

COMSECY-04-0014

May 25, 2004

MEMORANDUM FOR: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Annette Vietti-Cook, Secretary */RA by Kenneth R. Hart
Acting For/*

SUBJECT: COMSECY-04-0014 - STATUS OF 10 CFR PART 26
RULEMAKING ACTIVITIES FOR DRUG TESTING AND
FATIGUE

At the request of Commissioner McGaffigan, we have converted the attached memorandum to a COMSECY. Please reply to SECY by COB Wednesday, April 21, 2004.

Attachments:
As stated

cc: EDO
OGC
OPA
CFO
Regions

March 29, 2004

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: William D. Travers */RA/*
Executive Director for Operations

SUBJECT: STATUS OF 10 CFR PART 26 RULEMAKING ACTIVITIES FOR DRUG
TESTING AND FATIGUE

The purpose of this memorandum is to inform you of the status of two rulemaking efforts currently underway to revise 10 CFR Part 26, "Fitness For Duty Programs." The drug testing rulemaking effort would, in part, incorporate advances in drug testing methods and also be an overall revision of Part 26. The other Part 26 rulemaking would add provisions to specifically address worker fatigue concerns identified in Petition for Rulemaking (PRM) 26-2 and letters from several Congressmen and members of the public. Background information on both rulemaking efforts is attached.

The staff originally planned to submit both proposed rules to the Commission in March 2004. However, this approach raised the issue that the proposed fatigue rule draft language would be based on the draft language in the overall revision of Part 26, rather than on the current language in Part 26. As a result, meaningful public comment could be confounded by the simultaneous promulgation of two draft rules which are somewhat interdependent. Additionally, if parallel public comment periods were to take place, staff action to address a comment on one proposed rule could easily impact the other proposed rule, creating a high potential for the need to repropose one or both rules.

The staff evaluated alternative approaches during the fall of 2003, and concluded that the two rules should either be combined into one proposed rule or be proposed and completed sequentially. The staff is proceeding with sequential issuance of the two rules with the drug testing proposed rule as the lead rulemaking. Combining the two rules would delay issuance of the drug testing proposed rule by an additional eight months, because the regulatory analyses and statements of consideration would have to be substantially revised to combine the two. Combination of the two rules was rejected because of this delay.

The drug testing proposed rule was given priority because it is further along in development and internal review than the draft proposed fatigue rule and because it will have a broader impact on the language and organization of Part 26. Issuing the proposed fatigue rule first, before the

CONTACT: Rebecca Karas, NRR/DRIP
(301) 415-3711

proposed drug testing rule was discussed but rejected because the need to rewrite the draft fatigue rule text based on the current Part 26 framework would result in a greater delay to issuance of both rules. In addition, the staff intends to revalidate the original 1999 industry data on worker fatigue using more current data to provide greater assurance of a valid regulatory analysis. Because of the delay in issuance of the proposed fatigue rule, resolution of PRM-26-2 will be delayed. Staff determined this delay was preferable to a delay in issuance of the drug testing rule.

In December 2003, reconsideration was given to enhancing certain aspects of drug testing for authorization reinstatements. The additional considerations have the potential for significant changes to several aspects of the proposed drug testing rule. Therefore, the proposed drug testing rule was placed on hold pending their resolution. In early March 2004, a decision was made to subject certain reinstatement applicants for unescorted access to random testing at the normal rate. The staff is working to incorporate those decisions into the proposed drug testing rule text and regulatory analysis.

NRC staff expects to forward the proposed drug testing rule to the Commission in June 2005. The proposed fatigue rule would be ready for Commission review 3 months after publication in the *Federal Register* of the final drug testing rule. The proposed date of June 2005 for transmittal of the proposed drug testing rule to the Commission reflects the development of the additional enhancements noted above for authorization reinstatements and the staff's recognition of the need to hold an additional stakeholder meeting on the draft proposed rule following incorporation of the enhancements. The last stakeholder meeting took place over a year ago, and significant changes to the draft rule language have been made since then. It also reflects a delay in proceeding with the drug testing rulemaking while staff considered the various options for the two rulemaking efforts during the fall of 2003, and the impact of the additional enhancements on the proposed drug testing rule.

The staff will continue to keep the Commission informed of the progress of both rulemaking efforts. The staff will inform the Commission of significant stakeholder feedback received at the planned public meeting on the drug testing rulemaking.

