

UNITED STATES NUCLEAR REGULATORY COMMISSION WASHINGTON. D.C. 20555 IN RESPONSE, PLEASE REFER TO: M931221B

December 21, 1993

OFFICE OF THE SECRETARY

MEMORANDUM FOR:

James M. Taylor Executive Director for Operations

FROM:

Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 11:30 A.M., TUESDAY, DECEMBER 21, 1993, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE(

I. SECY-93-302 - Modifications to Fitness-for-Duty Program Requirements Concerning the Random Drug Testing Rate

The Commission, by a 4-0 vote, approved an amendment to its fitness-for-duty regulations which permits licensees to reduce the random testing rate for all persons covered by 10 CFR Part 26 to an annual rate equal to 50 percent.

The FRN should be: 1) revised to conform with the attached pages, 2) reviewed by the Rules Review and Directives Branch, ADM, for conformity with the requirement of the Federal Register, and 3) returned for signature and publication. (EDO) (SECY Suspense: 12/30/93)

Attachments: As stated

cc: The Chairman Commissioner Rogers Commissioner Remick Commissioner de Planque OGC OCA Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail) BDR - Advance VDCS - P1-24

220001 9312270119 931221 PDR 10CFR PT9.7 PDR other program elements, and the extent to which tested employees have been successful in subverting the testing process and avoiding detection.

The NRC does not have sufficient information about these or other factors that may influence testing results to be able to determine that the decreasing positive rates reported by licensees are an unqualified indication of FFD program effectiveness. Nonetheless, the Commission is gratified to observe the continuing downward trend in licensee employees' positive random test results during the past three years. The recently published NUREG/CR-5758, Volume 3, "Fitness for Duty in the Nuclear Power Industry: Annual Summary of Program Performance Reports," indicates that licensee employees' positive random testing rate in 1957 vas v.20 percent as compared to 0.28 percent in die Hoive in the Apositive rates for random testing of contractor and vendor personnel, viz., 0.56 percent in 1990, 0.55 percent in 1991, and 0.45 percent in 1992.

In making its decision, the Commission has considered these testing results along with the apparent continuing strength of the other elements of most licensees' FFD programs, the reduced invasion of employees' privacy interests, and the potential for cost savings. In light of this industry experience and of these beneficial effects, the Commission has concluded that it is reasonable at this time to lower the random testing rate for licensee employees and contractor and vendor personnel to 50 percent. The response to Comment 4 discusses the Commission's reasons for allowing reduction in the random testing rate for contractor and vendor personnel.

Comment. The random testing rate should be reduced to less than 50 percent.

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testing rates as positive testing results declined would likely discourage licensees from adopting lower screening cutoff levels and taking measures to detect attempts by users to avoid detection.

Lastly, a performance-based approach would require the collection and analysis of performance data to provide the bases for adjustments to the random testing rate. Such data is not currently collected by the licensees or the NRC. Previous efforts known to the NRC staff to identify and analyze the many candidate performance indicators for measuring the effectiveness of random testing have been inconclusive, primarily because of the numerous variables. Furthermore, assuming that the proper performance indicators can be developed, it would appear that the collection and analysis of data to support a performance-based approach would add a considerable administrative burden to both licensees and the NRC.

For all these reasons and until further experience is gained that would support a performance-based approach, the Commission declines to adopt such an approach to setting the random testing rate.

 Comment. The reduction in the random testing rate should be applied to all workers.

Four of the 30 commenters on this issue - three unions and one licensee - supported the Commission's proposal that licensees maintain the 100-percent random testing rate for contractor and vendor employees. Their reasons included a concern for lack of commitment by contractor employees to maintaining the industry's high drug-free standard and the need for the higher testing rate to provide continued deterrence for contractor employees. One of

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the three unions recommended that long-term contractors should have the same lower random testing rate as that of licensee employees because test results of long-term contractors and licensee employees have been almost identical.

There were several issues consistently mentioned by those 26 commenters who opposed maintaining the 100-percent random testing rate for contractor and vendor employees. There was a general concern for unnecessary inconsistencies in random testing rates between Federal agencies. Commenters recommended that the NRC program be kept as consistent as possible with programs in other Federally regulated safety-related industries. These include the DOT programs that currently require contractors and vendors to be randomly tested at a 50-percent rate.

Various licensees cited the testing results from 1990 and 1991 which, in their opinion, create no statistically sound rationale for testing contractor and vendor employees at a rate different from that of licensee employees. They argued that, while the contractor/vendor positive testing rate has been twice that of licensee employees, it is still low enough to make unnecessary the expenditure of the resources necessary to maintain two separate random testing pools.

Various commenters noted that contractors and vendors are subject to the identical access authorization and other FFD program requirements as are licensee employees, including behavioral observation. These stringent requirements, in their view, obviate the need to keep the contractor/vendor random rate at 100 percent. Some also noted that the deterrent value of random testing is in the act of testing itself and not in what many consider to be a high rate of testing. Some commenters warned that keeping contractors and vendors at 100 percent could be construed as discriminatory against those

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employees and may be perceived as punitive rather than as a corrective measure. Two licensees also cited a study of the detection effectiveness of nine random testing rates published in NUREG/CR-5784, "Fitness for Duty in the Nuclear Power Industry: A Review of the First Year of Program Performance and an Update of the Technical Issues," which indicates that a 100-percent testing rate is only a little more effective than a 50-percent rate for detecting occasional drug users.

