



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555-0001

January 3, 1994

The Honorable Joseph Lieberman, Chairman
Subcommittee on Clean Air and Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Nuclear Regulatory Commission is amending its Fitness-for-Duty Rule [10 CFR Part 26, which was published in the Federal Register on June 7, 1989 (54 FR 24468)] to permit licensees to reduce the random testing rate for all persons covered by the rule to 50 percent.

Enclosed for your information is a copy of the amendment to the rule as approved by the Commission for publication in the Federal Register.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis K. Rathbun".

Dennis K. Rathbun, Director
Office of Congressional Affairs

cc: Senator Alan Simpson

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UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

January 3, 1994

The Honorable Philip Sharp, Chairman
Subcommittee on Energy and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Nuclear Regulatory Commission is amending its Fitness-for-Duty Rule [10 CFR Part 26, which was published in the Federal Register on June 7, 1989 (54 FR 24468)] to permit licensees to reduce the random testing rate for all persons covered by the rule to 50 percent.

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Dennis K. Rathbun, Director
Office of Congressional Affairs

cc: Representative Michael Bilirakis



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555-0001

January 3, 1994

The Honorable Richard Lehman, Chairman
Subcommittee on Energy and Mineral Resources
Committee on Natural Resources
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Nuclear Regulatory Commission is amending its Fitness-for-Duty Rule [10 CFR Part 26, which was published in the Federal Register on June 7, 1989 (54 FR 24468)] to permit licensees to reduce the random testing rate for all persons covered by the rule to 50 percent.

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Dennis K. Rathbun, Director
Office of Congressional Affairs

cc: Representative Barbara Vucanovich



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D. C. 20555-0001

January 3, 1994

The Honorable Tom Beville, Chairman
Subcommittee on Energy and Water Development
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Nuclear Regulatory Commission is amending its Fitness-for-Duty Rule [10 CFR Part 26, which was published in the Federal Register on June 7, 1989 (54 FR 24468)] to permit licensees to reduce the random testing rate for all persons covered by the rule to 50 percent.

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Dennis K. Rathbun, Director
Office of Congressional Affairs

cc: Representative John Myers



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

January 3, 1994

The Honorable J. Bennett Johnston, Chairman
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Nuclear Regulatory Commission is amending its Fitness-for-Duty Rule [10 CFR Part 26, which was published in the Federal Register on June 7, 1989 (54 FR 24468)] to permit licensees to reduce the random testing rate for all persons covered by the rule to 50 percent.

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Dennis K. Rathbun, Director
Office of Congressional Affairs

cc: Senator Mark O. Hatfield

January 3, 1994

The Honorable Joseph Lieberman, Chairman
Subcommittee on Clean Air and Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Identical letters were
sent to Lehman, Sharp,
Bevill, and Johnston

Dear Mr. Chairman:

The Nuclear Regulatory Commission is amending its Fitness-for-Duty Rule [10 CFR Part 26, which was published in the Federal Register on June 7, 1989 (54 FR 24468)] to permit licensees to reduce the random testing rate for all persons covered by the rule to 50 percent.

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Sincerely,

Original signed by/

Dennis K. Rathbun, Director
Office of Congressional Affairs

cc: Senator Alan Simpson

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Draft of letter was approved
as part of rulemaking package
signed by EDO on 11/4/93

Office	PSGB/NRR	BC:PSGB:NRR	D:OCA		
Name	LBush	PFMcKee	DRathbun		
Date	12/22/93	12/13/93	12/13/93		

NUCLEAR REGULATORY COMMISSION
10 CFR Part 26
RIN 3150-AE38
Modifications to Fitness-For-Duty
Program Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations governing fitness-for-duty (FFD) programs that are applicable to licensees who are authorized to construct or operate nuclear power reactors and to licensees authorized to possess, use, or transport formula quantities of strategic special nuclear material (SSNM). The amendment permits licensees to reduce the random testing rate for all persons covered by the fitness-for-duty regulations to an annual rate equal to 50 percent.

