



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

June 30, 2005

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-05-0074

TITLE: PROPOSED RULE TO AMEND THE FITNESS-FOR-DUTY  
REQUIREMENTS IN 10 CFR PART 26

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of June 30, 2005.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette Vietti-Cook".

Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
Commissioner Jaczko  
Commissioner Lyons  
OGC  
EDO  
PDR

VOTING SUMMARY - SECY-05-0074

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	6/29/05
COMR. McGAFFIGAN	X				X	6/8/05
COMR. MERRIFIELD	X				X	6/27/05
COMR. JACZKO	X				X	6/28/05
COMR. LYONS	X				X	6/30/05

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on June 30, 2005.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: CHAIRMAN DIAZ  
SUBJECT: **SECY-05-0074 - PROPOSED RULE TO AMEND THE  
FITNESS-FOR-DUTY REQUIREMENTS IN 10 CFR  
PART 26**

Approved <sup>w/comments</sup> xx W Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_  
Not Participating \_\_\_\_\_

COMMENTS:

See attached comments.

hiffidiz  
SIGNATURE

June 29, 05  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

### Chairman Diaz' Comments on SECY-05-0074

The staff should be commended for an excellent effort on this difficult task. I approve the staff recommendations in SECY-05-0074, "Proposed Rule to Amend the Fitness-for-Duty Requirements in 10 CFR PART 26," subject to one revision.

A high level of reliability and trustworthiness has been achieved and a can continue to be achieved using the existing "reasonable assurance" standard that personnel will perform tasks in a reliable and trustworthy manner. This requirement is currently in 10 CFR 26.10. The staff is proposing to change this to a "high assurance" standard. There are only a few areas in our regulations where it is appropriate to require "high assurance." "High assurance" should only be required in limited circumstances. As a result, changing the standard in this area is unnecessary. The SRM should contain the following language:

The staff should revise the performance objectives in proposed rule section 26.23(a) to reflect a "reasonable assurance" standard for trustworthiness and reliability and make conforming changes to the rulemaking package prior to publishing the proposed rule in the *Federal Register*.

The disposition of public comments is likely to improve the rule. In reviewing the final rule, I would expect to give attention to a number of issues, including any comments on the following: significant differences between the proposed drug and alcohol provisions and those in place for employees in other critical infrastructure sectors, such as pilots; alignment of the penalties for FFD violations with the penalties for other serious violations of NRC requirements; and the clarity of the regulatory use (e.g., industry trending or use in a new performance indicator) for the proposed reporting requirements for waivers and assessments relating to the fatigue provisions.

Additionally, the proposed individual work hour provisions may have unintended consequences, such as, creating a significant incentive for licensees to replace 8 hour shifts with 12 hour shifts. Although the proposed rule has to be prescriptive in many areas, resolution of comments on the work hour provisions should ensure reasonable protection against the adverse effects of fatigue without imposing unnecessary requirements.

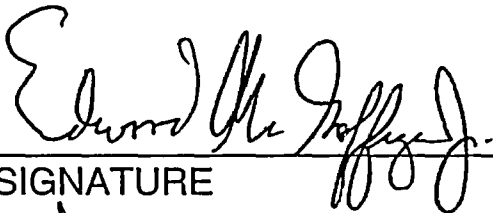
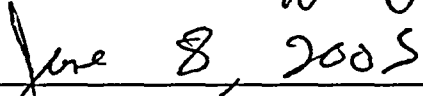
NOTATION VOTE  
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MCGAFFIGAN  
SUBJECT: **SECY-05-0074 - PROPOSED RULE TO AMEND THE  
FITNESS-FOR-DUTY REQUIREMENTS IN 10 CFR  
PART 26**

Approved  <sup>w/comments</sup> Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_  
Not Participating \_\_\_\_\_

COMMENTS:

See attached comments.

  
\_\_\_\_\_  
SIGNATURE  
  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

## Commissioner McGaffigan's Comments on SECY-05-0074

I approve the publication of the proposed rule that amends the 10 CFR 26, Fitness For Duty (FFD) Programs. I look forward to a robust round of public comments, the disposition of which I fully expect will further improve the final rule.

