

RULEMAKING ISSUE NOTATION VOTE

February 28, 2011

SECY-11-0028

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: OPTIONS FOR IMPLEMENTING AN ALTERNATIVE INTERIM
REGULATORY APPROACH TO THE MINIMUM DAYS OFF
PROVISIONS OF 10 CFR PART 26, SUBPART I, "MANAGING
FATIGUE"

PURPOSE:

The purpose of this paper is to request Commission direction on implementing the proposed alternative to the minimum days off (MDO) provisions in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26, "Fitness for Duty Programs," Subpart I, "Managing Fatigue."

SUMMARY:

In SECY-11-0003, "Status of Enforcement Discretion Request and Rulemaking Activities Related to 10 CFR Part 26, Subpart I, 'Managing Fatigue,'" dated January 4, 2011, the staff of the U.S. Nuclear Regulatory Commission (NRC) discussed its intent to bundle several petitions for rulemaking (PRMs) associated with 10 CFR Part 26. The staff also discussed its approach to addressing the Nuclear Energy Institute (NEI) request for enforcement discretion regarding the MDO provisions of Subpart I. The staff indicated that although it had planned rulemaking activities to address these same issues, it determined that an alternative interim regulatory approach was appropriate to address the stated industry concerns with the nonoutage MDO requirements in 10 CFR Part 26. This paper discusses the options for implementing an alternative approach to the MDO provisions for normal operations.

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BACKGROUND:

On September 23, 2010, NEI submitted a letter requesting enforcement discretion from certain requirements in 10 CFR Part 26. The letter parallels NEI's rulemaking petition (PRM-26-5) in that both state that implementation of the MDO requirements has caused licensees to curtail beneficial practices, and both seek removal of the requirements. Both the PRM and the NEI letter proposed that the NRC replace the MDO requirements for normal operations with a performance objective for managing cumulative fatigue. The staff held public meetings on November 18, 2010, to gain information on the issues underlying the industry's request for enforcement discretion from the MDO requirements of 10 CFR 26.205(d)(3), (4), (5) and (6); on January 6, 2011, to discuss possible alternatives to the MDO requirements and to explore whether the alternatives were consistent with the technical basis for the current rule; and on January 25, 2011, to refine the alternative approach to the MDO provisions described in this paper.

DISCUSSION:

The staff agrees that an interim alternative to the requirements of 10 CFR 26.205(d)(3), related to MDO for normal, nonoutage operations, is appropriate while the staff is working on the rulemaking related to the fatigue management provisions of 10 CFR Part 26. The staff recommends implementation of an alternative approach that will provide timely flexibility to licensees. The primary benefit is that this approach would not impede the implementation of the beneficial safety practices that the industry has stated have been curtailed under the existing regulation. Neither PRM-26-5 nor participants in the public meetings offered any equivalent alternatives for outage periods in 10 CFR 26.205(d)(4), (5), or (6); therefore, the staff is not taking action in regard to those regulations.

The staff has determined that an alternative approach to MDO using a weekly average of 54 hours worked, calculated based on a rolling window of up to 6 weeks, will limit work hours to levels comparable to current MDO requirements while adding the simplicity and flexibility desired by the industry. Similar to the current MDO requirements, this alternative, when implemented with the other aspects of Subpart I that will remain unchanged, will help prevent most instances of cumulative fatigue by limiting the number of extended work weeks and work days. In those cases where extended schedules are unavoidable, the alternative will limit their duration and contribute to fatigue mitigation. Additionally, the staff will engage licensees in the coming months through regularly scheduled public meetings to identify problems and lessons learned from implementation of the alternative approach. The staff will consider these insights when conducting the rulemaking activities related to PRM-26-5, NEI's rulemaking petition on this same issue.

The staff evaluated several options for incorporating the alternative approach to MDO into the NRC's regulatory structure. In evaluating each option, the staff has assumed that, based on feedback from licensee representatives, up to three quarters of the sites (up to 50) could choose to adopt the alternative approach to the MDO requirements of 10 CFR 26.205(d)(3).

Implementation Option 1: Direct Final Rulemaking

Option 1 is a method for quickly revising an existing regulation and allows for public participation through the comment process. However, the staff determined that replacing the MDO requirements and having all licensees adopt the alternative has the potential to introduce a new set of adverse consequences if those licensees satisfied with the current requirement were forced to change. As a result, if the Commission chooses rulemaking as the method for implementing the alternative approach, the most appropriate path would be to revise 10 CFR 26.205(d)(3) to add the alternative approach as a voluntary alternative that licensees could implement in lieu of the current nonoutage MDO requirements.

