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of the Fitness for Duty Rule (SECY-00-0159)

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
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4 STAKEHOLDER MEETING ON THE IMPLEMENTATION
5 OF THE FITNESS-FOR-DUTY RULE
6 (SECY-00-0159)

7 + + + + +

8 TUESDAY

9 MARCH 20, 2001

10 + + + + +

11 ROCKVILLE, MARYLAND

12 + + + + +

13 The public meeting was held in the
14 Auditorium of the Nuclear Regulatory Commission, Two
15 White Flint North, 11545 Rockville Pike, at 9:00 a.m.,
16 Garmon West, moderating.

17 PRESENT:

18 GARMON WEST	NRR
19 RON ALBERT	NRR
20 JESSE ARIDSEN	NRR
21 BRAD BAXTER	NRR
22 JIM CREED	Region III
23 NANCY DURBIN	MPD Consulting
24 BRUCE EARNEST	Region IV
25 FRANK GILLESPIE	NRR

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1	PRESENT: (continued)	
2	BRUCE EARNEST	Region IV
3	FRANK GILLESPIE	NRR
4	JON JOHNSON	NRR
5	TERRY MADEDA	Region III
6	GEARY MIZUNO	OGC
7	VONNA ORDAZ	NRR
8	GARY PIRTLE	Region III
9	GREG SMITH	Region I
10	GLENN TRACY	NRR

11 ALSO PRESENT:

12	BRAD BAXTER
13	JERRY BEBB
14	SHARON BLUE
15	BRETT BOISMENU
16	T. SCOTT BRAZIL
17	RICHARD BUCHER
18	KATHY BURKETT
19	MICHAEL BURRELL
20	LOREN BUSH
21	JEFF CAMPBELL
22	PATRICIA CAMPBELL
23	RON CASEY
24	PEGGY CLARK
25	RANDY CLEVELAND

26

27 ALSO PRESENT (Continued):

28	SHELLY CRAIG
29	PATRICIA DAVIS
30	PETE DEFLIPPI
31	NICK DiPIETRO
32	AL DYMOND
33	SHERRY ECKERT
34	RICH ENKEBOLL
35	RICH FITZSIMMONS
36	JOHN FLINN
37	PETER FOWLER
38	SANDRA FRANCIS
39	NEIL HARRIS
40	PAT HARRISON
41	AMY HANSE
42	LYNN HAUCK
43	LORI HAYES
44	LORNA L. HEALEY
45	WALTER JOHANSEN
46	MARGARET JULIANO
47	ROBERT R. KELM
48	DARLENE KOPP
49	SUSAN LANOUE

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1 LISA MATULA
2 EILEEN MOORE
3
4 ALSO PRESENT (Continued):
5 JOHN MORIARTY
6 RANDY MUMME
7 JAMES NOEL
8 PAMELA O'CONNOR
9 CINDY PARENT
10 REBECA L. PATSY
11 MICHAEL PRIEBE
12 SHARON QUINN
13 RICHARD RIST
14 BILLIE ROOKS
15 TED SHULTS
16 ROBERT SOUTHWORTH
17 REBECCA STANFIELD
18 MARTHA TAYLOR
19 SUE TECHAV
20 JANET THIEL
21 FREDERICK WHITT
22 GLENN WILSON
23 MANCHESTER WOODARD-HALL
24
25
26
27
28

I-N-D-E-X

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P-R-O-C-E-E-D-I-N-G-S

(8:59 a.m.)

MODERATOR WEST: Good morning to all of you, and welcome to the Fitness-for-Duty Workshop, implementation workshop. We are delighted to have you here.

I have a lot of talking to do during the day. So I am going to sort of save my voice here on the front end, and I just want to briefly introduce our introductory speaker.

His name is John Johnson. He is the Deputy Office Director for the Office of Nuclear Reactor Regulation, also referred to as NRR. We will try to stay from as many acronyms as we can and, when we do use them, we will certainly try to explain them to you.

So without any further ado, we will have some opening remarks from Mr. John Johnson.

MR. JOHNSON: Thanks, Garmon. I want to welcome everybody. I guess this is the first day of Spring. I saw a robin waiting for the Metro this morning.

I'm glad Loren Bush is here. I don't know if many of you know him, but -- No, I do want to welcome all our stakeholders as well as the NRC people. The success for this workshop will be to understand the implementation issues with the rule, the revision to Part 26, discuss a lot of questions.

I know there's two days planned to discuss all the implementation issues and changes to Part 26. Then Thursday is a time planned to discuss proposed change to the rule brought about by some stakeholders that want to reduce the amount of random testing for individuals that do not have to go into vital areas of the plant.

So I think there's quite a bit of issues to go over in three days. I was talking to Garmon last night about all the changes. To go back in history, this rule change has been being worked on for a number of years, and it's finally come to fruition for the NRC Commissioners. The Commission approved the rule on December 4.

