive. A limit on actual hours worked, when applied to schedules that require regular shift coverage, would limit the number of work hours that can contribute to cumulative fatigue and, as a practical matter, result in periodic days off for recovery rest. A schedule resulting in a weekly average of 54 hours worked, calculated using a rolling period of up to 6 weeks, would be such a schedule.

In general, most individuals that work their normal shift schedule and receive only the minimum number of days off required under the current minimum days off requirements of § 26.205(d)(3) could average as many as 54 hours of work per week. However, the NEI has indicated that implementation of the minimum days off 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 (i.e., averaging period) of up to 6 weeks would limit the number of consecutive weeks of extended work hours that an individual can work by using a comparable but simpler and more flexible requirement. The 6 week limit would also remain consistent with the averaging duration and technical basis of the minimum days off requirements, as described in the Statement of Considerations (SOC) for the 2008 10 CFR Part 26 final rule. In addition, this alternative would not depend on the length of an individual's shift schedule and would eliminate the burden of

tracking the number of days off that an individual receives in a period not to exceed 6 weeks. Based on stakeholder input, the alternative would relieve operational burdens by enabling licensee personnel to engage in certain safety-beneficial practices with fewer scheduling restrictions, such as holding off-shift shift manager meetings and using the most knowledgeable workers in responding to plant events and conditions.

In summary, the maximum number of hours that could be worked under the proposed alternative approach would be comparable to the maximum number of hours that can be worked by most individuals under the current 10 CFR Part 26 minimum days off requirements, except that the alternative requirement would provide for greater simplicity and flexibility. This proposed approach could be used only in place of the minimum days off requirements in § 26.205(d)(3) and would be applicable only to individuals subject to work hour controls under § 26.205(a). Under § 26.205(a), the subject individuals are those described in § 26.4(a). The NRC determination that the proposed alternative would be equivalent to the minimum days off requirements considered the collective advantages and disadvantages of having all individuals who are subject to the work hour controls under a single set of cumulative fatigue management requirements. Thus, licensees would not be able to subject one group of individuals under § 26.4(a) to the requirements in § 26.205(d)(3) and another group of individuals under § 26.4(a) to proposed § 26.205(d)(7) requirements. Allowing licensees to implement the minimum days off and proposed alternative requirements simultaneously would also create a burden for NRC oversight and inspections.

Although the rolling schedule required under the proposed alternative approach would limit the number of consecutive extended work weeks and thereby limit the potential for cumulative fatigue, there are unusual potential circumstances in which the proposed alternative requirement could be met and the schedule could be fatiguing. 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. However, the industry has stated that these unusual

schedules are improbable. The NRC believes that this proposed alternative approach, together with other aspects of the rule that will remain unchanged, would provide reasonable assurance that licensees will manage cumulative fatigue in a manner that contributes to the protection of public health and safety and common defense and security.

#### B. Proposed Alternative to the Minimum Days Off Requirements

The NRC proposes to create a new § 26.205(d)(7) that would contain the proposed alternative. The proposed rule would allow nuclear power plant licensees and other entities identified in § 26.3(a) and, if applicable, (c) and (d) to choose whether or not to implement this alternative approach, in lieu of compliance with the current rule's minimum days off requirements in § 26.205(d)(3). The NRC is not proposing to remove the current § 26.205(d)(3) minimum days off requirements and mandate that all licensees instead adopt new maximum average work hour requirements. Some licensees may be satisfied with the current requirements. In addition, a mandated change would constitute backfitting under the NRC's Backfit Rule, 10 CFR 50.109. None of the exceptions in § 50.109(a)(4) to preparation of a backfit analysis could be justified, and a backfit analysis could not demonstrate that a mandatory rule would constitute a cost-justified substantial increase in protection to public health and safety or common defense and security. For these reasons, the NRC has decided to propose the maximum weekly average of 54 work hours, averaged over a rolling window of up to 6 weeks, as an alternative to the minimum days off requirements.

#### C. Applicability

Consistent with the current rule's minimum days off requirements in § 26.205(d)(3), the proposed alternative maximum average work hours provisions would apply to all periods of operations, with several specified exceptions: during force-on-force exercises and plant emergencies and for security personnel when they are needed to maintain the common defense

and security. In those limited circumstances, special provisions, described below, would apply. In addition, licensees currently have the option under § 26.205(d)(4) to comply with the minimum days off requirements in either § 26.205(d)(3) or § 26.205(d)(4) during unit outages when the affected individuals are working on outage activities, and have the option under § 26.205(d)(5) to comply with the minimum days off requirements in either § 26.205(d)(3) or § 26.205(d)(5) during unit outages, security system outages, or increased threat conditions. Under the proposed rule, licensees also would have the option to comply with the maximum average work hours requirements under the above conditions. The reasons that the Commission permits the exceptions and options involving the minimum days off requirements are explained in the SOC for the 2008 10 CFR Part 26 final rule. Because the proposed optional approach would offer licensees an equivalent minimum days off alternative that is equally effective at managing cumulative fatigue, the 2008 10 CFR Part 26 final rule SOC also provides the justification for why the proposed alternative would apply to the exceptions and options described herein.