Using the direct final rulemaking process to add a voluntary, alternative regulatory requirement is uncommon. Such an approach does not meet the approved criteria for direct final rulemaking procedures contained in NUREG/BR-0053, Revision 6, "United States Nuclear Regulatory Commission Regulations Handbook," because the staff anticipates receiving at least one significant adverse comment. The Commission would need to take the following actions to implement this option:

- Delegate rulemaking authority to the Executive Director for Operations (EDO) (for the direct final rule and for the potential proposed and final rules).
- Direct the staff to forego any review by the Advisory Committee on Reactor Safeguards.
- Direct the staff to promulgate rule language consistent with the staff's interim approach discussed during the Commission meeting on February 8, 2011.
- Redirect and reprioritize staff resources in numerous areas to give the highest priority to this activity (except for other work involving immediate public health and safety and security concerns).

Direct final rulemaking can require at least 8 months. This estimate does not include the time needed for the staff to prepare regulatory guidance. The preparation of regulatory guidance, if needed, would begin after publication of the rule in the *Federal Register* and would take at least 6 months (2 months to prepare draft guidance and 4 more months to publish a draft regulatory guide). This option could ultimately fail to provide the requested timely relief from the unintended consequences. This option would expend approximately 2 full-time equivalent staff (FTEs) in fiscal year (FY) 2011 and FY 2012.

As stated in the Chairman's February 16, 2011, vote sheet on SECY-11-0003, the direct rulemaking process could be reduced to 4 months by:

- Assigning OGC as the lead office for rulemaking.
- Limiting the public comment period to 30 days with no extensions.
- Preparing updated regulatory guidance on an expedited basis.

Implementation Option 2: Plant-Specific Exemptions

Option 2 is the normal method by which the NRC can allow a licensee to meet the intent of a rule using an alternative means. This option could involve significant resources since it would require individual licensees to submit their requests and the staff to review them and grant exemptions from the MDO requirements. These exemptions would remain in place until the agency has revised 10 CFR 26.205(d)(3).

Although the staff would be able to complete individual exemption requests more quickly than it could finish a direct final rulemaking, the normal schedule for reviewing an exemption request is from 3 to 6 months per exemption. However, a large number of requests could result in delays in granting relief to individual licensees. On the other hand, accelerating the schedule for responding to licensees would require the diversion of staff resources from other licensing activities that are in process or planned. This process would be straightforward as long as each licensee submits a high-quality exemption request that parallels the requirements in the staff's proposed alternative regulatory approach. This option would expend approximately 0.1 FTE for each exemption request, resulting in an overall resource expenditure of up to 5 FTEs through the remainder of FY 2011 and into FY 2012.

Implementation Option 3: Orders

This option would require each licensee that wants to adopt the alternative approach to inform the NRC that it intends to do so. The NRC staff would then issue an order to each licensee allowing adoption of the alternative approach and would document the licensee's planned schedule for implementation. The order would be "confirmatory" in the sense that the licensee would consent to being bound by the alternative approach in lieu of the existing regulatory requirements. Orders have the advantage of being relatively quick to issue. Additionally, issuing orders may involve lower levels of staff resources as long as all licensees commit to the same interim alternative approach; however, this approach requires both action by multiple licensees and also staff resources to issue the plant-specific orders. Moreover, the NRC typically uses orders in circumstances where a net safety enhancement is associated with the action being ordered. In this case, the orders would merely provide an alternative to meet the existing requirements, which is usually handled by exemption or license amendment. Notwithstanding the licensees' consent to such orders, the orders are likely subject to a prior opportunity for hearing by other interested persons in individual cases. Thus, implementation of the alternative approach under an order may have to await the conclusion of the hearing process. The issuance of each order would take approximately 1 month and involve a level of effort of less than 0.1 FTE, resulting in a resource expenditure of approximately 3 FTEs through the remainder of in FY 2011 and into FY 2012. However, this does not reflect the resources that the NRC would expend on hearings if they were requested. The resource requirements would increase exponentially if a substantial number of hearings are requested.

