



NUCLEAR ENERGY INSTITUTE

DOCKETED  
USNRC

Anthony R. Pietrangelo  
SENIOR VICE PRESIDENT AND CHIEF  
NUCLEAR OFFICER

May 25, 2011

May 25, 2011 (4:57 pm)

Ms. Annette L. Vietti-Cook  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
ATTN: Rulemakings and Adjudications Staff

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**Subject:** Docket ID NRC-2011-0058; 10 CFR Part 26, Alternative to Minimum Days Off Requirements; Proposed Rule (76 Fed. Reg. 23208)

**Project Number: 689**

Dear Ms. Vietti-Cook:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute (NEI)<sup>1</sup> submits comments on the subject proposed rule. The proposed rule provides an alternative to the minimum days off requirements in Subpart I (Managing Fatigue) of 10 CFR Part 26, Fitness for Duty Programs.

On March 24, 2011, Staff Requirements Memorandum (SRM) – SECY-11-003 was issued directing the NRC Staff to address Subpart I implementation issues discussed in SECY-11-0003 and SECY-11-0028 through a combination of accelerated, limited-scope rulemaking and enforcement discretion. Notably, the SRM directs that the proposed rule language should be consistent with the interim approach described by the NRC staff at the February 8, 2011, Commission briefing, allowing an essentially "like-for-like" alternative to the current non-outage minimum days off requirements. The SRM also directs the preparation of updated regulatory guidance in parallel with the accelerated, limited-scope rulemaking.

Through the course of a series of public meetings, the industry and the NRC staff have been developing implementation guidance for the proposed rule. During the May 11, 2011, meeting, after the proposed rule was published, an element of the proposed rule language was identified as having inadvertent consequences that would substantially alter the alternative approach developed through the public meeting process and presented by the NRC staff at the February 8, 2011,

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<sup>1</sup>NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Ms. Annette L. Vietti-Cook  
May 25, 2011  
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briefing. This proposed rule language, if promulgated, would not achieve a "like-for-like" alternative and thus would not meet the Commission's intent as expressed in the SRM.

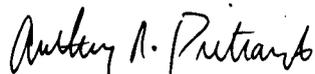
The language in question stipulates in proposed Section 26.205(d)(7)(i) that individuals may not work more than a weekly average of 54 hours, calculated using a rolling period of up to six (6) weeks, "which rolls by no more than 7 consecutive calendar days at any time." Our concern is with the rolling increment ("no more than 7 consecutive calendar days at any time"). The interim approach described by NRC staff at the briefing did not identify a specific rolling increment, although the public meetings did discuss the point that the rolling increment could be by week as opposed to by day. The point in time during a calendar week when the period would roll to the next week was to be determined by the licensee to allow matching the rolling period to payroll schedules.

The unintended consequence of this proposed wording in the rule would prevent the rolling periods being matched to the licensee's payroll schedules and could result in rolling schedules that are different for each individual worker. As a result, unwarranted complexity would be added. If this rule language remains, it would reflect a substantive change that is not consistent with the Commission direction in the SRM and would have significant negative consequences for NRC licensees seeking to implement this provision. Additional comments, including suggested replacement language for the rule, are attached.

NEI believes accelerated, limited-scope rulemaking can be a beneficial tool in instances where the rulemaking activity is minor (e.g., clarification of ambiguous or misleading rule language), intended to codify existing requirements (e.g., orders) and in special cases where the scope of the rulemaking is specifically limited and offered as a voluntary alternative to current rule language. As NRC is aware, a limited-scope rulemaking is not typically used to promulgate new requirements. We do not believe that the staff's intent here was to impose "new" requirements, but rather to promulgate a "like-for-like" alternative to the current non-outage minimum days off requirements. The change NEI recommends will ensure that the proposed rule accomplishes that purpose, and we ask the NRC to revise the proposed rule language accordingly.

If you have any questions regarding these comments, please contact me at 202.739.8081; [arp@nei.org](mailto:arp@nei.org) or Scott Bauer at 202.739.8058; [sab@nei.org](mailto:sab@nei.org).

Sincerely,



Anthony R. Pietrangelo

Attachment

c: Mr. R. William Borchardt, EDO, NRC  
Mr. Howard A. Benowitz, OGC/GCLR/RMR, NRC  
NRC Document Control Desk

**Industry Comments on Proposed Alternative to Minimum Days Off Requirements**

- 1) Throughout the proposed rule and supplementary information the terms "averaging period," "rolling period," and "rolling window" are used interchangeably when referring to the 6 week maximum period over which the 54 hour per week average is to be calculated. The latter two terms are used interchangeably in the proposed rule language. The industry prefers the term "averaging period" and requests that it be used consistently throughout. The recommended changes to the wording in proposed § 26.205(d)(7)(i) to address this comment are provided at the end of this attachment.
  