The current rule, in § 26.205(d)(4), offers licensees the option to apply different minimum days off requirements during the first 60 days of a unit outage for individuals working on outage activities. During this part of outages, licensees are not required to calculate the requisite number of an individual's days off by a weekly average over a period of up to 6 weeks. The regulation requires licensees who choose the outage option to provide affected individuals with a fixed number of days off over a 15-day period or 7-day period, depending on the duties performed by the individuals. Similarly, the cumulative fatigue management provisions for security personnel in current § 26.205(d)(5)(i) allow licensees, during the first 60 days of a unit outage or a planned security system outage, the option to comply with the minimum days off requirements in § 26.205(d)(3) or provide security personnel with a fixed number of days off over a 15-day period. Under proposed § 26.205(d)(4) and (d)(5)(i), licensees that choose the alternative maximum average work hours approach during non-outage periods would have the

option to use the proposed alternative or the fixed number of days off approaches during the first 60 days of outages.

During the first 60 days of an unplanned security system outage or increased threat condition, current § 26.205(d)(5)(ii) provides a discretionary exception from the minimum days off requirement in § 26.205(d)(3) and (d)(5)(i) so that security personnel subject to the work hour requirements would not be required to meet the minimum days off requirements. The proposed § 26.205(d)(5)(ii) would permit licensees who implement the maximum average work hours approach during non-outage periods to not meet the proposed § 26.205(d)(7) requirements during the first 60 days of an unplanned security system outage or increased threat condition.

Section 26.207(b) of the current regulations relieves licensees from the minimum days off requirements of § 26.205(d)(3) by allowing licensees to exclude shifts worked by security personnel during the actual conduct of NRC-evaluated force-on-force tactical exercises when calculating the individuals' required number of days off. The proposed rule would permit licensees who implement the proposed alternative during non-outage periods to exclude from the proposed § 26.205(d)(7) calculations the hours worked by security personnel during the actual conduct of NRC-evaluated force-on-force tactical exercises.

Current § 26.207(c) provides a licensee relief from the work hour control requirements of § 26.205 for security personnel upon written notification from the NRC, for the purpose of assuring the common defense and security for a period the NRC defines. In the proposed rule, licensees would also be relieved from the requirements of proposed § 26.205(d)(7) in this situation.

As stated in current § 26.207(d), a licensee need not meet the work hour controls, including the minimum days off requirements, during declared emergencies, as defined in the licensee's emergency plan. Under the proposed rule, consistent with the current approach for minimum days off requirements during declared emergencies, licensees would not need to meet the requirements of the proposed § 26.205(d)(7) during the period of the declared emergency.

The NRC Office of Enforcement issued EGM-09-008, “Enforcement Guidance Memorandum—Dispositioning Violations of NRC Requirements for Work Hour Controls Before and Immediately After a Hurricane Emergency Declaration,” dated September 24, 2009, to give the NRC staff guidance for processing violations of work hour controls requirements during conditions before and immediately after the declaration of an emergency for a hurricane, when licensees sequester plant staff on site to ensure personnel are available for relief of duties, and potentially granting enforcement discretion for the affected requirements. Under EGM-09-008, the NRC may exercise enforcement discretion and not cite licensees for violations of 10 CFR 26.205(c) and (d) while a licensee sequesters site personnel in preparation for hurricane conditions that are expected to result in the declaration of an emergency caused by high winds. The EGM refers to § 26.205(d) generally, and therefore, the requirements in proposed § 26.205(d)(7) would also fall under the enforcement discretion described by EGM-09-008.

#### **IV. Section-by-Section Analysis**

##### *10 CFR 26.203 General provisions.*

Section 26.203 establishes requirements for licensees’ fatigue management policies, procedures, training, examinations, recordkeeping, and reporting. The NRC proposes to make conforming changes to paragraphs within § 26.203 to ensure consistency between the implementation of the minimum days off requirements in § 26.205(d)(3) and the implementation of the maximum average work hours requirements in proposed § 26.205(d)(7).

##### *Section 26.203(d)(2)*

Section 26.203(d)(2) currently requires licensees to retain records of shift schedules and shift cycles of individuals who are subject to the work hour requirements established in

§ 26.205. These records are necessary, in part, to ensure that documentation of the licensee's fatigue management program is retained and available for the NRC inspectors to verify that licensees are complying with the work hour requirements and waiver and fatigue assessment provisions. Because licensees that implement the alternative would need to show inspectors that individuals subject to the new work hour controls have not exceeded the average weekly work hour limit, inspectors would need to know the averaging periods used by the licensee. Therefore, the NRC proposes to amend § 26.203(d)(2) to include the requirement that licensees implementing the requirements in proposed § 26.205(d)(7) maintain records showing the beginning and end times and dates of all 6-week or shorter averaging periods. These licensees would also need to retain records of shift schedules to ensure compliance with the requirements in § 26.205(c) and § 26.205(d)(2).

#### *Section 26.203(e)(1)*

Current § 26.203(e)(1) requires licensees to provide the NRC with an annual summary of all instances during the previous calendar year in which the licensee waived each of the work hour controls specified in § 26.205(d)(1) through (d)(5)(i) for individuals who perform the duties listed in § 26.4(a)(1) through (a)(5). Section 26.203(e)(1) would be revised in the proposed rule to require licensees to also report the instances when the licensee waived the requirements in proposed § 26.205(d)(7).

#### *Section 26.203(e)(1)(i) and (e)(1)(ii)*

Section 26.203(e)(1)(i) and (e)(1)(ii) requires licensees to report whether work hour controls are waived for individuals working on normal plant operations or working on outage activities. The proposed rule would require licensees to include whether the alternative requirements in proposed § 26.205(d)(7) were waived during normal plant operations or while working on outage activities.

