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USNRC

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October 4, 1982
OFFICE OF SECRETARY
REGULATING & SERVICE
BRANCH

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

DOCKET NUMBER
PROPOSED RULE PR-50
(47 FR 33980) ⁴²

Re: Proposed Regulation on Fitness for Duty
10 CFR §50.54

Dear Sir:

Consolidated Edison Company of New York, Inc. ("Con Edison") submits these comments concerning the proposed regulation on fitness for duty of personnel with unescorted access to protected areas of commercial and industrial facilities licensed under 10 CFR §50.22 (primarily nuclear power plant licensees) pursuant to the notice published in 47 Fed. Reg 33980(1982).*

The proposed rule would require each licensee to establish, document, and implement written procedures to ensure

* The proposed regulation provides:

§50.54 Conditions of licenses.

(x)(1) Each licensee with an operating license issued under §50.21(b) or §50.22 shall establish, document, and implement adequate written procedures designed to ensure that, while on duty the licensee's and its contractors' personnel with unescorted access to protected areas are not -

- (i) Under the influence of alcohol;
- (ii) Using any drugs that affect their faculties in any way contrary to safety; or
- (iii) Otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any way contrary to safety.

(2) Each licensee shall maintain the written records of these procedures for the life of the plant.

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Acknowledged by card 10/7/82 emp

that licensee and contractor personnel with unescorted access to protected areas are not under the influence of drugs or alcohol or otherwise unfit for duty. For the reasons set forth below, Con Edison recommends that the U.S. Nuclear Regulatory Commission (the "Commission") initially promote implementation of fitness for duty programs through the issuance of a policy statement rather than the proposed regulation. The need for rulemaking might be reassessed in the future based upon the experience gained pursuant to the policy statement.

A. Adequate Means Now Exist For Accomplishing
The Commission's Purpose.

In light of the information presented in NUREG-0903, "Survey of Industry and Government Programs to Combat Drug and Alcohol Abuse," Con Edison seriously questions the need for the proposed rule. It is apparent from a review of the NUREG that utilities are aware of the potential danger associated with the use of alcohol or drugs by those employed at nuclear facilities and have developed and implemented policies which include stringent disciplinary measures should drug or alcohol use by those at nuclear plants be found to occur. Con Edison's practice has been the immediate suspension of employees who are under the influence of alcohol and the immediate involvement of the medical department for any employee who is under the influence of drugs. This practice is documented in the Con Edison supervisor's guide to personnel practice and procedures.

Although the Commission is quite properly concerned with alcohol and drug-related incidents at nuclear plants in the past few years, it is important to emphasize that the total number of incidents is very few compared to the extremely large work force in the nuclear industry.* Indeed, we believe that the relatively few such incidents to date demonstrate that the policies and disciplinary measures now in force at most sites, together with the high degree of professionalism and sense of responsibility of the vast majority of those employed at nuclear facilities, are effective in curtailing the type of behavior which prompted the Commission to issue the proposed rule.

* Indeed, no program which could be mandated by the Commission or adopted by licensees could ensure the elimination of all alcohol and drug-related incidents.

In addition, the new American National Standard, ANSI/ANS-3.3-1982 sets forth a detailed access authorization program for nuclear facilities which includes the evaluation of the use of drugs and alcohol or a history of emotional instability that may cause a significant defect in the individual's judgement. Endorsement of this ANSI standard by the Commission in a policy statement would also obviate the need for a rule.

Since numerous measures are already being developed and implemented at most sites to cope with the Commission's concern, the imposition of new requirements, including the possible routine use of breathalizers and blood tests, would have an adverse effect on employee morale because (1) they may be seen as reflecting a lack of trust by management in the ability of employees to fulfill their duties in a responsible manner, and (2) they would add yet another potential bodily intrusion to those now legally permitted. Further, employees subject to the proposed regulation would be singled out from other occupations which affect the welfare of large numbers of people. Highly qualified personnel may be discouraged from pursuing or continuing a career subject to such repetitive physical intrusion.*

B. Implementation of the Regulation Would Be Difficult.

The proposed rule would be extremely difficult to implement. Some persons could assert that it requires screening of personnel prior to each separate access to the protected area. Generally, contact with personnel entering the area extends for a period of approximately thirty seconds. During that time, the licensee would be unable to assure that no

* The ANSI standard exempts certain individuals who were continuously employed for two or three years depending on the specific screening technique or relevant area. For example, a criminal conviction record check is not required for individuals with unescorted access to protected areas if they have been employed for two years. The record check is required for individuals with unescorted access to vital areas unless they have been employed for three years. A similar exemption in the regulation, if adopted, is recommended for reactor operators since it would lessen the impact on operators' morale.

one would enter the plant unfit for duty because of the influence of alcohol, drugs or otherwise. Further, the routine use of breathalizers or blood tests upon entrance to a protected area would result in an impractical consumption of time. In addition, the use of such physical tests would be costly in terms of training personnel in their use and incorporating written procedures.