EFFECTIVE DATE: January 1, 1994.

ADDRESSES:

Copies of the regulatory analysis, the comments received, and the Government Accounting Office (GAO) report (GAO/GGD-93-13) of November 1992 may

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be examined at the NRC Public Document Room, 2120 L Street NW, (Lower Level), Washington, DC.

Copies of NUREG-1354, NUREG/CR-5758 (Volumes 1, 2, and 3), and NUREG/CR-5784 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies are also available from the National Technical Information Service, 5282 Port Royal Road, Springfield, VA 22161. A copy is available for inspection and/or copying for a fee in the NRC Public Document Room, 2120 L Street NW, (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Loren L. Bush, Jr., Safeguards Branch, Division of Radiation Safety and Safeguards, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 504-2944.

SUPPLEMENTARY INFORMATION:

Background

The NRC has reviewed experiences gained since publication of the current FFD rule on June 7, 1989 (54 FR 24468), and implementation by power reactor licensees on January 3, 1990, and determined that it may be appropriate to modify the random testing rate. Accordingly, on March 24, 1993 (58 FR 15810), the Commission published a proposed modification to the FFD rule that would permit a reduction in the random testing rate for licensee employees, but maintain the 100-percent random testing rate for contractors and vendors.

Summary of Public Comments

The comment period expired on June 22, 1993. Forty comment letters were received. Twenty-eight were from power reactor licensees, six from unions, one from an industry association, one from a vendor, three from licensed reactor operators, and one from a private citizen. There was overwhelming support for the proposed reduction in the annual rate of random testing for licensee employees. Most of the commenters believed that the reduced rate also should apply to contractors and vendors, and several commenters proposed a flexible, performance-based rate. There was no support for excluding from any reduction in the random testing rate certain positions critical to the safe operation of a nuclear power plant, such as licensed reactor operators. A summary of the comments received and the NRC's responses are presented below.

1. Comment. The random testing rate for licensee employees should be reduced to 50 percent.

All of the 23 commenters submitting comments on the Commission's proposed reduction of the random testing rate to 50 percent for licensee employees supported the proposal. The reason most often expressed was the low rate of positive random test results experienced by licensee employees, particularly in comparison with other industries having significant safety concerns. These commenters believe that this low industry-wide positive rate justifies the lowering of the random testing rate to 50 percent. Some commenters stated that a 50-percent rate for licensee employees would make

that rate consistent with the random testing rate currently required in the substance abuse programs mandated for entities regulated by the agencies within the Department of Transportation (DOT), including the Federal Aviation Administration and the Federal Highway Administration. They also noted that DOT is currently considering lowering its proposed random testing rate below 50 percent even though Federal Highway Administration data, for example, indicate a significantly higher positive rate than that experienced among NRC licensee employees. Another commenter pointed out that the lowered random testing rate for licensee employees subject to the NRC's FFD rule also would be consistent with the random rate applied in the Commission's own internal drug testing program.

Other commenters supported the reduction with the expectation of significant cost savings for licensees as a result of only testing approximately one-half the number of employees now being tested. In this regard, the Nuclear Management and Resources Council (NUMARC) made reference to the November 1992 GAO report, "Employee Drug Testing: Opportunities Exist To Lower Drug-Testing Program Costs" (GAO/GGD-93-13), which suggests reduced random testing rates as a means of producing cost efficiencies in Federally mandated drug testing programs without adversely affecting program integrity.

Concerning the relative effectiveness of alternative random testing rates, some commenters believe that a 50-percent random testing rate would produce satisfactory deterrence of drug and alcohol abuse. This is particularly true in light of the fact that other FFD program elements, such as program awareness training and behavioral observation, and the access authorization program will continue to inhibit such behavior. Two commenters

also supported the proposed change because it would lessen the disruption of workers lives and reduce the invasion of privacy that random drug testing creates.