10 CFR 26.205 *Work hours.*

Section 26.205 sets forth the NRC's requirements governing work hour controls applicable to individuals performing the duties in 10 CFR 26.4(a)(1) through (a)(5). The NRC proposes to add a new § 26.205(d)(7) and make conforming changes to existing paragraphs within § 26.205 to ensure consistency between the implementation of the minimum days off requirements in § 26.205(d)(3) and the implementation of the maximum average work hours requirements in proposed § 26.205(d)(7).

*Section 26.205(b)(5)*

Section 26.205(b)(5) currently allows licensees to 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 § 26.205(d)(2) and the minimum days off requirements of § 26.205(d)(3) through (d)(5), such duties do not constitute work periods or work shifts. The proposed rule would revise § 26.205(b)(5) to exclude these incidental duties from hours worked under proposed § 26.205(d)(7).

*Section 26.205(d)(3)*

Currently, § 26.205(d)(3) requires licensees to ensure that subject individuals have, at minimum, the days off as specified in this section. Under the proposed rule, licensees would have the option of either complying with the minimum days off requirements in § 26.205(d)(3) or the alternative requirements in proposed § 26.205(d)(7).

*Section 26.205(d)(4)*

Current § 26.205(d)(4) provides a limited discretionary exception from the minimum day off requirements in § 26.205(d)(3) for individuals performing the duties specified in § 26.4(a)(1) through (a)(4) (i.e., certain operations, chemistry, health physics, fire brigade, and maintenance activities). The exception from the minimum days off requirements is available during the first 60 days of a unit outage while a subject individual is working on outage activities. In these circumstances, if the licensee elects to apply the exception, § 26.205(d)(4) requires licensees to ensure that individuals specified in § 26.4(a)(1) through (a)(3) have a minimum of 3 days off in each successive (i.e., non-rolling) 15-day period and that individuals specified in § 26.4(a)(4) have at least 1 day off in any 7-day period. Detailed guidance on the applicability of this rule provision is available in Regulatory Guide 5.73, “Fatigue Management for Nuclear Power Plant Personnel.” After the first 60 days of a unit outage, regardless of whether the individual is working on unit outage activities, the individual is again subject to the minimum days off requirements of § 26.205(d)(3), except as permitted by § 26.205(d)(6). The NRC proposes to revise § 26.205(d)(4) to allow licensees that choose the maximum average work hours alternative during non-outage periods to have the option to use the proposed alternative or the fixed number of days off approach during the first 60 days of a unit outage.

#### *Section 26.205(d)(5)(i)*

Section 26.205(d)(5)(i) currently provides a discretionary exception from the minimum days off requirements of § 26.205(d)(3) for personnel performing the duties described in § 26.4(a)(5) during unit outages or unplanned security system outages. The requirement limits this exception period to 60 days from the beginning of the outage and requires that individuals performing the security duties identified in § 26.4(a)(5) during this period have a minimum of 4 days off in each non-rolling 15-day period. Proposed § 26.205(d)(5)(i) would allow licensees that choose the maximum average work hours alternative during non-outage periods to have the option to use the proposed alternative or the fixed number of days off approach in

§ 26.205(d)(5)(i) for security personnel during the first 60 days of a unit outage or unplanned security system outage.

*Section 26.205(d)(5)(ii)*

Current § 26.205(d)(5)(ii) provides a discretionary exception from the minimum days off requirements of § 26.205(d)(3) for security personnel during the first 60 days of an unplanned security system outage or an increased threat condition. Individuals performing the security duties identified in § 26.4(a)(5) during this period do not have to meet the minimum days off requirements of § 26.205(d)(3). Proposed § 26.205(d)(5)(ii) would provide that, during the first 60 days of an unplanned security system outage or an increased threat condition, licensees would not need to meet the requirements of § 26.205(d)(3), § 26.205(d)(5)(i), or proposed § 26.205(d)(7) for security personnel.

*Section 26.205(d)(7)*

This would be a new section governing maximum average work hours for subject individuals, with which licensees could voluntarily choose to comply as an alternative to complying with comparable provisions in § 26.205(d)(3). Licensees who choose to comply with this alternative would nonetheless comply with all requirements in § 26.205 other than the minimum days off requirements in § 26.205(d)(3).

The individuals subject to the proposed maximum average work hours requirements in this section would be the same as the individuals subject to the comparable controls in § 26.205(d)(3), which, according to § 26.205(a), are the individuals described in § 26.4(a). Unlike the minimum days off requirements, the proposed maximum average work hours alternative would apply to all individuals described in § 26.205(a) without regard for their assigned duties or the length of their shift schedules.

*Section 26.205(d)(7)(i)*

Licensees who elect to implement the requirements of proposed § 26.205(d)(7)(i) would manage affected individuals' cumulative fatigue by limiting the number of hours they work each week to an average of 54 hours. The 54-hour average would be computed over a rolling period of up to 6 weeks. Licensees would roll (i.e., adjust forward) the beginning and end times and dates of their averaging periods (of up to 6 weeks) by no more than 7 consecutive calendar days at any time. Licensees would be expected to describe in their FFD procedures, as required by proposed § 26.205(d)(7)(ii), the beginning and end times and days of the week for the averaging periods.

*Section 26.205(d)(7)(ii)*

In proposed § 26.205(d)(7)(ii), each licensee would need to explicitly state, in its FFD policies and procedures required by 10 CFR 26.27 and 10 CFR 26.203, with which requirements it is complying: the minimum days off provisions in § 26.205(d)(3) or the maximum average work hours requirements in proposed § 26.205(d)(7). As a general matter, good regulatory practice requires each licensee to clearly document its licensing basis, especially where the NRC's requirements offer the licensee one or more regulatory alternatives. If a licensee clearly and sufficiently documents its licensing basis, then the licensee can more easily determine, despite changes (as applicable) in personnel, procedures, or its design, whether the licensee continues to comply with its licensing basis and applicable NRC requirements. Effective documentation also allows the NRC to quickly and accurately determine the licensee's status of compliance and affords the public an opportunity to understand the legal constraints to which that licensee is subject.

