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DEC -5 A11:41

December 2, 1988

Secretary of the Commission  
Attention: Docketing and Service Branch  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Subject: Comments on Proposed Rule for Fitness-for-Duty Program  
(10 CFR Part 26; 53 FR 184, p. 36795, September 22, 1988)

Public Citizen commends the Nuclear Regulatory Commission (NRC) for finally promulgating regulations that require that all nuclear facilities develop and implement fitness-for-duty programs. Although the proposed rule is an improvement over the previous absence of any binding guidelines, there are a number of areas in which it should be improved.

Generally, the proposed rule is weakened by the NRC's underlying dislike of binding regulations and public scrutiny of the nuclear industry's programs. This is illustrated in the numerous instances in the proposed rule where the NRC either defers to the judgement of its licensees, refrains from explicitly stating its inspection plans, or suggests that documents be kept in the licensee's files (and thus unavailable to the public under the Freedom of Information Act). The following specific comments are made with an eye toward strengthening the NRC's regulation of an area of nuclear power plant operations where the industry has already failed to succeed on its own.

The NRC's emphasis on drug abuse should not be made at the expense of effective regulations dealing with alcohol abuse. Both can, and should, be directly addressed in the proposed rule. However, the testing provisions in Section 26.24 do not mention alcohol -- nor do the training provisions of Sections 26.21 and 26.22. Although an end to alcohol abuse at nuclear plants may be generally understood to be one of the NRC's targets in this proposed rule, specific mention and provisions should be made to further this goal. This problem could partially be addressed by using a definition of "drugs" that expressly includes alcohol.

## Section 26.20 -- "Written policy and procedures"

This section of the proposed rule states that the licensee should establish, implement, and retain written fitness for duty policies and procedures. Public Citizen feels that the NRC should also retain a copy which the licensee should update

whenever the policy or procedures are changed. This record should be made available to the public either through the NRC's Public Document Room or through the Freedom of Information Act.

#### Section 26.23 -- "Contractors"

Paragraph (a) of this section of the proposed rule states that the "contractor is responsible to the licensee for adhering to the licensee's fitness-for-duty policy, or maintaining and adhering to an effective fitness-for-duty program which meets the standards of this part..." The NRC in this case is, in effect, making the same mistake for which it has often criticized the Institute of Nuclear Power Operations (INPO) with regard to its accreditation of industry personnel training programs: that contractors are not directly responsible to the regulatory body for their own program. (See for example, SECY-87-121, p. 5, May 11, 1987)

The NRC should inspect the fitness-for-duty programs of the contractors instead of leaving it to the utility to make certain that the contractor's program complies with the NRC's guidelines. Inasmuch as INPO has now pledged to specifically inspect contracted training programs as it does other facility training programs, the NRC should expand this rule to hold contractors responsible to the federal government for their fitness-for-duty programs.

#### Section 26.24 -- "Chemical Testing"

Paragraph (c) mentions that testing procedures for other drugs not included in the Health and Human Services (HHS) Guidelines should be developed where those drugs are being used in a facility's area or by the local workforce. According to the proposed rule, "Conservative cutoff limits must be established by the licensee for these drugs." This deferral to the industry's judgement to define "conservative" is a grave mistake which is underscored by the NRC's own experience as described in the first paragraph of the discussion of the proposed rule. The discussion states, in pertinent part, that under an industry-run fitness-for-duty program, "drug testing cutoff levels varied significantly, some of which were inadequate." To avoid a repetition of this problem with regard to drugs not listed in the HHS Guidelines, the NRC (or HHS) should set the cut-off levels for these drugs as they become known to licensees.

#### Section 26.27 -- "Management Actions and Sanctions to be Imposed"

Paragraph (a) proposes that screening the fitness-for-duty histories of potential licensee employees be accomplished by means of licensee inquiries to that person's past employers. A complete and accurate list of such employers is to be obtained, under threat of denial of unescorted access, by the potential

employee. The result is that if an employee was recently fired from another facility for drug abuse on-site, this record will only be discovered if that person chooses to list that employer upon applying for work at a different facility. This is not a sufficient means to safeguard against the omission of pertinent information by a person seeking unescorted access to a facility.

To remedy this problem, a central database should be developed and maintained by the NRC. This data base would track fitness-for-duty incidents such as those mentioned in this paragraph of the proposed rule for both licensees and contractors. This system, of course, would require that licensees report all such incidents to the agency. Each data point would include the name of the employee, an identifying number, the name of the employer, the date of the incident, and the nature of the incident. Upon considering an applicant for unescorted access to a facility, a licensee would clear that person with the NRC's database to ensure that the person was not withholding any pertinent fitness-for-duty information. This service could ease some of the licensees' and contractors' burden to "complete a suitable inquiry" into a person's fitness-for-duty history if the database were expanded to include more employee information (complete employment histories, for example).