NRC Response

The NRC concurs with those commenters who stated that a 50-percent random testing rate as applied to licensee employees can be expected to provide sufficient deterrence to justify lowering the rate at this time. It also agrees with the observation that the access authorization program and other FFD program elements, such as policy communications and awareness training, behavioral observation, for-cause testing, employee assistance programs, and the imposition of strict sanctions for violations of an FFD policy will continue to deter drug and alcohol abuse by most of the workforce. As some commenters noted, requiring fewer tests of licensee employees should decrease the privacy invasion experienced by some employees. It also should result in cost savings across the industry by reducing lost work hours and the number of tests to be administered.

The Commission recognizes that positive results in the nuclear power industry's random testing are generally among the lowest of any U.S. industry. Nonetheless, it realizes that there are many variables that can affect the rate of positive testing results and that relatively low positive test results, by themselves, are not the only indicator of the effectiveness of a testing program either on an industry-wide or a licensee program level. Some of the variables that could affect the testing results are the propensity of the population being tested to use drugs and alcohol, the effectiveness of

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 decreasing positive rates in licensee employees' 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 1992 was 0.20 percent as compared to 0.28 percent in 1990 and 0.22 percent in 1991. There also have been decreasing positive 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.

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

Four commenters recommended that the random testing rate be reduced to less than 50 percent. The rates they recommended varied from 5 percent to 25 percent. Their central argument was that the random testing rate can be lowered substantially without threatening the effectiveness of the program. The very low rates of drug and alcohol positive tests that have been recorded by the nuclear industry during the first two years of FFD program operations are the basis for their recommendation. One licensee stated that most chronic drug users probably have been eliminated and currently there is not a serious drug or alcohol abuse problem in the industry. This commenter and NUMARC also cited the GAO study that found that the percentage of positives does not vary significantly among Federal agency drug testing programs, regardless of what random rate is used. Another licensee emphasized that behavioral observation, not random testing, is the most potent tool in detecting drug abuse. Another commenter recommended that the NRC consider further reductions because the effectiveness of other program elements makes a random rate of even 50 percent unnecessarily high.

Significant cost savings was given as the most compelling reason to reduce the random rate below 50 percent. One licensee estimated the industry would save up to \$30 million annually without degradation of the overall program.

NRC Response

As stated in the response to Comment 1 above, positive random testing results are not, by themselves, the only indicator of the FFD program's effectiveness in detecting substance abuse. The NRC does not have sufficient

information about the many variables that could affect testing results to be able to determine that a lower random testing rate would maintain an acceptable level of program effectiveness. Therefore, the Commission believes that the industry's relatively low numbers of drug and alcohol positive random test results should not be used as the sole justification for lowering the random testing rate below 50 percent. While behavioral observation and for-cause testing are valuable program elements, there still must be a strong random testing program that provides an adequate level of detection and deterrence. The Commission continues to believe that it must choose a conservative and prudent random testing rate that maximizes both detection and deterrence of substance abuse while minimizing the monetary and social costs of such testing. The Commission believes that a 50-percent random testing rate will strike the proper balance between the dictates of public health and safety, the financial needs of licensees, and the privacy and other interests of workers subject to the testing requirement. Given the substantial unknowns currently associated with the true detection and deterrence effectiveness of alternative random testing rates as applied to the particular conditions of the nuclear power industry workforce, the Commission believes that it cannot establish a random testing rate lower than 50 percent for any segment of the industry at this time.

It should also be noted that relatively low positive test rates do not necessarily indicate that there is not a drug and alcohol abuse problem, as some commenters asserted. First, some users have become adept at avoiding detection, and the use of increasingly effective subversion techniques may be one reason why random testing results are decreasing. Second, while it may be that most of the chronic drug users who were in the industry when the program

started have been detected or have left, there can be expected to be a continuing level of intermittent illegal drug use and alcohol abuse among industry employees; such use is difficult to detect. The Commission concludes that the low positive random test results do not indicate that there has ceased to be a drug and alcohol abuse problem and that further reduction in the random testing rate would not be appropriate at this time.

