

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION
OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
WASHINGTON, DC 20555-0001

November 22, 2005

**NRC REGULATORY ISSUE SUMMARY 2005-28
SCOPE OF FOR-CAUSE FITNESS-FOR-DUTY TESTING
REQUIRED BY 10 CFR 26.24(a)(3)**

ADDRESSEES

All licensees authorized to operate a nuclear power reactor, possess or use formula quantities of strategic special nuclear material, or transport formula quantities of strategic special nuclear material.

INTENT

The U.S. Nuclear Regulatory Commission (NRC) is issuing this regulatory issue summary (RIS) to convey the NRC's staff position on the circumstances under which for-cause fitness-for-duty (FFD) testing is required after an accident and to provide the basis for enforcement guidance on the type and severity of personal injury accidents for which this testing must be performed. The staff's current position was established through an enforcement action taken against a nuclear power plant licensee. The information in this RIS is intended for licensees who are required to establish and maintain FFD programs and procedures as specified in Title 10 of the *Code of Federal Regulations*, Part 26 (10 CFR Part 26). No specific action or written response is required.

BACKGROUND

In June 1989, the NRC amended its regulations to incorporate into 10 CFR Part 26, a requirement that licensees establish and implement FFD testing programs at certain types of licensed facilities (54 FR 24494). As part of the final rulemaking process, the agency issued NUREG-1354 (May 1989), "Fitness for Duty in the Nuclear Power Industry: Responses to Public Comments," which addressed comments and questions about the proposed rule. Although the information in NUREG-1354 did not constitute an official interpretation of the regulation as specified in 10 CFR 26.4, licensees used the report in developing and implementing their FFD testing programs and procedures required by 10 CFR Part 26.

During NRC inspections of licensees' FFD testing programs, questions have arisen concerning the meaning of 10 CFR 26.24(a)(3), which requires for-cause testing (1) as soon as possible after any observed behavior indicating possible substance abuse, (2) after any accident involving a failure in individual performance (human error) that results in personal injury, radiation exposure, or release of radioactivity in excess of regulatory limits or actual or potential

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substantial degradation of the level of safety of the plant if there is reasonable suspicion that a worker's behavior contributed to the event, or (3) after receiving credible information that an individual is abusing drugs or alcohol. The questions about 10 CFR 26.24(a)(3) concern the requirements in the second clause for for-cause testing after an accident involving a failure in individual performance resulting in personal injury. Additional questions have arisen about apparent inconsistencies in the NUREG-1354 guidance and the lack of guidance on the type and severity of injuries that require for-cause testing.

SUMMARY OF ISSUE

10 CFR 26.24(a)(3) sets forth the requirements that licensees must implement for for-cause testing. The subsection has three clauses separated by semicolons. The first and third clauses ("as soon as possible following any observed behavior indicating possible substance abuse" and "after receiving credible information that an individual is abusing drugs or alcohol") do not directly relate to a worker's involvement in an accident and appear to be adequately addressed by licensees' FFD testing programs. The second clause of 10 CFR 26.24(a)(3) specifies three conditions for for-cause testing after an accident involving a failure in individual performance. The conditions are separated by commas. In the rest of this RIS, the event-related conditions will be referred to by lower case Roman numerals. Criterion (i) is that the accident involves a failure in individual performance resulting in personal injury, Criterion (ii) is that the accident involves a radiation exposure or release of radioactivity in excess of regulatory limits, and Criterion (iii) that the accident involves an actual or potential substantial degradation of the level of safety of the plant and there is reasonable suspicion that a worker's behavior contributed to the event.

NRC inspections of licensees' FFD testing programs have revealed inconsistencies in the circumstances under which licensees perform for-cause testing under the second condition of 10 CFR 26.24(a)(3). The inconsistencies result from different interpretations of the phrase "if there is reasonable suspicion that a worker's behavior contributed to the event" in Criterion (iii) and the applicability of this phrase to Criterion (i) above. The NRC's position is that the phrase "if there is reasonable suspicion that the worker's behavior contributed to the event" applies only to the phrase to which it is grammatically connected; that is, Criterion (iii), "actual or potential substantial degradation of the level of safety of the plant," and it does not apply to Criterion (i) and (ii).

NRC inspections have revealed that some licensees interpret "reasonable suspicion" in Criterion (iii) to mean "reasonable suspicion of drug use" or some other type of observed behavior that indicates possible substance abuse. This interpretation of "reasonable suspicion" is incorrect. Rather, if a worker is involved in an accident (event) involving a failure in individual performance resulting in any of the conditions specified in Criteria (i) and (ii), the worker is subject to for-cause testing regardless of the worker's observed behavior or any licensee suspicion of substance abuse.

The NRC staff is currently revising 10 CFR Part 26 and is considering the use of the OSHA standard. The standard is "a significant injury or illness that results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or other significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness..." As such,

the NRC staff encourages licensees to perform for-cause testing after accidents involving a failure in individual performance (human error) that results in a significant personal injury or an illness that is recordable at the time of the event, or reasonably could ultimately be recordable under the Department of Labor Occupational Safety and Health Administration (OSHA) standard in 29 CFR 1907.4 and subsequent amendments.