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NRC Response

Although there is a difference between the positive results of random testing of licensee employees and those of contractor and vendor employees, the positive random testing rate of both groups has been less in each year since 1990 there is a general downward trand of the results of random testing, as stated Although the contractor/vendor random in the response to Comment 1 above. testing positive rates continue to be about twice the rate for licensee employees and statistical analysis of the data shows that the difference in proportion between the contractors' and licensees' employees is not explained within statistical fluctuations (therefore, differences in the rates are statistically significant), the Commission agrees that the absolute numbers of positive test results of all categories of nuclear power workers are low. Therefore, the Commission agrees with those commenters who contend that the testing results during the past three years do not justify making a distinction between these groups insofar as the random testing rate is concerned and will permit its licensees to lower the random testing rate to 50 percent for all persons covered by 10 CFR Part 26. However, the Commission

will continue to monitor licensee program performance and effectiveness and will make program adjustments as necessary.

In response to the comments regarding the study of the detection effectiveness of nine random testing rates published in NUREG/CR-5784, the Commission notes that the study explicitly dealt with only the hypothetical detection effectiveness of those alternatives. It did not address their relative deterrence effectiveness. While it may be that the effectiveness of a 100-percent random testing rate for deterring occasional drug users could be slightly higher than that of a 50-percent rate, the Commission nonetheless believes that a 50-percent random testing rate will provide sufficient deterrence to drug and alcohol abuse by contractor and vendor employees.

With respect to commenters' concerns about unnecessary inconsistencies in random testing rates between Federal agencies, the Commission continues to believe that the random test rate for employees in the nuclear power industry need not be similar to the rates applied to employees in all, or even most, other Federal agencies or Federally mandated programs. Not all Federal agencies have identical safety concerns or responsibilities.

5. Comment. There should be no difference in the random testing rate for certain positions critical to the safe operation of a nuclear power plant.

Seventeen commenters responded to the Commission's question as to whether certain positions critical to the safe operation of a nuclear power plant, such as licensed reactor operators, should be excluded from any reduction of the random testing rate. All these commenters recommended against such differentiation. Two licensees stated that treating people in

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positions critical to safety differently from other employees could have a negative effect on the morale, self-image, and motivation of this group of highly trained and dedicated specialists. Another stated that all plant employees are critical to safe operation. Therefore, a reduction in the random testing rate should apply to all employees. The potential for added record-keeping requirements creating unnecessary burdens for the industry was another reason for not making this distinction. In the opinion of one commenter, the 1990-1992 industry-wide program performance data do not support testing people in positions critical to safety at a different rate than that applied to other licensee employees. Finally, one licensee cited potential problems getting union agreement to testing this classification of employees at a higher rate than other licensee personnel subject to the FFD rule.

NRC Response

The essence and unanimity of these comments -- that licensed operators and other employees in positions critical to the safe operation of a nuclear power plant should not be excluded from a reduction of the random testing rate -- is not surprising. These particular members of the nuclear power industry's workforce have collectively demonstrated their dedication to safe and efficient plant operations. As at least one commenter noted, the industry's program performance data for the first three years of operation do not support differentiating between people in safety-critical positions and other licensee employees insofar as the random testing rate is concerned. The 1992 program performance data, for example, show that eighteen of the industry's approximately 5,000 licensed operators tested positive for drugs or

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alcohol or otherwise violated the licensee's FFD policy; twelve of these were a result of random testing. When comparing these results to the 461 positive results out of 156,730 random tests administered to the industry workforce, the difference in proportion between the licensed operators and the industry workforce is within statistical fluctuations and the difference in the second field of the statistical fluctuations and the difference in the second field of the statistical fluctuations and the difference in the second field of the statistical fluctuations and the difference in the second field of the statistical fluctuations and the difference in the second field of the statistical fluctuations and the difference in the second field of the statistical fluctuations and the second down even further, this record does not merit testing people in these positions at a rate different from that applied to other licensee employees. The Commission, therefore, concurs with the commenters' recommendation that certain positions critical to the safe operation of a nuclear power plant, such as licensed reactor operators, should not be excluded from a reduction of the random testing rate.

Comment. Random testing is expensive and produces false positives.
Furthermore, chronic users are able to avoid detection.

Two commenters, a power plant worker and a union, argued against the usefulness of continued random testing. One of these commenters stated that random testing produces false positives. These cost the industry large amounts of money in settlements and damage the public's perception of licensees' fairness. As additional support for this position, this commenter warned that chronic drug abusers are particularly adept at escaping detection from random testing by subverting the testing process. The other commenter recommended that random testing be eliminated because it is not effective in identifying workers who are impaired at the time urine samples are collected.

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