If the rule is interpreted to require reasonable cause to believe an individual is intoxicated or under the influence of a drug prior to compelling him or her to submit to physical tests, the proposal adds little or nothing to procedures currently in force at most utilities. See NUREG 0903. On the other hand, since the rule can reasonably be read to require physical testing of each individual each time access to protected areas is permitted,* the resulting cost in both time and money is manifestly unreasonable. For example, at Indian Point No. 2, approximately 750 individual entries into protected areas are made daily, not including outage periods, when as many as 2000 entries may be made daily. The inordinately large cost in both time and money to perform possibly several hundred thousand physical tests every year is obvious.

If behavioral observation is relied upon instead of routine physical testing, the proposed rule would require intensive training of supervisory and security personnel; while individuals who are obviously under the influence of alcohol or drugs might be easily detected, supervisory and security personnel would hardly be qualified, even with limited intensive training, to recognize or evaluate more subtle forms of individual instability which affect fitness for duty. Indeed, the supervisor's and security officers' limited contact during ingress and egress of large numbers of people makes the fitness evaluation task insurmountable, especially given the Commission's proposal that licensees must ensure the fitness for duty of their employees. Licensees may tend to overzealously apply the rule to avoid potential violations and concomitant civil penalties.

* This is the only procedure by which one could ensure that alcohol or drug use has not occurred prior to entry into the protected area.

The rule is difficult to implement in other respects as well. It refers to personnel "using any drugs that affect their faculties in any way contrary to safety." This requirement could be interpreted to include drugs prescribed by a licensed physician or over-the-counter medications, which in certain clinical studies have been found to have an adverse effect on a small percentage of the population. The detection of whether licensee and contractor employees are using such drugs and what might be the potential effect of those drugs on the individual would entail both a burdensome, perhaps impossible task, and an unwarranted invasion of privacy.

With regard to the language of the proposed rule which refers to conditions under which a person is "otherwise unfit for duty," that terminology is hopelessly vague and can only lead to uncertainty in both implementation by licensees and enforcement by the NRC. In this regard, while easy to diagnose after the fact, the consideration of the effects of other factors than alcohol or drugs, such as fatigue, stress, illness, financial or personal problems, and temporary physical impairments make the rule impossible or at least extremely difficult to implement. Periodic medical and psychological examinations would appear to be necessary because of the consideration of the other factors. However, the licensee would still be unable to ensure that an individual is fit for duty.

The analogy to FAA regulations which the Commission has relied on in proposing this rule fails to consider the difference in emphasis of the two rules. While the FAA places the onus of maintaining crew members' fitness for duty on the individual crew members, the only ones who can ensure their own fitness for duty,* the proposed NRC regulation places the burden on utilities to assure compliance. Since only a small proportion of the employees at a nuclear facility are licensed by the NRC, the Commission's desire to hold the licensee responsible for the mental and physical state of those who have access to protected areas may be understandable. However, for all of the reasons set forth in this comment letter, it is, nevertheless, totally impractical.

A limitation of the employee population affected by the fitness for duty rule would aid in its implementation. Therefore, if the proposed regulation is adopted, restricting its application to persons with unescorted access to a vital area would be the preferred approach.

* 800,000 individual airmen are subject to the FAA rule.

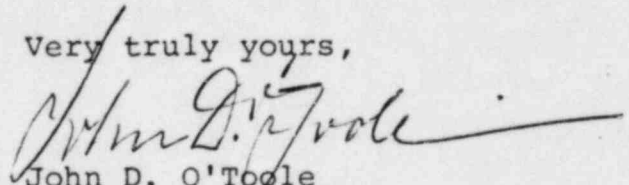
However, a restriction of the regulation's application to licensee employees and contractors is not satisfactory. If adopted, the rule should include all persons with unescorted access to the relevant area as defined by the rule. There is no rational reason to believe that persons not employed by the utility are immune to problems with drugs or alcohol or other impairments which influence safety. The proposed rule exempts NRC personnel. In fact, the rule as written exempts all individuals except licensee and contractor employees. The rule creates the possibility that all other government employees or NRC contractors who may be granted unescorted access for emergency services or inspection purposes will be exempted from its application.

C. Enforcement of the Regulation Would Be Difficult.

The proposed rule would be difficult to enforce. Factors such as stress, fatigue and illness which can influence an employee's fitness for duty give rise to subjective determinations by supervisors and enforcement officers. Any two opinions may differ and create unforeseen disparate treatment among licensees from inspector to inspector and region to region. In addition, should some event with adverse public safety consequences occur at the plant, and operator or contractor error be determined to have been the cause, impossible judgments would have to be made after the fact regarding the fitness for duty of the individual(s) involved at the time of the event. The question also arises as to how the Commission would train its enforcement officers in the ability to determine fitness for duty.

In conclusion, since adequate measures now exist to deal with this matter, and since the proposed regulation would be difficult and in some respects impossible to implement and fairly enforce, Con Edison recommends that the Commission's concerns expressed, at least initially, in a policy statement rather than a rule.