I commend the staff for its excellent and voluminous work on a difficult subject. In fact, I wrote that same commendation to lead off my vote nearly six years ago when this subject first came before me, early in my time on the Commission (SECY-99-279). It was, however, hardly the first time this difficult topic came before the Commission itself. Indeed, the Commission recognized right from the start, when issuing 10 CFR 26 almost exactly 16 years ago (in June 1989), that the rule would need to be updated and, in that regard, instructed the NRC staff to report back on the insights gained from the first 18 months of implementation. Unfortunately, the backfit rule (10 CFR 50.109) became a formidable obstacle to updating the FFD rule (or any other comprehensive rule), as I recounted in some detail in my vote on SECY-01-0134.

In the SRM for SECY-01-0134, the Commission tried, in my opinion, to return to the backfit process a measure of the "rule of reason", as the process had degraded to the point where cost-benefit analyses were being performed on the rule on a clause-by-subclause basis, by instructing the staff to use aggregation within the following guidelines:

In the new fitness-for-duty rulemaking, the Commission will conduct an aggregate backfit analysis of the entire rulemaking. If there is a reasonable indication that a proposed change imposes costs disproportionate to the safety benefit attributable to that change, as part of the final rule package the Commission will perform an analysis of that proposed change in addition to the aggregate analysis of the entire rulemaking to determine whether this proposed change should be aggregated with the other proposed change for the purposes of the backfit analysis. That analysis will need to show that the individual change is integral to achieving the purpose of the rule, has costs that are justified in view of the benefits that would be provided or qualifies for one of the exceptions in 10 CFR § 50.109(a)(4).

The staff was apparently ultimately successful in that SECY-05-0074, which contains a soundly supported proposed FFD rule update and regulatory analysis, is before the Commission. Nonetheless, I cannot help but conclude that much more remains to be done in the way of rationalizing the backfit rule as I note with regret both that it took another four years for a proposed FFD rule to return to the Commission and that the package here before us numbers over 1,600 pages.



NOTATION VOTE  
RESPONSE SHEET

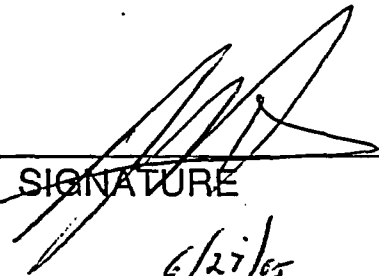
TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MERRIFIELD  
SUBJECT: **SECY-05-0074 - PROPOSED RULE TO AMEND THE  
FITNESS-FOR-DUTY REQUIREMENTS IN 10 CFR  
PART 26**

Approved  Disapproved  Abstain

Not Participating

COMMENTS:

*See attached comments.*

  
\_\_\_\_\_  
SIGNATURE  
*6/27/05*  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No

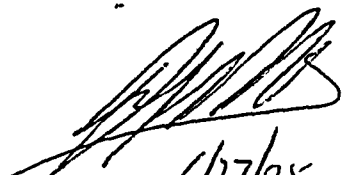
**Commissioner Merrifield's Vote on SECY-05-0074**  
**Proposed Rule to Amend the Fitness-for-Duty Requirements in 10 CFR Part 26**

I would first like to commend the staff for their efforts to codify the requirements governing drug and alcohol testing, as well as fatigue management, for nuclear power plant workers. That having been said, I remain frustrated that this proposed rule has taken so long to reach the Commission. I acknowledge the fact that issues like fitness-for-duty are highly technical and complex, and I recognize that this issue predates many of the current NRC team that is working on this issue, but we owe it to the public in general, as well as our licensees, to make decisions concerning new regulations or the revision of existing regulations in a timely manner. I hope that, in the future, the staff will make every effort to develop the technical bases and prepare proposed rules for Commission consideration in a timely manner.

I approve the staff's recommendation to publish the proposed Fitness-for-Duty rule in the *Federal Register* for public comment, with the exception of the group work hour limits. I am very concerned that the proposed group work hour limits would involve a significant administrative burden with very little benefit that is not provided already by the other provisions of the rule. Although I recognize that the group average limit of 48 hours/week over a 13-week period is intended to prevent excessive use of the maximum work hours and minimum rest breaks that would be permitted under the proposed individual work hour controls, I am not convinced that this group work hour limit would address the control of work hours over extended periods of time more effectively than the combination of other proposed rule provisions (mandatory individual work hour limits, rest break requirements, for-cause assessment and self declarations). Other than the industry contractors and consultants needed to implement these limits, I have a hard time putting my finger on any tangible benefits from this proposal. In sum, I believe the individual rest break provisions offer a simple, less burdensome control for managing cumulative fatigue.

