



OFFICE OF THE SECRETARY

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

RELEASED TO THE PDR

4/7/94 date initials

March 25, 1994

MEMORANDUM TO: James M. Taylor Executive Director for Operations
FROM: Samuel J. Chalk, Secretary
SUBJECT: SECY-94-016 - REEVALUATION OF THE SCOPE OF THE RANDOM DRUG TESTING REQUIREMENTS IN 10 CFR PART 26 (FITNESS -FOR-DUTY RULE)

The Commission (with all Commissioners agreeing) has approved publication of the request for information and comments in the Federal Register subject to incorporation of the changes in the attachment and the considerations listed below.

The changes provided in the February 15, 1994 Correction Notice to SECY-94-016 should be incorporated in the Notice.

The staff should carefully review the Notice to ensure that it is as informative as enclosure 1 of the SECY paper in describing alternatives.

The usefulness of the second part of question 3b may be limited unless evidence is forthcoming that a substance abuser is significantly more susceptible to blackmail than others who also engage in activities which might make them susceptible to blackmail, e.g., financial irregularities, criminal behavior, etc.

The staff should add material to the Federal Register notice which will identify "protected area" and "vital area" and apprise readers of the distinction between the two.

SECY NOTE: THIS SRM, SECY-94-016, AND THE VOTE SHEETS OF ALL COMMISSIONERS WILL BE MADE PUBLICLY AVAILABLE 10 WORKING DAYS FROM THE DATE OF THIS SRM

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The final Notice should be forwarded to the Secretary for signature and submission to the Federal Register.
(EDO) (SECY Suspense: 4/29/94)

Attachments:
As stated

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

UNITED STATES NUCLEAR REGULATORY COMMISSION

10 CFR Part 26

RIN 3150-XXXX

Consideration of Changes to Fitness-For-Duty (FFD) Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for Information and Comments.

In response to a Federal court decision, IBEW v. NRC, 966 F.2d 521 (1992),

SUMMARY: The Nuclear Regulatory Commission (NRC) is evaluating alternative approaches for designation of persons who should be subject to the random drug testing at nuclear power plants. In the evaluation, the staff has identified several issues that have a significant bearing on whether the current approach should be revised. Public comments are requested on these issues to aid the staff in completing their evaluation. If any changes are developed to current regulations as a consequence of this evaluation, these proposed changes will again be published in the Federal Register for public comments. If a revised rule is later adopted, these changes would apply to all licensees authorized to construct or operate nuclear power reactors and to all licensees authorized to possess, use, or transport Category I nuclear material.

ENCLOSURE [2]

DATE: The comment period expires (insert date 90 days following publication in the Federal Register). Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Mail written comments to: U. S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch.

Deliver comments to: 11555 Rockville Pike, Rockville, Maryland between 7:30 a.m. and 4:15 p.m. on Federal workdays.

FOR FURTHER INFORMATION CONTACT: Charles H. Hendren, Safeguards Branch, Division of Radiation Safety and Safeguards, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC, (301) 504-3209.

AVAILABILITY OF DOCUMENTS: Copies of the staff's report, "Reevaluation of the Scope of the FFD Rule with Respect to Persons Covered by Random Drug Testing (COMSECY-92-018)," and comments received may be examined and/or copied for a fee at the NRC Public Document Room, 2120 L Street NW, (Lower Level) Washington, DC.

Copies of NUREG/CR-1879, NUREG/CR-5227, and Supplement 1 to NUREG/CR-5227 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

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Be sure title is identical
to title of document labeled
Enclosure 1

21161. 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.

SUPPLEMENTARY INFORMATION:

Background

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Before the effective implementation date of the FFD rule (January 3, 1990), licensees had various forms of programs to control substance abuse. However, these programs were not uniform in their procedures, standards, testing methods, or sanctions for substance abuse. Most of the programs did include (1) preemployment drug testing, (2) for-cause drug testing, (3) employee assistance programs, (4) behavioral observation, and (5) some type of training on the problems associated with substance abuse. Not all licensees had random drug testing as an element of their program; in some cases, random testing was precluded because of union intervention or prohibition by State laws.