Arguably, the NRC's regulations would already require the licensee to document its decision to comply with the alternative to the minimum days off requirements in proposed § 26.205(d)(7). Section 26.27 requires licensees to establish written FFD policies and

procedures, and 10 CFR 26.203(a) and (b) requires licensees to include in the § 26.27 written policies and procedures the specific policies and procedures for the management of fatigue, including the process for implementing the work hour controls in § 26.205. However, to avoid ambiguity on this matter, the NRC would make clear in § 26.205(d)(7)(ii) the licensee's (and applicant's) regulatory obligation to document in its FFD policies and procedures, required by § 26.27 and § 26.203(a) and (b), including the process for implementing the work hour controls, with which requirements it will comply: the requirements in § 26.205(d)(3) or proposed § 26.205(d)(7).

The cumulative fatigue management requirements with which each licensee elects to comply, either the requirements in § 26.205(d)(3) or proposed § 26.205(d)(7), would be the legally-binding requirements for that licensee for all individuals subject to the work hour controls of § 26.205. For example, licensees would not be able to subject one group of individuals under § 26.4(a) to the requirements in § 26.205(d)(3) and another group of individuals under § 26.4(a) to proposed § 26.205(d)(7) requirements. Implementing the minimum days off and proposed alternative requirements simultaneously would create a burden for NRC inspectors because before they could even begin their inspection review, the inspectors would have to ascertain which groups of individuals were subject to which set of requirements. The review itself would then be more burdensome because the review would include additional steps depending on the applicable individuals and requirements. In addition, the NRC assessed the proposed alternative as equivalent to the minimum days off requirements considering the collective advantages and disadvantages of having all individuals who are subject to the work hour controls under a single set of cumulative fatigue management requirements. Nevertheless, licensees would be free to switch to the other set of legally-binding requirements, so long as the requirement of proposed § 26.205(d)(7)(ii) was met.

*Section 26.205(e)(1)(i)*

Currently, § 26.205(e)(1) requires licensees to review the actual work hours and performance of individuals who are subject to this section for consistency with the requirements of § 26.205(c), so that licensees can determine if they are controlling the work hours of individuals consistent with the objective of preventing impairment from fatigue due to the duration, frequency, or sequencing of successive shifts. Section 26.205(e)(1)(i) requires the licensees to assess the actual work hours and performance of 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). The NRC proposes to amend § 26.205(e)(1)(i) to require licensees to assess the actual work hours and performance of individuals whose actual hours worked during the review period exceeded an average of 54 hours per week in any averaging period of up to 6 weeks. The duration of the averaging periods would be the same duration that the licensees use to control the individuals' work hours to comply with the requirements of proposed § 26.205(d)(7).

#### 10 CFR 26.207 *Waivers and exceptions.*

Section 26.207 provides the criteria that licensees must meet to authorize waivers and enact exceptions from the work hour requirements in § 26.205(d)(1) through (d)(5)(i). The NRC proposes to make conforming changes to paragraphs within § 26.207 to ensure consistency between the implementation of the minimum days off requirements in § 26.205(d)(3) and the implementation of the maximum average hours worked requirements in proposed § 26.205(d)(7).

#### *Section 26.207(a)*

Section 26.207(a) permits licensees to authorize waivers from the work hour requirements in § 26.205(d)(1) through (d)(5)(i) for conditions that meet the two criteria specified in § 26.207(a). Section 26.207(a) would be revised in the proposed rule to authorize licensees

to grant waivers from the work hour requirements in proposed § 26.205(d)(7) if the criteria in § 26.207(a) are met.

*Section 26.207(b)*

Current § 26.207(b) relieves licensees from the minimum days off requirements of § 26.205(d)(3) by allowing them to exclude shifts worked by security personnel during the actual conduct of NRC-evaluated force-on-force tactical exercises when calculating the individual's number of days off. The proposed rule would amend § 26.207(b) to permit licensees to exclude from the maximum average work hours requirements of proposed § 26.205(d)(7) the hours worked by security personnel during the actual conduct of NRC-evaluated force-on-force tactical exercises.

10 CFR 26.209 *Self-declarations.*

Section 26.209 requires licensees to take immediate action in response to a self-declaration by an individual who is working under, or being considered for, a waiver from the work hour controls in § 26.205(d)(1) through (d)(5)(i). The NRC proposes to make a conforming change to § 26.209(a) to ensure consistency between the implementation of the minimum days off requirements in § 26.205(d)(3) and the implementation of the maximum average hours worked requirements in proposed § 26.205(d)(7).

*Section 26.209(a)*

Section 26.209(a) would be amended in the proposed rule to address the situation when an individual is performing, or being assessed for, work under a waiver of the requirements contained in proposed § 26.205(d)(7) and declares that, due to fatigue, he or she is unable to safely and competently perform his or her duties. As in the current § 26.209(a), 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 in 10 CFR Part 26. If the subject individual must continue performing the duties listed in § 26.4(a) until relieved, then the licensee shall immediately take action to relieve the individual.

#### 10 CFR 26.211 *Fatigue assessments.*

Section 26.211 currently requires licensees to conduct fatigue assessments under several conditions. The NRC proposes to make conforming changes to paragraphs within § 26.211 to ensure consistency between the implementation of the minimum days off requirements in § 26.205(d)(3) and the implementation of the maximum average hours worked requirements in proposed § 26.205(d)(7).