Implementation Option 4: Enforcement Discretion

Option 4 would allow a licensee to receive enforcement discretion for failing to meet the requirements of 10 CFR 26.205(d)(3), provided that the licensee properly implements the interim alternative approach. The NRC would make such enforcement discretion available to licensees through the issuance of an interim enforcement policy. The interim policy would describe the alternative to the MDO requirements that could be adopted by a licensee, if it

chooses to do so, and would be published in the *Federal Register*. The enforcement discretion process is well established and has been used in the past to provide this type of relief. In addition, approving interim changes to the Enforcement Policy is completely within the Commission's control. This option also has the advantage of being relatively quick to implement and requires fewer resources than the other options. The disadvantage is that the NRC would be granting enforcement discretion for ongoing violations of the nonoutage MDO requirements. The discretion could cover a large number of licensees for the period of time until rulemaking on Subpart I is complete (approximately 28 months).

This interim change to the Commission's Enforcement Policy could be finalized and published in the *Federal Register* with an immediately effective implementation date. This approach has been used in the past. Issuing the policy as immediately effective would acknowledge the significant public discussion of this option that has taken place in three Category 3 meetings held by the staff between November 18, 2010, and January 25, 2011, and at the February 8, 2011, Commission briefing on 10 CFR Part 26. Further, the staff understood and considered the range of views on this issue during the development of the alternative and will provide additional opportunities for public comment as part of the related rulemaking activities. Any needed guidance to support implementation of the interim policy would be developed and issued using less formal processes than required for rulemaking. The staff anticipates that issuing this guidance will require additional staff resources of approximately 0.1 FTE.

Therefore, if the agency were to issue the interim Enforcement Policy as final without soliciting additional public comment, the staff expects that the alternative to the MDO requirements would be available for licensee adoption less than 1 month after publication in the *Federal Register*. The Office of Nuclear Reactor Regulation and the Office of Enforcement believe the necessary resources to implement this option could be absorbed without impacting the FY 2011 budgeted workload.

RECOMMENDATION:

The staff recommends Option 4. The staff requests that the Commission approve the enclosed draft *Federal Register* notice, "Interim Enforcement Policy for Minimum Days Off Requirements," for publication in the *Federal Register* as immediately effective.

RESOURCES:

The resources are not included in the FY 2011 President's Budget or in the FY 2012 budget request.

Option	Business Line	Product Line	Product	FTE
1	Operating Reactors	Rulemaking	Rulemaking	2
2	Operating Reactors	Licensing	Licensing Actions	5
3	Operating Reactors	Licensing	Licensing Actions	3-5
4	Operating Reactors	Licensing	Licensing Actions	0.1

The Commissioners

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COORDINATION:

The Office of the General Counsel has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections.

/RA by Martin J. Virgilio for/

R. W. Borchardt
Executive Director
for Operations

Enclosure:
Draft *Federal Register* Notice

NUCLEAR REGULATORY COMMISSION

[NRC-XXXX-XXXX]

Interim Enforcement Policy for Minimum Days Off Requirements

AGENCY: Nuclear Regulatory Commission

ACTION: Policy Statement: Revision

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is revising its Enforcement Policy to include a provision allowing licensees enforcement discretion if they implement an alternative approach to meet NRC's requirements for managing worker fatigue at operating nuclear power plants. This interim policy affects licensees subject to the minimum days off (MDO) requirements of NRC's fitness for duty regulations and will remain in place until the NRC publishes a revised rule associated with the MDO requirements for managing fatigue.

DATES: This revision is effective [INSERT date of publication]. The NRC is not requesting comments on this revision to its Enforcement Policy at this time.

ADDRESSES:

You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

NRC's Agencywide Documents Access and Management System (ADAMS):

Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301 415-4737, or by e-mail to pdresource@nrc.gov.

The NRC maintains the Enforcement Policy on its Web site at <http://www.nrc.gov>; select **Public Meetings and Involvement**, then **Enforcement**, and then **Enforcement Policy**. The Enforcement Policy is also accessible via ADAMS accession number ML093480037.

FOR FURTHER INFORMATION CONTACT: Gerry Gulla, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; **telephone:** 301-415-2872; e-mail: Gerald.Gulla@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

On March 31, 2008 (73 FR 17176), the NRC published a final rule in the *Federal Register* amending 10 CFR Part 26, "Fitness for Duty Programs". The Commission updated the requirements in Part 26 by reorganizing the rule and adding Subpart I, Managing Fatigue. Subpart I establishes requirements for managing worker fatigue at operating nuclear power plants, which was in response to a need for clear and enforceable requirements for the management of worker fatigue. Although the rule was effective on April 30, 2008, the NRC permitted an 18-month implementation period for Subpart I.