I also am concerned that the scope of the work hour controls may impact an overly broad group of workers, some of whom, because of the interactive nature of their work, may not be as susceptible as security officers or control room operators to the effects of fatigue. I anticipate there will be constructive dialogue during the public comment period on these points and other issues brought to the table by stakeholders. I encourage the staff, the industry, and members of the public to engage in meaningful discussion on the proposed rule to ensure that the safety benefit of the final rule is commensurate with the cost of implementation.

The agency's efforts to publish a proposed rule on fitness-for-duty predates my joining the Commission in 1998. After a forest of trees has been expended to get us to where we are today, I am glad we can move forward on this issue.

  
6/27/05



NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER JACZKO  
SUBJECT: **SECY-05-0074 - PROPOSED RULE TO AMEND THE  
FITNESS-FOR-DUTY REQUIREMENTS IN 10 CFR  
PART 26**

Approved  Disapproved  Abstain

Not Participating

COMMENTS: See Attached Comments

  
\_\_\_\_\_  
SIGNATURE

6/28/05  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No

June 28, 2005

**COMMISSIONER JACZKO'S COMMENTS ON SECY-05-0074**

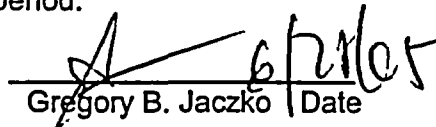
**PROPOSED RULE TO AMEND THE FITNESS-FOR-DUTY REQUIREMENTS IN 10 CFR  
PART 26**

I approve the staff's recommendation to publish the proposed rule for public comment. I commend the staff for preparing a comprehensive, defensible approach to revising the Fitness-for-Duty Programs rule.

I largely find the drug and alcohol portions of the proposed rule to be well supported and non-controversial. I do question the parity of the sanction that would be imposed for adulterating a urine sample (lifetime ban) with the maximum sanction available for any other willful or deliberate violations of NRC requirements available through the NRC's Enforcement Policy (5-year ban). I am not necessarily opposed to a lifetime ban, but there seems there is the likelihood of disparate treatment for violations that are equally or even more egregious. This issue can be resolved during the public comment period.

With respect to the fatigue provision, I consider the staff has proposed reasonable individual and group work hour controls. I am interested in the concerns that some stakeholders have voiced with respect to the group work hour controls and look forward to the stakeholder comments on both sides of the issue.

I consider that the staff has put forth an excellent effort that will only be enhanced and or appropriately modified for the better through the public comment period.

  
\_\_\_\_\_  
Gregory B. Jaczko | Date

NOTATION VOTE

RESPONSE SHEET

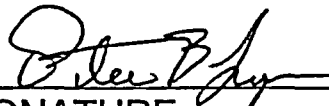
TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER LYONS  
SUBJECT: **SECY-05-0074 - PROPOSED RULE TO AMEND THE  
FITNESS-FOR-DUTY REQUIREMENTS IN 10 CFR  
PART 26**

Approved <sup>w/comment</sup>  X  Disapproved        Abstain       

Not Participating       

COMMENTS:

As attached.

  
\_\_\_\_\_  
SIGNATURE

June 30, 2005  
DATE

Entered on "STARS" Yes  ✓  No

## Commissioner Lyons' Comment on SECY-05-0074

### **Proposed Rulemaking for "Proposed Rule to Amend the Fitness-for-Duty Requirements of 10 CFR 26"**

I approve the staff's recommendations in SECY-05-0074, which include the publication of the proposed rule for public comment. However, I remain concerned that the proposed rule language on fatigue is, in certain respects, unnecessarily burdensome, overly complex, and insufficiently flexible. For these aspects, I would value additional public input as noted below.

First, I commend the staff for the extensive and extended effort it has taken to bring this proposed rule to this point. In particular, I appreciate the staff's degree of public outreach, including the 24 public stakeholder meetings held from 2001 to the present (15 of which were dedicated to the fatigue provisions), and their efforts to provide ongoing iterations of the draft rule language to the public. The staff has clearly met the Commission's expectation expressed in SRM-SECY-01-0113 to "develop the rule in an open, consultative process with stakeholders."

Second, I support the need for regulatory requirements aimed at reducing the potential for fatigue to cause human inattentiveness or error in actions and decisions upon which the immediate safety of the plant may depend. The science of human fatigue, the examples of inattentiveness which have occurred within the nuclear industry (and the very significant regulatory actions taken in response), and our own personal experiences indicate this need. The historical evolution of the proposed rule before us today, including the prior Commission Policy Statement and the more recent Orders specific to guard force personnel, demonstrate a consistency in the Commission's intent over several years and multiple Commissions and one that I continue to support.