- 2) Proposed § 26.205(d)(7)(i) states "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." The latter phrase ("which rolls by no more than 7 consecutive calendar days at any time.") constitutes a new requirement. This new requirement is not consistent with the interim approach discussed at the February 8, 2011, Commission briefing (which was to allow an essentially "like-for-like" alternative to the current non-outage minimum days off requirements). Nor is this phrase based on the technical and regulatory analysis performed by the NRC Staff. Neither the current rule nor the current guidance stipulate the duration of the rolling increment and rolling shift cycles are acceptable under the current rule. Establishing an allowed duration for the increment by which the schedule can roll is a new rule provision that would be outside the scope of what was intended by the Commission in the March 24, 2011 SRM. Therefore, this phrase should be removed from the proposed rule.

During the public meetings on November 18, 2010, January 6, 2011, and January 25, 2011, the alternative to the minimum days off requirements was developed. This alternative was then presented to the Commission at the February 8, 2011 Commission briefing. The agreement reached on the alternative was not based upon a specific rolling increment though it was discussed in the public meetings that the rolling increment could be by week as opposed to by day. The point in time during a calendar week when the period would roll to the next week was to be determined by the licensee to allow matching the rolling period to payroll schedules. The unintended consequence of this proposed wording in the rule would prevent the rolling periods being matched to the licensee's payroll schedules and could result in rolling schedules that are different for each individual worker. As a result, unwarranted complexity would be added.

Another reason supporting the removal of this phrase is that, in the short amount of time available to consider comments on the proposed rule, it is not possible to thoroughly evaluate all possible short-term and long-term effects of the proposed wording. Additionally, this language should be deleted because its inclusion exceeds the limited scope the rulemaking was intended to address. See SRM-SECY-11-0003. NEI believes this level of detail should more appropriately be addressed in the guidance accompanying the rule change.

Another unintended consequence of this wording has to do with the definition of a day off contained in § 26.205(d)(3) which states that a day off is a calendar day in which an individual does not start a work shift. For many licensees this definition is used in the software to count work hours that bridge the end of the calendar day as hours worked on the day the shift started as opposed to splitting the hours between the two days. The interpretation provided at the May 11, 2011, public meeting of the phrase in question would impact this practice and cause an unnecessary change to the industry software.

- 3) In Section III.C (Applicability) of the Supplementary Information section of the Federal Register Notice for the proposed rule, the fourth paragraph discusses the force-on-force tactical exercise exception. To be consistent with the proposed rule wording as well as with the current rule, the last sentence should read...."exclude from the § 26.205(d)(7) calculations the shifts worked" as opposed to the "hours" worked. Similarly, the proposed rule language for § 26.207(b) should be revised as noted below.
- 4) In Section III.C (Applicability) of the Supplementary Information section of the Federal Register Notice for the proposed rule, the last paragraph addresses the applicability of Enforcement Guidance Memorandum EGM-09-008 to the maximum average work hour alternative. NEI requests that a statement be included in this paragraph for licensees that have already received their exemptions that those exemptions remain valid if they choose to adopt the maximum average work hour alternative.
- 5) The second sentence in § 26.205(d)(7) is not necessary. If it is determined to be necessary, then a similar sentence should be added to § 26.205(d)(3) as it would be an equally valid alternative that licensees could voluntarily choose to implement. There is nothing stated or implied in § 26.205(d)(7) that would lead one to conclude that it provides any relief from complying with all other requirements in § 26.205 other than those in § 26.205(d)(3).

The recommended changes to the proposed § 26.205(d)(7), § 26.205(d)(7)(i) and § 26.207(b) are as follows:

§ 26.205(d)(7) Modify the wording as shown below:

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.

§ 26.205(d)(7)(i) Modify the wording as shown below:

Individuals may not work more than a weekly average of 54 hours, calculated using an averaging period of up to six (6) weeks.

§ 26.207(b) Modify the wording as shown below:

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 maximum average work hours, as applicable.

## Rulemaking Comments

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**From:** Vietti-Cook, Annette  
**Sent:** Thursday, May 26, 2011 8:23 AM  
**To:** Rulemaking Comments  
**Subject:** FW: Docket ID NRC-2011-0058; 10 CFR Part 26, Alternative to Minimum Days Off Requirements; Proposed Rule (76 Fed. Reg. 23208)  
**Attachments:** 05-25-11\_Comments on NRC Proposed Rule for Alternative to MDOs.pdf; 05-25-11\_Comments on NRC Proposed Rule for Alternative to MDOs\_Attachment.pdf

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**From:** PIETRANGELO, Tony [<mailto:arp@nei.org>]  
**Sent:** Wednesday, May 25, 2011 4:31 PM  
**Subject:** Docket ID NRC-2011-0058; 10 CFR Part 26, Alternative to Minimum Days Off Requirements; Proposed Rule (76 Fed. Reg. 23208)

May 25, 2011

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would not achieve a "like-for-like" alternative and thus would not meet the Commission's intent as expressed in the SRM.

## Attachment

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<sup>[1]</sup> NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.