In response to the commenters' reference to the GAO's observation that the percentage of positives does not vary significantly among Federal agency drug testing programs, the NRC notes that the GAO's objective in that report was to identify potential cost savings in Federal employee drug testing programs. Its objective did not include determination of the relative deterrent values of alternative random testing rates. In accomplishing its objective, the GAO properly concentrated on only the costs associated with Federal employee drug testing. It did not perform an indepth analysis of the several variables that influence testing results nor of the very complex relationship between those variables and the deterrence value of testing. Such variables would include the inclination for drug or alcohol abuse among the employees in the various industries in which the Federal testing programs operate, the extent to which the strength and effectiveness of other, non-testing program elements, such as drug awareness training, may affect testing results, and the relative stringency of sanctions imposed by the various Federal agencies following positive test results. Because the GAO's objective was to address the cost rather than the deterrence effectiveness of testing, the NRC does not consider the commenter's reference to the GAO's observation to be a persuasive argument for reduced random testing rates.

The NRC will continue to monitor implementation of the rule and will modify the rule in response to industry experience, advances in technology, or other considerations to ensure that the rule is achieving the general performance objectives set forth in 10 CFR Part 26.

3. Comment. The random testing rate should be flexible and based on performance, such as the positive rate of random testing.

Twelve commenters recommended that the Commission allow some form of performance-based approach to determine the random testing rate. Under such a system, the random testing rate would vary over time. This would depend on each licensee's or, alternatively, the industry's positive random test results from a previous period. One licensee, for example, suggested that each licensee's random testing rate should be based upon that particular licensee's previous 12-month testing results. Under this approach, a licensee would be subject to a minimum 50-percent random testing rate if it experienced a positive rate of greater than 0.50 percent during the previous 12 months. That licensee could reduce its random rate to 25 percent if it subsequently had a 12-month positive rate between 0.25 percent and 0.50 percent or to as low as 10 percent if its positive rate for the previous year was less than 0.25 percent. Three other licensees recommended similar schemes whereby a licensee's random rate would be determined by its own record of positive test results. One of these recommendations based the rate on the results of the previous 2 years rather than those of the previous 12 months.

NUMARC proposed that the industry-wide random testing rate be determined by the industry-wide random testing results from the previous period. This

recommendation was endorsed by five licensees. Under NUMARC's proposed approach, the industry would be allowed by regulation to adjust its random testing rate based on testing results from the previous reporting period. All licensees would be required to test at a 100-percent random rate if the industry-wide positive rate were greater than 1.0 percent in the previous period, at a 50-percent random rate if the positive rate was between 0.50 percent and 1.0 percent, at a 25-percent random rate if the positive rate was between 0.25 percent and 0.50 percent, and at a 10-percent random rate if the positive rate was less than 0.25 percent. Two of the eleven licensees favoring a performance-based testing system provided a general recommendation that did not specify whether the random testing rate should be based on the positive testing results of each individual licensee, or on the results of the industry as a whole.

The commenters noted various potential advantages of adopting a performance-based approach to setting the random testing rate. One stated that adopting such an approach would be consistent with the NRC's initiative to identify performance-based programs that would be beneficial to the industry. Another listed cost savings, equity in that each licensee's random rate would be commensurate with its program performance, and an incentive for licensees to maximize program conformance with the FFD rule as advantages of such an approach.

NRC Response

During development of 10 CFR Part 26 in 1989, the Commission considered a variation of the flexible, performance-based random rate similar to the