Very truly yours,



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Vice President

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Before the
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555
ATTN: Docketing and Service Branch

DOCKET NUMBER
PROPOSED RULE PR-50

(43)

(47 FR 33980)

In Re Personnel With Unescorted
Access to Protected Areas; Fitness for
Duty

10 CFR Part 50

Comments of the
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I. INTRODUCTION

The Washington Legal Foundation (WLF) offers the following comments on a proposal by the Nuclear Regulatory Commission (NRC) to require nuclear power plant licensees to implement fitness for duty programs so as to provide "greater assurance of safer and more reliable operation of nuclear facilities." 47 Fed. Reg. 33980 (August 5, 1982). Specifically, licensees would be required to establish and implement controls designed to assure that personnel with unescorted access to protected areas are not under the influence of drugs or alcohol or otherwise unfit for duty. Id. A "protected area" is an area encompassed by physical barriers and to which access is controlled. Id. at 33981.

At present, the establishment of specific criteria to be used for determining fitness for duty and the specific methods for implementation of the required program have been left to the individual licensees. Id. at 33981. WLF believes that NRC should keep these provisions in its final rule. It is important that licensee have adequate flexibility to develop a fitness for duty program that takes into account the conditions unique to its facility. The establishment of specific criteria for all nuclear plant licensees would impose an unnecessary burden on an already financially-troubled industry.

II. INTERESTS OF THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation is a non-profit, public interest law firm organized and existing under the laws of the

District of Columbia for the purpose of engaging in litigation and administrative affairs in matters affecting the broad public interest. The Foundation was founded in 1977 and has more than 80,000 members and 120,000 supporters throughout the United States whose interests the Foundation represents.

WLF has filed numerous comments in the past on regulatory actions proposed by Federal Agencies including the Consumer Product Safety Commission, Environmental Protection Agency, Federal Communications Commission, Federal Reserve Board, Nuclear Regulatory Commission, and the Department of Energy, among others. WLF has also litigated extensively in Federal courts in opposition to unlawful regulations and in support of the rights of individuals and businesses.

III. COMMENTS OF THE WASHINGTON LEGAL FOUNDATION

The nuclear industry is unique. It offers this nation a relatively secure source of energy in an otherwise unstable energy market. However the dangers inherent in the production of nuclear energy demand comprehensive safeguards to ensure the public safety. These safeguards and other regulations promulgated by NRC in turn place a tremendous financial strain on the nuclear industry. Therefore, it is important that any new rules promulgated by NRC be as cost effective as possible so as to avoid imposing additional unnecessary expenses on nuclear plant licensees.

According to NRC, the proposed fitness for duty program is in response to an increase over the last three years in drug-related incidents in which licensee or contractor employees were arrested

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or terminated. The proposed rule is limited in scope. It applies only to personnel with unescorted access to protected areas of nuclear facilities.

WLF favors this limited application of the proposed rule. The narrow scope of the fitness for duty program is rationally related to NRC's objective of providing greater assurance of safer and more reliable operation of nuclear power plants and does not impose unnecessary costs on licensees. As NRC correctly points out, "any person with unescorted access to a protected area may have the opportunity to affect adversely the health and safety of the public through an unobserved act, whether intentional or inadvertent." Id. at 33980. A similar danger does not exist with personnel who do not have such access. While no employee should be permitted on the job site if unfit for duty, NRC should regulate the fitness of only those individuals whose conduct could jeopardize the public safety.

A. Establishment of Criteria to Determine Fitness for Duty and Methods of Implementing the Fitness for Duty Program.

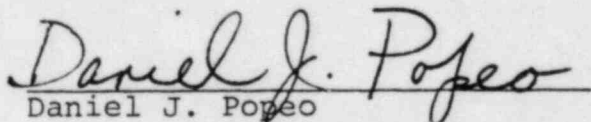
NRC should leave the establishment of criteria used to determine employee fitness and the methods of implementing the required fitness program to the individual licensees. The Commission states that it "wants to allow each licensee to develop procedure which take into consideration not only fairness to and due process for its employees, but also any conditions or circumstances unique to its facility." Id. at 33980. Establishment of industry-wide criteria and methods of implementation would defeat NRC's objective and only result in unnecessary costs to the industry.

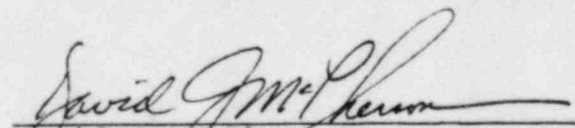
It is reasonable to assume then that each facility could design its own fitness for duty program tailored to its specific needs while meeting minimum NRC standards of insuring employee fitness for duty. The programs developed by the licensee would also be more cost efficient than any across-the-board program implemented by NRC. If NRC keeps the provisions allowing licensees to implement their own fitness programs, it will succeed in providing safer and more reliable operation of nuclear facilities, and the industry will avoid the extra costs normally associated with rigid agency procedures.

IV. CONCLUSION

For the foregoing reasons, the Washington Legal Foundation recommends that NRC keep the current broad language of the proposed rule in its final rule that will permit each licensee to design and implement its own fitness for duty program.

Respectfully submitted,


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