On September 3, 2010, the Nuclear Energy Institute (NEI) submitted a petition for rulemaking (PRM-26-5) (ML102590440). The NEI stated that “the new rule has resulted in consequences not originally envisioned when the rule was developed and that these consequences have diminished the safety benefits of the rule.” The NEI has stated that the unintended consequences stem from the minimum days off requirements, specifically § 26.205(d)(3) through § 26.205(d)(6), which create an undue level of complexity and inflexibility in managing worker fatigue. The NEI requested, among other changes, that 10 CFR Part 26, Subpart I, be amended to replace the MDO requirements in § 26.205(d) with a performance-based objective, consisting of an average of 54-hours worked per week, averaged over a calendar quarter rather than over each shift cycle. The NEI also proposed changing the annual assessment in § 26.205(e)(1) to a quarterly assessment to provide a more frequent review of hours worked. The NEI proposed to eliminate the MDO requirements addressed at § 26.205(d)(3) through § 26.205(d)(6) and apply the work hour limit and break requirements (§ 26.205(d)(1)(i), § 26.205(d)(1)(ii), § 26.205(d)(1)(iii), § 26.205(d)(2)(i), and § 26.205(d)(2)(ii)), would remain unchanged and apply during on-line and outage periods.

Separate from PRM-26-5, on September 23, 2010, NEI submitted a request for enforcement discretion regarding the MDO provisions of Part 26 (ML102710208). The request reiterates NEI’s opinion that the regulations which govern fatigue management impede “many safety-beneficial practices at plant sites, adversely [impact] the quality of life of covered workers, and [result] in conflicts between rule requirements and represented bargaining unit agreements.” The letter requests that the NRC “exercise enforcement discretion from the [MDO] provisions of the rule” until the final disposition of PRM-26-5.

The NRC held three public meetings (November 18, 2010, January 6, 2011, and January 25, 2011), during which the staff and stakeholders discussed alternatives to the MDO requirements. Although some of the stakeholders were comfortable with the MDO requirements, most focused their discussion on the unintended consequences, which they claim have diminished the safety benefits of the rule, along with needing an alternative that is simpler and would provide greater scheduling flexibility. The staff's goal was to develop an alternative approach that was responsive to the needs of stakeholders, would maintain clear and enforceable requirements and would ensure that the effects of cumulative fatigue are appropriately managed by licensees.

Discussion

Cumulative fatigue is caused by consecutive days of restricted or poor quality sleep caused by such things as shift-work, extended work days, and extended work weeks. Currently, Subpart I requires licensees to manage cumulative fatigue primarily by providing workers with a minimum number of days off over the course of a period not to exceed 6 weeks. The distribution of the days off during the 6-week period act to either prevent or mitigate fatigue. An alternative method for managing cumulative fatigue is to establish a requirement to limit actual hours worked. A limit on actual hours worked, when applied to schedules that require regular shift coverage, limits the number of work hours that can contribute to cumulative fatigue and provides indirect assurance of periodic days off for recovery rest. A schedule resulting in a weekly average of 54 hours worked, calculated using a rolling window of up to 6 weeks is such a schedule. In general, most individuals that work their normal shift duration and receive only the minimum number of days off required under the current MDO requirements could average up to 54 hours per week. However, NEI has indicated that implementation of the MDO

requirements has reduced licensee scheduling flexibility and imposed a substantial administrative burden. By comparison, limiting work hours to an average of not more than 54 hours per week by using a rolling window of up to 6 weeks limits the number of consecutive weeks of extended work hours that an individual can work by using a comparable but simpler and more flexible requirement. In addition, this alternative eliminates the burden of tracking the number of days off an individual receives in each shift cycle.

In summary, the maximum hours that can be worked under the alternative approach is comparable to the maximum hours worked under the current Part 26 MDO requirements, except that the alternative approach provides the simplicity and flexibility desired by the industry. This alternative is only applicable to § 26.205(d)(3) and covered workers described in § 26.4(a). Neither NEI's PRM-26-5 nor its enforcement discretion request offered any comparably effective alternatives for § 26.205(d)(4), § 26.205(d)(5), and § 26.205(d)(6), nor were any identified during the public meetings; therefore, the staff is taking no action in regard to those regulations.

The staff determined that replacing the MDO requirements and requiring all licensees to adopt this interim alternative approach has the potential for introducing adverse consequences if those licensees satisfied with MDO requirements were forced to change. As a result, the interim enforcement policy would allow licensees to choose whether or not to implement this alternative approach. Licensees who properly implement this alternative approach will receive enforcement discretion for failing to meet the requirements of 10 CFR 26.205(d)(3).