#### *Section 26.211(b)(2)(iii)*

Section 26.211(b)(2)(iii) prohibits individuals from performing a post-event fatigue assessment if they evaluated or approved a waiver of the limits specified in § 26.205(d)(1) through (d)(5)(i) for any of the individuals who were performing or directing the work activities during which the event occurred if the event occurred while such individuals were performing work under that waiver. The proposed rule would amend § 26.211(b)(2)(iii) to prohibit individuals from performing a post-event fatigue assessment if they evaluated or approved a waiver of the limits specified in proposed § 26.205(d)(7) for any of the individuals who were performing or directing the work activities during which the event occurred if the event occurred while such individuals were performing work under that waiver.

#### *Section 26.211(d)*

Current § 26.211(d) prohibits licensees from concluding that fatigue has not degraded 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 rest breaks required in § 26.205(d)(2) or the minimum days off required in § 26.205(d)(3) through (d)(5). The NRC proposes to amend § 26.211(d) to include the maximum average work hours among the criteria that licensees may not solely rely on when concluding that fatigue has not degraded or will not degrade an individual's ability to safely and competently perform his or her duties.

### V. Specific Request for Comment

The NRC is seeking advice and recommendations from the public on this proposed rule. The NRC will consider all comments received within the limited scope of this proposed rulemaking and address them in the final rule. We are particularly interested in comments and supporting rationale from the public on the following issue: Would the alternative approach provide comparable assurance of the management of cumulative fatigue as the current minimum days off requirements?

### VI. Availability of Documents

The following table lists documents that are related to this proposed rule and available to the public and indicates how they may be obtained. See Submitting Comments and Accessing Information of the **SUPPLEMENTARY INFORMATION** section on the physical locations and Web sites where the documents may be accessed.

DOCUMENT	PDR	WEB	ELECTRONIC READING ROOM (ADAMS)
U.S. Nuclear Regulatory Commission, Regulatory Guide 5.73, "Fatigue Management For Nuclear Power Plant Personnel" (March 2009).	X		ML083450028

PRM-26-5, Petition to Amend 10 CFR Part 26, "Fitness-for-Duty Programs," filed by the Nuclear Energy Institute (September 3, 2010).	X	Docket ID. NRC-2010-0304	ML102590440
Anthony R. Pietrangelo on Behalf of the Nuclear Energy Institute; Notice of Receipt of Petition for Rulemaking, 75 FR 65249 (October 22, 2010).		Docket ID. NRC-2010-0304	
Request for Enforcement Discretion filed by the Nuclear Energy Institute (September 23, 2010).	X		ML102710208
PRM-26-6, Petition to Amend 10 CFR Part 26, filed by Eric Erb (August 17, 2010).	X	Docket ID. NRC-2010-0310	ML102630127
Eric Erb; Notice of Receipt of Petition for Rulemaking, 75 FR 71368 (November 23, 2010).		Docket ID. NRC-2010-0310	
SECY-11-0003, Status of Enforcement Discretion Request and Rulemaking Activities Related to 10 CFR Part 26, Subpart I, "Managing Fatigue" (January 4, 2011).	X		ML103420201
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" (February 28, 2011).	X		ML110390077
EGM-09-008, "Enforcement Guidance Memorandum—Dispositioning Violations of NRC Requirements for Work Hour Controls Before and Immediately After a Hurricane Emergency Declaration" (September 24, 2009).	X		ML092380177
Staff Requirements – SECY-11-0003 – Status of Enforcement Discretion Request and Rulemaking Activities Related to 10 CFR Part 26, Subpart I, "Managing Fatigue" and 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" (March 24, 2011).	X		ML110830971
Updated Notice of Public Meeting to Discuss Part 26, Subpart I Implementation to Understand Unintended Consequences of the Minimum Day Off Requirements (November 15, 2010).	X		ML103160388
Summary of November 18, 2010, Public Meeting to Discuss Part 26, Subpart I Implementation to Understand Unintended Consequences of the Minimum Day Off Requirements (December 13, 2010).	X		ML103430557
Update - Notice of Public Meeting Regarding Part 26, Subpart I Minimum Days Off Requirements and Options Licensees May Implement to Receive Enforcement Discretion From These Requirements (December 30, 2010).	X		ML103550089
Summary of January 6, 2011, Public Meeting Regarding Part 26, Subpart I Minimum Days Off Requirements and Options Licensees May Implement to Receive Enforcement Discretion from these Requirements (February 3, 2011).	X		ML110280446
Notice of Public Meeting to Discuss Alternatives to the Part 26, Subpart I, Minimum Days Off Requirements (January 14, 2011).	X		ML110140315

Summary of January 25, 2011, Public Meeting to Discuss Alternatives to the Part 26, Subpart I, Minimum Days Off Requirements.	X		ML110340512
Sunshine Federal Register Notice of February 8, 2011, Commission Briefing on the Implementation of Part 26, 76 FR 5626 (February 1, 2011).	X		ML110200295
Transcript of February 8, 2011, Commission Briefing on the Implementation of Part 26.	X		ML110410169

## **VII. Criminal Penalties**

For the purposes of Section 223 of the Atomic Energy Act (AEA), as amended, the NRC is issuing this proposed rule that would amend 10 CFR Part 26 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule would be subject to criminal enforcement. Criminal penalties as they apply to regulations in 10 CFR Part 26 are discussed in § 26.825.