approaches recommended by these commenters. (See, for example, the NRC's response to Comment 7.4.2 in NUREG-1354, "Fitness for Duty in the Nuclear Power Industry: Responses to Public Comments.") At that time, the Commission decided against adopting a performance-based rate for various reasons. As stated above, positive random testing results are not the only indicator of detection and deterrence effectiveness or of overall random testing program performance to allow the testing rate to vary with testing results. Adopting a performance-based approach would tend to discourage the initiatives that the Commission is encouraging in 10 CFR 26.24(b) and in Section 2.1 of Appendix A to Part 26. In § 26.24(b), the NRC allows licensees to implement programs with more stringent standards, for example, lower screening and confirmation cutoff levels and a broader panel of drugs than those specified in the rule. In Section 2.1 of Appendix A, licensees are permitted to test for any illegal drugs during a for-cause test or analysis of specimens suspected of being adulterated or diluted. Program performance data for the first three years of FFD program implementation have shown that those licensees using screening cutoff levels for marijuana that are lower than the maximum allowed 100 nanograms per milliliter (ng/ml) have had a higher percentage of confirmed positive results than those screening at 100 ng/ml. (See NUREG/CR-5758, Vols. 1-3.) Licensees that employ special measures to detect attempts to dilute specimens or flush metabolites from the body report that their positive rate is about doubled. This result is similar to data presented to the Department of Health and Human Services' Drug Testing Advisory Board on June 10, 1993, and reported in "The National Report on Substance Abuse" on June 18, 1993. (The study is currently undergoing peer review before publication.) Adopting a performance-based approach that allowed licensees to reduce their random

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.

4. 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

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

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.

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, as stated in the response to Comment 1 above. While the contractor/vendor random 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 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 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 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 positive rates is not statistically significant. While the NRC expects licensees to continue to take action to drive this number of positives 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.

6. 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.

For-cause testing, in this commenter's opinion, is more effective because it more accurately reflects a worker's present ability to perform his/her job at the time he/she is tested. This commenter also stated that random testing appears to be a means of having the NRC enforce the Controlled Substances Act which is not the NRC's responsibility.

NRC Response

The Commission has long been well aware of the types of FFD program-related concerns as addressed by these commenters. During the promulgation of 10 CFR Part 26 in 1989, the Commission fully addressed these and many other such concerns. (See NUREG-1354, "Fitness for Duty in the Nuclear Power Industry: Responses to Public Comments.") At that time the NRC concluded, for example, that licensee FFD programs should be concerned not only with impairment, but also with worker reliability and trustworthiness. The NRC believes that any illegal drug use or alcohol abuse by a worker reflects upon his or her trustworthiness and reliability. Likewise, random testing is not intended, nor has it ever functioned, as a means to enforce the Controlled Substances Act. Section 26.29(b) provides that licensees, contractors, and vendors shall not disclose test results to law enforcement officials unless those officials request such information under court order. It also is noted that there is no requirement to routinely provide such officials with testing results.

The Commission is well aware that there is a potential for false positive results and, therefore, has required numerous quality control measures and safeguards to prevent such occurrences. In Appendix D to

NUREG/CR-5758. Volume 3, the testing process errors that were reported by licensees during the first three years under the FFD rule were analyzed. Of over 800,000 specimens tested, there were two false positives of personnel specimens reported by the laboratories, both due to administrative errors. In both cases, the quality assurance programs detected and corrected the problem.

Because of the NRC's particular concern with the degree to which the testing process can be subverted, the Commission staff has continued to track the ways in which workers have subverted testing processes in industries across the country. These efforts have resulted in staff recommendations for amending 10 CFR Part 26 to introduce various means for combatting subversion. Lastly, the Commission believes that the added protection of public health and safety that the FFD program provides is well worth the industry's costs of administering this program.

7. Comment. Maintaining two separate populations of workers for random testing is an unnecessary and expensive burden.

Some of the commenters stated that requiring two random testing rates would force licensees to develop two separate testing programs. The resulting additional administrative and financial burdens would cancel out any savings resulting from reducing the licensee employee rate to 50 percent. NUMARC stated that the industry would save approximately \$4.1 million if the number of tests of contractor and vendor employees was cut in half.