In developing the FFD rule, the scope of random drug testing was one issue that received considerable attention. In the Federal Register notice for the proposed rule (53 FR 36795 at 36797, September 22, 1988), the Commission solicited comments on the appropriateness of the worker categories identified for testing. At 53 FR 36817, the Commission indicated that it was proposing that the rule apply to all persons who have been granted unescorted access to protected areas because (1) current programs are implemented in accordance with the Commission's Policy Statement on Fitness-for-Duty of Nuclear Power Plant Personnel (51 FR 27921, August

[Insert on page 3 of the draft FRN:]

In 1992, the United States Court of Appeals for the Ninth Circuit upheld the NRC's denial of a request by Diablo Canyon nuclear workers for an exemption from NRC random drug-testing requirements. A labor union had requested the exemption on behalf of members working in clerical, maintenance and warehouse positions. While declining to upset the exemption denial on the record before the court, the 3-judge panel issued two separate opinions strongly criticizing the NRC's justification for imposing random drug tests on workers with no direct safety functions, particularly routine clerical workers.

Because the court of appeals affirmed the exemption denial, the NRC is under no immediate legal obligation to take any action. However, the NRC believes that a careful agency study of the issue raised by the court is in order. Therefore, the NRC is reconsidering whether to require random drug-testing for clerks, secretaries or other employees who have unescorted access to a nuclear plant's protected area but whose own jobs are not directly safety-related (i.e., whose jobs provide no opportunity to affect the operational or safety status of vital components or systems.)

Discussion

Random drug testing involves two distinct functions: (1) random selection of persons to be tested, and (2) collection and analysis of test specimens. The random selection process is designed to ensure that all persons subject to drug testing will have an equal ^{probability of} exposure to testing at any time. Random drug testing also serves as a very strong deterrent to substance abuse.

In developing the FFD rule, the NRC decided to specify random drug testing because of a concern about the threat that substance-impaired workers posed to the public health and safety. Based upon comments received during rulemaking, the Commission concluded that all workers with unescorted access to protected areas of operating nuclear power plants should be included within the scope of the rule. However, some workers have argued that they do not perform safety-related functions and have now questioned whether random testing is an undue encroachment on individual expectations of privacy. See International Brotherhood of Electrical Workers, Local 1245 v. NRC, 966 F. 2d 521 (9th Cir. 1992). Other viewpoints contend that expectations of privacy are diminished when workers apply for and accept jobs in the nuclear industry, because job applicants willingly agree to significant privacy encroachments, including preemployment urinalysis tests, detailed background investigations, security and fingerprint checks with the Federal Bureau of Investigation, credit checks, and psychological assessments. Accordingly, the Commission is now re-assessing the scope of random urinalysis testing as applied to workers without safety-related duties, to ensure a proper balance between safeguarding individual rights and the Commission's responsibility to protect public health and safety.

At nuclear power reactors, the safety risks from someone using illegal drugs or abusing alcohol arise from the potential for that person to inadvertently or deliberately take actions that could affect plant safety. The safety risks from inadvertent acts primarily involve impairment caused by substance abuse and the effect of that impairment on the person's ability to perform safety-related functions. The safety risks from deliberate acts come from the susceptibility of a person who is abusing a substance to be coerced or influenced into deliberately damaging a nuclear power plant. For example, the person could lose their inhibitions while under the influence or could be blackmailed into some act against the plant by someone aware of that person's substance abuse. Objective data establishes a relationship between substance abuse, impairment, and inadvertent acts [NUREG/CR-5227, "Fitness for Duty in the Nuclear Power Industry: A Review of Technical Issues"], but [^]insufficient scientific data exists to directly link substance abuse to the performance of deliberate and malicious acts. However, it has been clearly demonstrated that, as human error rates increase, the risks to plant safety will increase significantly [NUREG/CR-1879, "Sensitivity of Risk Parameters to Human Errors in Reactor Safety Studies for a PWR"] -- and that substance abuse can sufficiently impair a worker's motor skills and judgment that accidents attributable to neglect and human error become significantly more probable [NUREG/CR-5227 and Supplement 1 to NUREG/CR-5227].