## **VIII. Compatibility of Agreement State Regulations**

Under the “Policy Statement on Adequacy and Compatibility of Agreement State Programs,” approved by the Commission on June 20, 1997, and published in the *Federal Register* on September 3, 1997 (62 FR 46517), this proposed rule is classified as compatibility “NRC.” Compatibility is not required for Category “NRC” regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA or the provisions of 10 CFR, and although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with a particular State’s administrative procedure laws but does not confer regulatory authority on the State.

## **IX. Plain Language**

The Plain Writing Act of 2010 (Pub. L. 11 1-274) requires Federal agencies to write documents in a clear, concise, well-organized manner that also follows other best practices appropriate to the subject or field and the intended audience. Although regulations are exempt under the Act, the NRC is applying the same principles to its rulemaking documents. Therefore, the NRC has written this document, including the proposed amended and new rule language, to be consistent with the Plain Writing Act. In addition, where existing rule language must be changed, the NRC has rewritten that language to improve its organization and readability. The NRC requests comment on the proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the NRC as explained in the ADDRESSES caption of this document.

## **X. Voluntary Consensus Standards**

The NRC proposes using this standard instead of the following voluntary consensus standard developed by the American Nuclear Society (ANS): American National Standards Institute (ANSI)/ANS-3.2-1988. The NRC has determined that using a Government-unique standard would be justified. The NRC declined to use the ANS standard when the fatigue management provisions in Subpart I of 10 CFR Part 26 were adopted in 2008. (73 FR 16966; March 31, 2008, at 17170 (second and third column)). The alternative for managing cumulative fatigue through a maximum average work hours requirement in this proposed rule has no counterpart in ANSI/ANS-3.2-1988 that could be adopted to manage cumulative fatigue, and the NRC declines to reconsider its overall decision in the 2008 rulemaking not to adopt the fatigue management approach embodied in the ANS standard. Accordingly, the NRC concludes that

there are no voluntary consensus standards that could be adopted in lieu of the proposal to adopt the Government-unique standard in this proposed rule.

### **XI. Finding of No Significant Environmental Impact**

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this proposed rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. This proposed rule would allow licensees of nuclear power reactors to voluntarily use a different method from the one currently prescribed in the NRC's regulations for determining whether certain nuclear power plant workers must be afforded time off from work.

The NRC has determined that the alternative for determining time off would not significantly alter the likelihood that there will be an increase in fatigued workers causing operational problems or a radiological event, or being unable to properly perform their functions. The alternative would provide affected licensees with a more-easily implemented approach for determining when subject individuals must be afforded the time off. The NRC recognizes that there are unusual potential circumstances in which the proposed alternative requirement could be met and the schedule could be fatiguing. 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. However, the industry has stated that these unusual schedules are improbable. The NRC believes that this proposed alternative approach, together with other aspects of the rule that will remain unchanged, would provide reasonable assurance that licensees will manage cumulative fatigue in a manner that contributes to the protection of public health and safety and common defense and security. In addition, the proposed alternative is expected to reduce scheduling constraints on certain safety-beneficial practices. Because the

NRC's regulatory objective would continue to be met under the alternative adopted in this proposed rule, there should be no change in environmental impacts, during operation or while the nuclear power plant is in shutdown, as compared with the environmental impact of the current rule.

The primary alternative to this action would be the no-action alternative. The no-action alternative could result in a greater administrative burden on nuclear power plant licensees in complying with the minimum days off requirements in the current rule, as compared with the alternative to the minimum days off requirements under the proposed rule. In addition, individuals subject to minimum days off requirements could personally believe that their quality of life and work conditions are less under the no-action alternative, as compared with the alternative maximum average work hours requirements that could be selected under the proposed rule.

The no-action alternative would provide little or no environmental benefit. In addition, the no-action alternative has led nuclear power plant licensees to use work scheduling approaches that, for example, reduce their capability to use the most knowledgeable workers in responding to plant events and conditions. This may provide less safety and greater risk as compared with the less burdensome scheduling approaches that licensees would be allowed to use under the alternative to the minimum days off requirements under the proposed rule.

For these reasons, the NRC concludes that this rulemaking would not have a significant adverse impact on the environment. This discussion constitutes the environmental assessment for this proposed rule. However, public stakeholders should note that the NRC is seeking public participation. Comments on any aspect of this environmental assessment may be submitted to the NRC as indicated under the **ADDRESSES** section.

## **XII. Paperwork Reduction Act Statement**

The public burden for this information collection is estimated to be 257 hours, which is insignificant. Because the burden for this information collection is insignificant, Office of Management and Budget (OMB) clearance is not required. Existing requirements were approved by the OMB Control Number 3150-0146.

### *Abstract:*

This proposed rule would allow holders of nuclear power plant operating licenses the option to use a different method than the one currently prescribed in the NRC's regulations for determining when certain nuclear power plant workers must be afforded time off from work to ensure that such workers are not impaired due to cumulative fatigue caused by work schedules. Licensees using the alternative method would calculate the number of hours worked by applicable individuals, with a per-person limit of a maximum weekly average of 54 hours worked over a 6-week rolling window. Burden would not increase for ongoing requirements, such as scheduling work hours, recording calculations of work hours, or recording and trending problems regarding work hours. Licensees choosing to use the alternate method would incur a one-time implementation burden to revise FFD procedures, modify their work hour tracking systems and individual work scheduling systems, and state in their FFD policies which method of fatigue management is being used.