NRC Response

Some of the comments noted above asserted that separate random testing rates for licensee employees and contractors/vendors would create additional administrative and financial burdens for licensees. Although this issue is somewhat moot since the Commission will permit licensees to reduce the random testing rate to 50 percent per year for all persons covered by Part 26, the Commission does not concur that conducting random testing using two random rates would have caused appreciably higher administrative or operating costs. Presumably, most licensees' data bases already distinguish between licensee employees and contractor/vendor employees subject to testing. Numerous commenters on the initial rule in 1989 indicated that the workforce population should be separated so that permanent employees would not be tested at a much higher rate to make up for contractors who might not be on site when selected for testing (see comment/response 7.4.3 of NUREG-1354). The NRC staff understands that several licensees have divided their testing population as permitted by the rule. The number and identity of licensee employees in the testing pool remains rather constant over time. The number and identity of contractor/vendor employees in the testing pool, on the other hand, varies quite considerably over time depending on outages and other operational considerations. A licensee may choose to create more than one test population so that it may test portions of its workforce at a greater rate or reduce the burden on its employees from being tested at a higher rate to compensate for the testing of contractors and vendors not normally on site.

8. Comment. The Commission should modify certain portions of 10 CFR Part 26 based on industry experience and lessons learned and incorporate numerous program enhancements as discussed at various industry forums.

Eight commenters recommended that the Commission make future modifications to certain portions of 10 CFR Part 26 based on industry experience and lessons learned and incorporate numerous program enhancements as discussed at various industry forums.

NRC Response

The specific recommendations for ways in which Part 26 can be improved and numerous other program enhancements are currently being considered by the NRC in conjunction with a general package of rule revisions currently under development.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, the NRC has not prepared an environmental impact statement, nor an environmental assessment for this final rule.

Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) These requirements and amendments were approved by the Office of Management and Budget, approval number 3150-0146.

Since the rule will permit licensees to reduce the random testing rate for their employees, the resulting reduction in the reporting and recordkeeping burden is expected to be an average of 223 hours per site, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Information and Records Management Branch (MNBB-7714), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-3019 (3150-0146), Office of Management and Budget, Washington, DC 20503.

Regulatory Analysis

The NRC has prepared a regulatory analysis for this regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The analysis is available for inspection in the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, DC. Single copies of the analysis may be obtained from Loren L. Bush, Jr., Division of Radiation Safety and Safeguards, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 504-2944.

Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only the licensing and operation of nuclear power plants and activities associated with the possession or transportation of Category I material. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards issued by the Small Business Administration in 13 CFR Part 121.

Backfit Analysis

The rule represents a relaxation from current Part 26 requirements for drug testing since the rule permits (but does not require) licensees to reduce the random testing rate for all persons covered by the rule. Accordingly, the rule does not represent a backfit as defined in 10 CFR 50.109(a)(1), and a backfit analysis is not required for this rule.

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, Hazardous materials transportation, Management actions, Nuclear materials, Nuclear power plants and reactors, Penalties, Protection of information, Radiation

protection, Reporting and recordkeeping requirements, Sanctions, Special nuclear materials.

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. 552 and 553, the NRC is adopting the following amendment 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, 939, 948, as amended (42 U.S.C. 2073, 2111, 2112, 2133, 2134, 2137, 2201); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846).

2. In § 26.24, paragraph (a)(2) is revised to read as follows:

§ 26.24 Chemical and alcohol testing.

(a) * * *

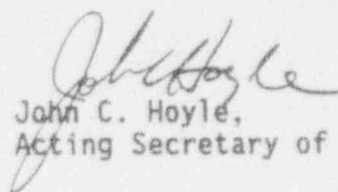
(2) Unannounced drug and alcohol tests imposed in a statistically random and unpredictable manner so that all persons in the population subject to testing have an equal probability of being selected and tested. The tests must be administered so that a person completing a test is immediately eligible for another unannounced test. As a minimum, tests must be administered on a nominal weekly frequency and at various times during the

day. Random testing must be conducted at an annual rate equal to at least 50 percent of the workforce.

* * * * *

Dated at Rockville, Maryland, this 29th day of December, 1993.

For the Nuclear Regulatory Commission


John C. Hoyle,
Acting Secretary of the Commission