Although the rolling schedule required under the alternative approach limits the number of consecutive extended work weeks and thereby limits the potential for cumulative fatigue, there are unusual potential circumstances where the average can be met and the schedule may

be fatiguing; however the industry has stated that these unusual schedules are improbable. Such schedules include having only one day off in every nine or consistently working the maximum allowable hours, which would likely result in cumulative fatigue. Nevertheless, the staff believes that this alternative approach, together with other aspects of the rule that will remain unchanged, will provide reasonable assurance that licensees manage cumulative fatigue consistent with the protection of public health, safety, and security. The staff will engage licensees during regularly scheduled public meetings in the coming months to identify problems and lessons learned from implementation of the alternative approach.

Licensees must inform the NRC of their intent to adopt the alternative approach, and must comply with all requirements of Subpart I, as applicable. The interim policy will remain in place until the NRC publishes a new final rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue."

The NRC is not requesting public comment on this alternative approach at this time; instead, the NRC will seek public comment on the effectiveness of this approach during the comment period for a proposed rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue."

PROCEDURAL REQUIREMENTS

Paperwork Reduction Act

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Existing requirements were approved by the Office of Management and Budget (OMB), Approval Number 3150-0136.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

Accordingly, the NRC Enforcement Policy is revised to read as follows:

NRC Enforcement Policy

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9.2 Enforcement Discretion for the Minimum Days Off Requirements of 10 CFR 26.205(d)(3)

This section sets forth the interim policy that the NRC will follow to exercise enforcement discretion for licensees who pursue the alternative approach to the minimum days off (MDO) requirements of 10 CFR 26.205(d)(3). This alternative approach is consistent with the bases and objectives of Part 26, specifically managing cumulative fatigue, and provides licensees improved simplicity and flexibility for work scheduling.

This interim policy is only applicable to licensees who inform the NRC of their intent to adopt the alternative approach. Licensees shall comply with all requirements of Subpart I, as applicable, unless explicitly replaced or amended in this interim policy. The alternative approach to the MDO requirements applies to the work hours of covered individuals¹ during normal (e.g., non-outage/emergency) plant operations. This interim policy will remain in place until the implementation date of a revised final rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue."

A licensee who informs the NRC of its intent to transition to the alternative approach will receive enforcement discretion, and no enforcement action will be taken for the violation of 10 CFR 26.205(d)(3). If at any time while the licensee is implementing this alternate approach it does not meet the requirements, as stated in this interim policy, the licensee may be in violation of 10 CFR 26.205(d)(3) and subject to enforcement action. Once a licensee has transitioned to the alternate approach, it has the option to revert back to the requirement of § 26.205(d)(3), however the licensee is only allowed one opportunity to do so.

A. Actions and Requirements for Transition

A licensee must inform the NRC of its intent to transition to the alternative approach. Notification shall be made via a letter to the respective Regional Administrator and shall identify the implementation date which will be set by the licensee. The hours worked prior to the implementation date must meet the requirement of 10 CFR 26.205(d)(3), or enforcement action

¹ The term "covered workers" refers to those individuals identified in § 26.4(a) who are subject to the requirements in § 26.205.

may be taken. Once the NRC has been notified of the implementation date, the licensee can commence its transition to the alternate approach.

In order to receive continuous enforcement discretion once the alternate approach is implemented, each covered worker is limited to a weekly average of 54 hours worked, calculated using a rolling window of up to 6 weeks. This alternative is not applicable to unit outages or security system outages. Any instance of an individual's average weekly work hours exceeding the requirements for enforcement discretion may result in a violation of the MDO requirements. Typically an instance of an isolated occurrence or occurrences with limited duration would generally be considered either a minor violation or a non-cited violation.

B. Required Actions for Transition Back to the MDO Requirement

At any time prior to the implementation date of a revised final rule associated with the MDO requirements in 10 CFR Part 26, Subpart I, "Managing Fatigue," the licensee has the option to transition back to the MDO requirements. However, the licensee only has this option once. The licensee must submit a written notification to the respective Regional Administrator stating that it is reverting back to compliance with the MDO requirements as specified under § 26.205(d)(3), and shall give the NRC advance notice of its transition date. There will be no enforcement

action taken on any MDO violations which occurred while the licensee was implementing the alternate approach, unless the licensee failed to meet the requirements as stated in Section 9.2 A of this policy.

Dated at Rockville, MD, this day of 2011.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.