The NRC is seeking public comment on the potential impact of the information collections contained in this proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Is the estimate of burden accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

The public may examine and have copied, for a fee, publicly available documents, including the NRC Form 670, "Information Required for Making an Insignificant Burden Determination To Support a Decision That OMB Clearance Is Not Required," at the NRC's PDR, One White Flint North, 11555 Rockville Pike, Room O-1 F21, Rockville, MD 20852. The NRC Form 670 and proposed rule are available at the NRC's Web site:

<http://www.nrc.gov/public-involve/doccomment/omb/index.html> for 30 days after the signature date of this notice.

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden and on the above issues, by **[Insert date 30 days after the date of publication in the Federal Register]**, to the Information Services Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by e-mail to [Infocollects.Resource@nrc.gov](mailto:Infocollects.Resource@nrc.gov); and to Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202 (3150-0146), Office of Management and Budget, Washington, DC 20503. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. You may also e-mail comments to [Christine\\_J.\\_Kymn@omb.eop.gov](mailto:Christine_J._Kymn@omb.eop.gov) or comment by telephone at 202-395-4638.

### **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 unless the requesting document displays a currently valid OMB control number.

### **XIII. Regulatory Analysis**

The NRC has not prepared a full regulatory analysis for this proposed rulemaking. The NRC has determined that the proposed maximum average work hours requirement would provide reasonable assurance that subject individuals are not impaired due to cumulative fatigue caused by excessive work hours. As such, adequate implementation of the alternative approach would maintain reasonable assurance that persons subject to work hour controls can safely and competently perform their assigned duties and therefore meets the intent of the current minimum days off requirement. The 2008 10 CFR Part 26 final rule contained a regulatory analysis to support the minimum days off requirement. Because the proposed approach would offer licensees an alternative that is generally equivalent to the current minimum days off requirements in managing cumulative fatigue, the 2008 final rule regulatory analysis also supports this proposed rule.

Furthermore, both nuclear power plant licensees and individuals subject to the NRC's existing requirements in 10 CFR 26.205(d)(3) governing minimum days off would derive substantial benefits if the NRC were to adopt an alternative approach for controlling cumulative fatigue through maximum average work hours that could be voluntarily adopted by those licensees. In addition, the NRC concludes that providing an alternative would maintain the ability of those licensees to continue using scheduling practices that have a positive safety benefit. The NRC's conclusions in this regard are based upon information presented by two petitioners for rulemaking seeking changes to the work hour controls in 10 CFR 26.205, NEI's request for enforcement discretion of those same regulatory provisions in 10 CFR 26.205, evidence gathered from stakeholders at the three public meetings, and analysis performed by the NRC staff and explained in a January 4, 2011, memorandum and a February 28, 2011, memorandum to the Commission. In these memoranda, the NRC staff documented its evaluation of the options available to the Commission to address the concerns raised in the

petitions for rulemaking and request for enforcement discretion. At the February 8, 2011, Commission briefing on the implementation of 10 CFR Part 26, stakeholders appeared to support the use of an expedited rulemaking process to address the issues presented by the industry. In view of all of this information, the NRC did not see any value in preparing a more detailed regulatory analysis for this proposed rule. The NRC requests public comment on this draft regulatory analysis. Comments on the draft regulatory analysis may be submitted to the NRC as indicated under the **ADDRESSES** section of this document.

#### **XIV. Regulatory Flexibility Certification**

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the NRC certifies that this proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only licensees that do not fall within the scope of the definition of “small entities” set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

#### **XV. Backfitting**

The NRC has determined that the Backfit Rule, 10 CFR 50.109, would not apply to this proposed rule, nor would the proposed rule be inconsistent with any of the finality provisions in 10 CFR Part 52. The proposed rule, in 10 CFR 26.205(d)(7), would provide nuclear power plant licensees with an alternative for compliance with the existing controls in 10 CFR 26.205(d)(3) governing minimum days off for certain nuclear power plant workers. Licensees would be free to comply with either the existing rule’s requirements governing minimum days off or with the proposed alternative requirements in 10 CFR 26.205(d)(7). The NRC concludes that a backfit analysis would not be required for this proposed rule because this proposed rule would not contain any provisions that constitute backfitting.

The proposed rule would not be inconsistent with any finality provisions in 10 CFR Part 52. No standard design certification rule or standard design approval issued under 10 CFR Part 52, or currently being considered by the NRC, addresses fitness-for-duty requirements in 10 CFR Part 26. Accordingly, there are no issues resolved in those design certification rules or design approvals that would be within the scope of the minimum days off controls in this proposed rule. In addition, the NRC has not issued any combined licenses under 10 CFR Part 52. Hence, there are currently no holders of combined licenses who would be protected by applicable issue finality provisions. The NRC concludes that this proposed rule would not contain any provisions that would be inconsistent with any of the finality provisions in 10 CFR Part 52.

#### 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.

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 amendments 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, 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2111, 2112, 2133, 2134, 2137, 2201, 2297f); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846).