Protected areas at operating nuclear power plants contain numerous systems and equipment which, if their functions are disrupted, can challenge safety systems necessary for safe operation and emergency shutdown. The challenges result from the mechanical, thermal, and electrical stresses that occur when a nuclear power plant

the staff's review of the relevant literature suggests that

is forced to shut down. The concern is that, although the plant is designed to sustain such transients, a disruptive event can unnecessarily challenge safety systems, ~~and repeated stresses could result in catastrophic failure~~

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One ongoing NRC activity that could affect considerations for changes in regulatory requirements for persons subject to random testing is a study of security requirements associated with the insider threat. ~~In this study~~ the staff is considering ^{whether} ~~possible~~ ^{are possible} reductions in the safeguards that control access into vital areas from protected areas. Substantial reductions in the access control safeguards for vital areas could alter the safety impact assessments for optional approaches to random drug testing. These safety assessments are based to some degree on the use of access controls to segregate persons having access to vital areas from persons whose access is limited to protected areas (i.e., persons who do not have access to vital areas). Depending on how much importance is given to concerns about deliberate acts based on influence from illegal drug or alcohol abuse, future relaxation of the safeguards to control access into vital areas from protected areas could significantly affect any considerations for narrowing the scope of persons subject to random testing.

To assist in the ongoing evaluation of alternative approaches to the scope of random testing, the Commission seeks comments on the proposed alternative approaches to the scope for random testing and other related issues. ^v Specifically, comments are requested on the following:

Further information on these alternative approaches is contained in the staff's report, "Reevaluation of the ^{E2 - 7} Scope of the FFD Rule with Respect to Persons Covered by Random Drug Testing" which is available in the Public Document Room.

[Insert on page 7 of the draft FRN:]

There have been some indications that access control safeguards could, in some circumstances, make it much harder for reactor operators to maintain control of a plant.

are current technical limitations, primarily varying degrees of detectability, reliability, sensitivity, and accuracy. (This is related to question 5, below.)

3. a) For each of the four approaches above (2a - 2d), what is the ^{potential} ~~perceived~~ effect on risks to public health and safety or to the vulnerability of nuclear power plants due to accidental acts or deliberate acts of sabotage or vandalism? Will vulnerability or risk increase or decrease to any significant degree, or will they remain unchanged?
- b) Is there any evidence that links substance abuse to the performance of deliberate and malicious acts or that links substance abuse to an increase in the substance abuser's susceptibility to blackmail?
4. Is there any evidence that licensee or contractor employees have engaged in trafficking in illegal drugs within the protected area? If so, which testing regime would more fully and completely deter the illicit trafficking in drugs within the protected area? Do any of the alternatives show better promise of deterring the use of coercion to influence an employee to participate in an illicit drug activity?

5. Should the Commission continue to investigate new testing methods that could be used for all workers who have unescorted access to protected areas? What are some methods that might be acceptable and some effective alternatives to the existing approach? For proposed methods, please provide data that establishes accuracy (i.e., test's error rate), specificity (i.e., degree to which the test can measure what it's supposed to measure), reliability (i.e., the precision with which the test can be repeated and the consistency of test results), and similar supporting parameters. The Commission is specifically interested in data on the validity of performance testing measures.

would be the expected

6. What ~~is the perceived~~ effect on the need for random drug testing under each of the four approaches above (2a-2d) ~~risk or vulnerability of nuclear power plants if vital area access controls are reduced (e.g., by eliminating requirements for locks and/or for alarms on vital area access points)?~~ allowing certain vital area doors to normally be unlocked, but be capable of (i) being remotely locked on demand in the event of a security contingency, and (ii) generating an alarm if a vital area door is opened without an authorized key card.]

Backfit Analysis

Because this notice makes no changes to any requirement or interpretation and merely solicits public comments and information, no backfit analysis has been performed. Should the subsequent analysis and resolution of the received comments and inputs lead to proposed changes to 10 CFR Part 26,