Paragraph (a) of this section also provides that if a record is established of a person testing positive for illegal drug use or being denied unescorted access or being subject to other action in accordance with a fitness-for-duty policy, then "granting of unescorted access must be based upon a management and medical determination of fitness for duty and the establishment of an appropriate follow-up testing program..." Public Citizen feels that, in accordance with the spirit of this proposed rule and the NRC's experience with the variance and occasional inadequacy of industry judgement in the area of fitness-for-duty, the NRC should include in this rule specific guidelines describing what an adequate "management and medical determination of fitness for duty" should be based on. Further, the rule should explain exactly what an "appropriate follow-up testing program" should entail.

#### Section 26.70 -- "Inspections"

Paragraph (b)(2) of this section of the proposed rule states: "The NRC may inspect, copy, or take away copies of any contractor documents, records, and reports related to implementation of the licensee's or contractor's fitness-for-duty program under the scope of the contracted activities." To avoid a repeat of the current situation with INPO's training records in which the NRC is unable to remove copies of documents from INPO headquarters in Atlanta, the wording of the proposed rule should be changed to read: "The NRC may inspect, copy, and take away copies..." Thus these documents would explicitly be available to

the public under the Freedom of Information Act subject to reasonable application of the Act's exemptions.

Furthermore, there is no provision in the proposed rule for the frequency of the NRC's inspections of the licensee's fitness-for-duty programs. This is important for two reasons: (1) to legally require the NRC to carry out these inspections on a regular basis to make fitness-for-duty a priority in the industry and; (2) to dispel any uncertainties licensees may have about what is expected of them and what sort of inspection regimen they can expect. Public Citizen feels that these inspections should be made at least as often as the Systematic Assessment of Licensee Performance reports are released for each plant.

#### Section 26.71 -- "Recordkeeping requirements"

Paragraph (d) of this section of the proposed rule states that an NRC form will be used to collect information on fitness-for-duty programs. According to the proposed rule, "The data shall be analyzed and appropriate actions taken to correct program weaknesses." However, the rule does not specify the time frame within which these "appropriate actions" must be taken. To ensure timely correction of program weaknesses and to clarify for licensees what is expected of them, the rule should include such a specification. Public Citizen feels that thirty days should be specified as time frame within which these "appropriate actions" must be taken.

#### Section 26.73 -- "Reporting requirements"

Paragraph (a)(1)(i) holds that "Each licensee subject to this part shall inform the Commission of significant fitness-for-duty events including . . . Sale, use, or possession of illegal drugs within the protected area." The proposed rule should also require that licensees report incidents in which persons within the protected area are discovered to be under the influence of drugs or alcohol, even if they used the substance off-site. Although a person under the influence of drugs could arguably be considered "in possession" of the drug, it is not clear from the current wording that reporting of such an incident is required, and it should be.

#### Appendix to the Document -- "Elements Not Included in the Proposed 10 CFR Part 26"

In response to the NRC's solicitation of public comments on the elements listed in the Appendix, Public Citizen submits the following suggestions:

1. The scope of the rule should be expanded to include "other activities directly related to nuclear safety by licensee and contractor personnel." In fact, it should include all such

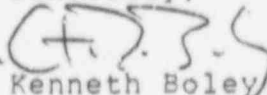
activities. If the purpose of a fitness-for-duty rule is to improve the safety of nuclear power plants, then not including all activities that directly affect their safety detracts from that goal.

2. Public Citizen supports all four of the proposals listed in this program element and feels that they should be included as part of the rule, not simply as "recommendations in implementing guidance." However, it is imperative that the rule specify how to carry out these items without unduly impinging on the civil liberties of licensee or contractor employees.

3. The draft form seems to include relevant information for the evaluation of licensee fitness-for-duty programs, although it would seem to make it impossible to track the a program's handling of any specific case. Although presumably inspections of the licensee's or contractor's records could facilitate this, a more detailed form listing each case individually (by number) and tracking it through its programmatic stages would be more effective. The summary data provided on the current draft form could still be included so that it would retain its usefulness.

Public Citizen appreciates this opportunity to comment on the proposed 10 CFR Part 26. Although the proposed rule is an improvement over the previous lack of any binding regulations on fitness-for-duty. However, the NRC needs to strengthen its proposal by deferring less to the judgement of its licensees, by specifying when and how often it will inspect fitness-for-duty programs, and by making fitness-for-duty related documents available to the public. These comments detail our suggested changes.

Sincerely,



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