Third, I support the Chairman's comments that the standard of "high assurance" proposed for personnel reliability and trustworthiness is unnecessary, and agree with his suggestions of areas for public comment.

My concerns with the specifics of this proposed rule, however, are as follows:

1. I am not convinced that the staff has made a sufficient case for adding a new reporting burden to licensees. In the past, the Commission has sought to reduce administrative reporting burdens for information that had a limited nexus to our safety mission, even to include raising the threshold for licensee event reports under 10 CFR 50.72/73. Information collected by a licensee to demonstrate compliance with any rule should always be available for NRC inspection, and this should be sufficient in the present case. In addition to seeking public comment on this, I would also seek a specific determination from the staff, based on an evaluation by experienced inspectors, that this rule would be clear enough to be easily inspectable.

2. I am concerned that the scope of the proposed rule change may encompass an unnecessarily large number of personnel. In SECY-01-0113, the staff reviewed work hour limits for commercial and military aircraft pilots, marine captains and rail engineers, and truck drivers. These cases represent occupations where public safety requires the responsible person to maintain the capability to correctly and rapidly diagnose a situation and/or take prescribed immediate initial action, as well as make routine operational decisions strictly in accordance with established procedures that maintain the intended margins of safety. This appears to be a

well-founded basis for imposing requirements that minimize the likelihood of fatigue, and if translated into nuclear industry terms, would suggest that such requirements be applicable primarily to on-shift or on-duty personnel who are specifically designated as responsible for performing operational functions in which time-critical decisions and actions may suddenly become necessary, such as reactor plant operations, health physics and radiochemistry, fire response, emergency preparedness, and security. These criteria would consequently suggest excluding from the scope of this proposed rule any other personnel whose safety contributions are achieved in a non-time-critical manner through organizational quality mechanisms such as use of prescribed procedures and processes that require multiple levels of checks, reviews, and testing, such as personnel performing maintenance, engineering, and work control functions. Therefore, I would specifically like to solicit public comment on the possibility of defining the attributes (e.g., time-critical nature of decisions needed to ensure public health and safety, operational control of risk-important equipment) of the job functions that should fall within the scope of these requirements, such that staff can consider modifying the rule change to require each licensee to identify the specific job functions that fit these attributes, as an alternative to prescriptively defining job categories in the rule. This alternative could be similar in concept to how 10 CFR 50.65 requires the licensee to determine the specific systems, structures, and components to be monitored for maintenance effectiveness within the scope of that rule.

3. I am also concerned that the individual work hour controls may not provide sufficient flexibility to licensee management, which is one of the key considerations identified in SRM-SECY-01-0113. Industry concerns have been raised on this point, however industry's suggested remedy is to delete all individual work hour controls, which would be contrary to the Commission Policy Statement which has been in effect since 1982 and which in my view would not leave an adequate regulatory framework. I believe that the staff must demonstrate in the final rule package a range of work-scheduling examples that meet the provisions of the proposed rule and that afford a reasonable degree of flexibility.

4. I am also concerned that the suspension of fatigue requirements during maintenance or refueling outages will occur at precisely the time that shutdown risk issues (see NRC Information Notice 2005-16 "Outage Planning and Scheduling - Impacts on Risk") suggest that the risk of core damage can be the greatest and therefore the contribution of human error to risk can be magnified. The combination of time-pressure, abnormal and frequently changing plant conditions and system alignments, and the potential extensive use of overtime do not appear to be risk-informed. Staff should solicit public comment on how this could be addressed. In particular, if the scope of these rule requirements were limited more to shift personnel who were directly responsible for the operation of the plant and for response to abnormal or emergency conditions, and excluded maintenance personnel who worked within a quality process which included approved procedures, supervision, QA/QC checks, and post-maintenance testing, would this provide a better focus on the most important benefits to be achieved by this rule change while affording adequate flexibility to licensees?

5. Finally, I am also concerned that the bookkeeping required for maintaining group work hour limits among multiple groups with changing populations will be unnecessarily complex to implement and to inspect. The staff's stated goal is to ensure that overtime use is not excessive (defined to be not more than about 20%). Staff should specifically solicit public comment on alternative approaches that might equally address the issue of cumulative fatigue, such as individual work hour limits based on a longer term (e.g., monthly or quarterly).

  
6/30/05