The staff recognizes that the requirements in 10 CFR 26.24(a)(3) contradict information in Section 8.3 of NUREG-1354. Subsection 8.3.3 of NUREG-1354 states: "The NRC believes that post-accident testing is necessary to determine whether the cause of the accident is related to substance abuse, if reasonable suspicion indicates that it may be drug related." The meaning of "reasonable suspicion" in the context of post-accident testing for substance abuse is not the same as in Criterion (iii). Criterion (iii) applies to the worker's behavior. Therefore, the staff is informing licensees not only of the staff's position on the meaning of 10 CFR 26.24(a)(3) but of the type of personal injury for which for-cause testing must be done. If violations of the for-cause testing requirements are identified during the course of NRC inspections, the NRC staff will consider enforcement discretion in accordance with Section VII.B.6 of NUREG-1600, "The General Statement of Policy and Procedures for NRC Enforcement Actions," on a case-by-case basis for violations that occur prior to and for a period of 30 days from the date of this RIS.

The aforementioned staff position regarding the meaning of 10 CFR 26.24(a)(3) was established through enforcement action taken against the Virgil C. Summer Nuclear Station. The enforcement action is described in detail in NRC Integrated Inspection Report No. 50-395/02-02; Exercise of Enforcement Discretion, at the following public internet link: http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/REPORTS/sum_2002002.pdf.

BACKFIT DISCUSSION

This RIS communicates a staff position that may be viewed as a backfitting under 10 CFR 50.109 regarding the appropriate interpretation of the requirements with respect to "for-cause" testing in 10 CFR 26.24(a)(3) based upon the Virgil C. Summer Nuclear Station enforcement action. In particular, this RIS makes clear that "reasonable suspicion that a worker's behavior contributed to the event," as an element for determining whether to conduct "for-cause" testing, is relevant only in those circumstances where there is an accident involving a failure in individual performance resulting in actual or potential substantial degradations in the level of plant safety. There are NRC documents [e.g., Section 4.2.4 of NUREG/CR-5227, Fitness for Duty in the Nuclear power Industry, A Review of Technical Issues (September 1988); Section 4.1 of Supplement 1 to NUREG/CR-5227 (May 1989); and Section 4.3 of NUREG-1385, Fitness for Duty in the Nuclear Power Industry: Responses to Implementation Questions (October 1989)] that are consistent with this RIS.

However, the NRC also issued NUREG-1354, Fitness for Duty in the Nuclear Power Industry: Responses to Public Comments (May 1989), which is inconsistent with this RIS. This past guidance on "for-cause" testing after an accident stated, in part: (1) "Post-accident urinalysis screening is to be conducted as soon as possible after accidents involving a failure in individual performance which results in personal injury or in a radiation exposure or release of radioactivity in excess of regulatory limits if there is reasonable suspicion that the worker's behavior contributed to the event [p. 8-6]." (2) ". . . "Unless otherwise stated in 10 CFR

26.24(a)(3), the licensee should determine whether post-accident testing is necessary, based on reasonable suspicion and on the nature and severity of the accident [p.8-6].”

Due to the apparent inconsistencies in the guidance, questions have arisen during NRC inspections of licensees’ FFD testing programs regarding “for-cause” testing after an accident involving a failure in individual performance. The interpretation in NUREG-1354 is incorrect, given the grammatical structure of the second clause in 10 CFR 26.24(a)(3).

Backfitting is defined in 10 CFR 50.109, (as well as in all other applicable regulations) in part, as a modification of or addition to the procedures or organization required to operate a facility, which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position. The NRC has determined that the interpretation of 10 CFR 26.24(a)(3) found in NUREG-1354 is incorrect and cannot be relied upon by licensees in implementation of their FFD testing programs. This constitutes a different interpretation from a previously applicable staff position, and consequently, would be considered a backfit.

A backfit analysis is not required if the staff determines that one of the exceptions to the backfit rule is applicable. The staff has determined that the compliance exception, 10 CFR 50.109(a)(4)(i), (and all other applicable regulations) would apply in this case because any required modifications to a licensee’s program would be necessary to bring the licensee into compliance with the correct interpretation of 10 CFR 26.24(a)(3), consistent with the three guidance documents identified above.

Consequently, a backfit analysis is not necessary because pursuant to 10 CFR 50.109(a)(4)(i), 10 CFR 70.76(a)(4)(i), and 10 CFR 76.76(a)(4)(i) we need to bring licensees into compliance with regulations.

FEDERAL REGISTER NOTIFICATION

A notice of opportunity for public comment on this RIS was not published in the *Federal Register* because it is informational and requires no specific action or written response.

SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996

The NRC has determined that this action is not subject to the Small Business Regulatory Enforcement Fairness Act of 1996.

PAPERWORK REDUCTION ACT STATEMENT

This RIS does not contain any information collections and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

CONTACT

Please direct any questions about this matter to the technical contact listed below.

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Attachment: List of recently issued NMSS Generic Communications

Note: NRC generic communications may be found on the NRC public Web site,
<http://www.nrc.gov>, under Electronic Reading Room/Document Collections.