Attachment: Background of Part 26 Rulemaking Efforts

cc: SECY
OCA
OGC
OPA
CFO

Background of Part 26 Rulemaking Efforts

Drug Testing (FFD) Rulemaking:

In a June 7, 1989, *Federal Register* notice (54 FR 24468), the Commission announced the adoption of a new rule, 10 CFR Part 26, "Fitness for Duty Programs." The Commission directed the Nuclear Regulatory Commission (NRC) staff to continue to analyze licensee programs, assess the effectiveness of the rule, and recommend appropriate improvements or changes. The staff completed this assessment and the Commission published proposed amendments to the fitness for duty (FFD) rule in the *Federal Register* on May 9, 1996, (61 FR 21105). The staff reviewed the public comments on the proposed rule and submitted a final rule to the Commission in SECY-00-0159, dated July 26, 2000. The Commission affirmed the rule in a Staff Requirements Memorandum (SRM) dated December 4, 2000, (SRM-M001204A). However, when the staff sent the affirmed rule to the Office of Management and Budget (OMB) to obtain a clearance under the Paperwork Reduction Act, OMB and NRC received public comments that objected to some aspects of the rule. Consequently, in SECY-01-0134, dated July 23, 2001, the staff recommended withdrawing the request for clearance and preparing a new proposed rule. In SRM SECY-01-0134 dated October 3, 2001, the Commission approved the staff's recommendation.

The October 3, 2001, SRM further directed that staff conduct stakeholder meetings on a combined access authorization and FFD guidance document. During 2001 and 2002, the staff held 10 public meetings at NRC headquarters to discuss the draft drug testing rule provisions with interested stakeholders.

The goals of the rulemaking effort are as follows:

- (1) Update and enhance the consistency of 10 CFR Part 26 with advances in other relevant Federal rules and guidelines, including the U.S. Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Guidelines) and other Federal drug and alcohol testing programs (e.g., those required by the U.S. Department of Transportation [DOT]) that impose similar requirements on the private sector.
- (2) Improve the effectiveness and efficiency of FFD programs.
- (3) Improve consistency between FFD requirements and access authorization requirements established in 10 CFR 73.56, as supplemented by orders to nuclear power plant licensees dated January 7, 2003.
- (4) Reduce unnecessary regulatory burden.
- (5) Improve clarity in the organization and language of the rule.
- (6) Protect the privacy and due process rights of individuals who are subject to 10 CFR Part 26.

Fatigue Rulemaking:

In a February 25, 1999, letter to former NRC Chairman Shirley Ann Jackson, Congressmen Dingell, Klink, and Markey expressed concerns regarding low staffing levels and excessive overtime at some commercial nuclear power plants. Similar concerns were raised in a

March 18, 1999, Union of Concerned Scientists (UCS) report, "Overtime and Staffing Problems in the Commercial Nuclear Power Industry." In a letter dated May 18, 1999, the Chairman informed the Congressmen of the staff's preliminary findings on this issue and stated that the staff would assess the need to revise the NRC's "Policy on Factors Causing Fatigue of Operating Personnel at Nuclear Reactors."

In October 1999, the Commission received Petition for Rulemaking (PRM) 26-2 requesting clear and enforceable work-hour limits to mitigate the effects of fatigue for nuclear power plant personnel performing safety-related work. On June 22, 2001, the staff issued SECY-01-0113, "Fatigue of Workers at Nuclear Power Plants," which summarized the staff's assessment of the policy and proposed granting, in part, PRM-26-2. On January 10, 2002, the Commission approved the staff's rulemaking plan (WITS 200200001).

From February 2002 through August 2003, the staff held 13 public meetings with stakeholders on the draft proposed rule. The draft language addressing worker fatigue was based on the draft language for the drug testing proposed rule, which was originally anticipated to precede the fatigue rulemaking. Later, the schedules for the drug testing and fatigue proposed rules were aligned such that both proposed rules were to be provided to the Commission in March 2004.

The goals of the rulemaking effort are as follows:

- (1) Enhance safety and assurance of worker FFD;
- (2) Enhance efficiency and effectiveness of NRC regulatory actions relative to FFD;
- (3) Resolve inconsistency between NRC policy and industry practices;
- (4) Increase public confidence; and
- (5) Codify FFD requirements established by order.