2. Section 26.203 is amended by revising paragraphs (d)(2), (e)(1) introductory text, (e)(1)(i), and (e)(1)(ii) to read as follows:

**§ 26.203 General provisions.**

\* \* \* \* \*

(d) \* \* \*

(2) For licensees implementing the requirements of § 26.205(d)(3), records of shift schedules and shift cycles, or, for licensees implementing the requirements of § 26.205(d)(7), records of shift schedules and records showing the beginning and end times and dates of all averaging periods, of individuals who are subject to the work hour controls in § 26.205;

\* \* \* \* \*

(e) \* \* \*

(1) A summary for each nuclear power plant site of all instances during the previous calendar year when the licensee waived one or more of the work hour controls specified in § 26.205(d)(1) through (d)(5)(i) and (d)(7) 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 when each applicable 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)(v), and (d)(7) was waived for individuals not working on outage activities;

(ii) The number of instances when each applicable 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)(v), (d)(4) and (d)(5)(i), and (d)(7) was waived for individuals working on outage activities; and

\* \* \* \* \*

3. Section 26.205 is amended by revising paragraphs (b)(5), (d)(4), (d)(5)(i), (d)(5)(ii), and (e)(1)(i) and the introductory text of paragraph (d)(3), and adding a new paragraph (d)(7) to read as follows:

**§ 26.205 Work hours.**

\* \* \* \* \*

(b) \* \* \*

(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 § 26.205(d)(2), and the minimum days off requirements of § 26.205(d)(3) through (d)(5) or the maximum average work hours requirements of § 26.205(d)(7), such duties do not constitute work periods, work shifts, or hours worked.

\* \* \* \* \*

(d) \* \* \*

(3) Licensees shall either ensure that individuals have, at a minimum, the number of days off specified in this paragraph, or comply with the requirements for maximum average work hours in § 26.205(d)(7). For the purposes of this section, a day off is defined as a calendar day during 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.

\* \* \* \* \*

(4) During the first 60 days of a unit outage, licensees need not meet the requirements of § 26.205(d)(3) or (d)(7) for individuals specified in § 26.4(a)(1) through (a)(4), while those individuals are working on outage activities. However, the licensee shall ensure that the individuals specified in § 26.4(a)(1) through (a)(3) have at least 3 days off in each successive (i.e., non-rolling) 15-day period and that the individuals specified in § 26.4(a)(4) have at least 1 day off in any 7-day period;

(5) \* \* \*

(i) During the first 60 days of a unit outage or a planned security system outage, licensees need not meet the requirements of § 26.205(d)(3) or (d)(7). However, licensees shall ensure that these individuals have at least 4 days off in each successive (i.e., non-rolling) 15-day period; and

(ii) During the first 60 days of an unplanned security system outage or increased threat condition, licensees need not meet the requirements of § 26.205(d)(3), (d)(5)(i), or (d)(7).

\* \* \* \* \*

(7) Licensees may, as an alternative to complying with the minimum days off requirements in § 26.205(d)(3), comply with the requirements for maximum average work hours in this paragraph. Licensees voluntarily choosing to comply with the alternative maximum average work hours requirements in this paragraph are not relieved from complying with all other requirements in § 26.205 other than § 26.205(d)(3).

(i) Individuals may not work more than a weekly average of 54 hours, calculated using a rolling period of up to six (6) weeks, which rolls by no more than 7 consecutive calendar days at any time.

(ii) Each licensee shall state, in its FFD policy and procedures required by § 26.27 and § 26.203(a) and (b), with which requirements the licensee is complying: the minimum days off requirements in § 26.205(d)(3) or maximum average work hours requirements in § 26.205(d)(7).

(e) \* \* \*

(1) \* \* \*

(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) or in any averaging period of up to 6 weeks, using the same averaging period durations that the licensees use to control the individuals' work hours, while the individuals' work hours are subject to the requirements of § 26.205(d)(7);

\* \* \* \* \*

4. Section 26.207 is amended by revising paragraphs (a) introductory text and (b) to read as follows:

**§ 26.207 Waivers and assessments.**

(a) *Waivers.* Licensees may grant a waiver of one or more of the work hour controls in § 26.205(d)(1) through (d)(5)(i) and (d)(7), as follows:

\* \* \* \* \*

(b) *Force-on-force tactical exercises.* For the purposes of compliance with the minimum days off requirements of § 26.205(d)(3) or the maximum average work hours requirements of § 26.205(d)(7), licensees may exclude shifts worked by security personnel during the actual conduct of NRC-evaluated force-on-force tactical exercises when calculating the individual’s number of days off or hours worked, as applicable.

\* \* \* \* \*

5. Section 26.209 is amended by revising paragraph (a) to read as follows:

**§ 26.209 Self-declarations.**

(a) If an individual is performing, or being assessed for, work under a waiver of one or more of the requirements contained in § 26.205(d)(1) through (d)(5)(i) and (d)(7) 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 10 CFR Part 26. 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.

\* \* \* \* \*

6. Section 26.211 is amended by revising paragraphs (b)(2)(iii) and (d) to read as follows:

**§ 26.211 Fatigue assessments.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iii) Evaluated or approved a waiver of one or more of the limits specified in § 26.205(d)(1) through (d)(5)(i) and (d)(7) 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.

\* \* \* \* \*

(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), the

individual has had the minimum breaks required in § 26.205(d)(2) or minimum days off required in § 26.205(d)(3) through (d)(5), as applicable, or the individual's hours worked have not exceeded the maximum average number of hours worked in § 26.205(d)(7).

\* \* \* \* \*

Dated at Rockville, Maryland, this 13th day of April, 2011.

For the Nuclear Regulatory Commission.

***/RA/***

Michael F. Weber  
Acting Executive Director  
for Operations.

the individual has had the minimum breaks required in § 26.205(d)(2) or minimum days off required in § 26.205(d)(3) through (d)(5), as applicable, or the individual's hours worked have not exceeded the maximum average number of hours worked in § 26.205(d)(7).

\* \* \* \* \*

Dated at Rockville, Maryland, this 13th day of April, 2011.

For the Nuclear Regulatory Commission.

**/RA/**

Michael F. Weber  
Acting Executive Director  
for Operations.

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