I asked Garmon last night when it is going to be effective and, of course, the rule becomes effective once it is published in the Federal Register for a period of time, and we are waiting for the Office of Management and Budget to give us clearance to issue that rule, and I know there's a lot of controversy over the cost/benefit of this rule.

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1 Just to make sure that we all understand
2 the status of it, the NRC Commission has approved the
3 rule, and the main purpose of this discussion is to go
4 over the details of what all those changes are.

5 One of the things that, I think, we all
6 can agree on, even though we have disagreements on the
7 costs of the testing and so forth, is that we want to
8 make sure to maintain safety that all the personnel
9 that work at a nuclear power plant are reliable and
10 trustworthy. We want to make sure that they are not
11 under the influence of alcohol or drugs and that they
12 are certainly fit for duty.

13 Why did we make this change? Why did we
14 make a change to Part 26? Well, there's a number of
15 reasons. We did a regulatory analysis of each one of
16 these individual changes, and we also did a regulatory
17 analysis of the integrated sum of them all, at the
18 Commission's request, and there are many reasons for
19 the changes.

20 We made some changes to look at areas
21 where we thought there were some loopholes in terms of
22 individuals that would want to subvert the testing.
23 We made some changes to reduce unnecessary burden, and
24 we made some other changes to make our rule in
25 conformance with industry or nationwide consensus
26 standards, in this case with Health and Human
27 Services.

28 Garmon and the staff will go over some of
29 the details as to where and why we haven't conformed
30 100 percent to those Health and Human Services
31 requirements. There are some differences, and we can
32 go over those and give you the reasons why.

33 We also -- Part of the change to this rule
34 was to react to a petition for rulemaking from a
35 licensee that requested a change in the audit
36 schedule, and that request was made to change the
37 audit to every two years instead of every year, and I
38 think we have made it every three years, if I'm
39 correct.

40 So we have attempted to address a number
41 of different issues. So this is a fairly widespread,
42 complicated change that has a lot of changes -- a lot
43 of nuances to it, and it was done for a number of
44 reasons.

45 So it's been very difficult to even
46 explain to our own employees and explain to our
47 Commissioners why the change, what's been changed, and
48 is it a benefit -- and overall benefit. We think it
49 is.

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1 I mentioned some of the increases,
2 additional changes we have made to maintain safety.
3 One of those is in an area of to prevent subversion of
4 the testing. Now I don't want to mention this from a
5 standpoint of there is widespread subversion out
6 there. It's a very small percentage, but there is
7 some actions we have taken that we think we can help
8 eliminate that.

9 Also, there's some actions we have taken
10 to make the alcohol abuse sanctions in line with drug
11 abuse. We feel that that was warranted.

12 From a reduction in unnecessary burden, we
13 have reduced some training requirements, some audit
14 requirements. We have reduced some waiting times. We
15 believe waiting times for people to be able to work,
16 and I think some of the overall benefits that we see
17 in terms of unnecessary burden in terms of cost,
18 dollars cost, actually go into some of these
19 considerations for people having to wait around before
20 they can go in and work at a power plant when they
21 have no history of drug abuse, and they have properly
22 been screened.

23 So we feel that overall the change to this
24 rule is a benefit for safety, a benefit for reducing
25 some unnecessary burden, and to make our rule more
26 consistent with Health and Human Services standards.

27 I learned what the term suitable inquiry
28 means. I'm sure there will be a lot of discussion
29 about that. There is some relationship, of course,
30 with security rules and getting access to a plant from
31 a security standpoint in terms of going through
32 people's background, doing a background check, and
33 there is some relationship between this check in terms
34 of looking into someone's history of drug or alcohol
35 abuse.

36 So I hope that during the workshop you can
37 get into the details of those questions and understand
38 what the rule requires and what it doesn't require.

39 I looked at the agenda, and I see all
40 these breaks in here, and I tried to figure out why
41 they were there. As far as I know, they are there
42 because, if you didn't get a chance -- We had planned
43 to have a health clinic come over here and test
44 everyone of you before the workshop, but if you
45 haven't been tested while you registered this morning,
46 we have plenty of breaks set up so that we can do that
47 testing. We want to make sure that you are all fit
48 for duty, too. Only kidding.

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1 Anyway, that's about all I wanted to say.
2 I again welcome you, and hope that we can go through
3 all the details of this. I know there's a lot of
4 controversial issues, but understand that the
5 Commission has approved this rule, and we are prepared
6 to explain the differences, all the details, and
7 discuss how to implement it.

8 Thank you.

9 MODERATOR WEST: I have several items that
10 I just want to start off with that are, I guess, more
11 in the area of just housekeeping, if you will. So
12 I'll mention those, and then I'll give you more
13 precisely an overview of what the various workshops
14 will cover over the next few days and some of my
15 thoughts on just how that should be done, the format
16 for it.

17 We are certainly aware that anytime you
18 get this many people together, you are going to have
19 some that would want to perhaps have a smoke break.
20 So I thought I would mention to you, just in terms of
21 how the building is set up, it's my understanding that
22 if you go up this stairwell that is right outside of
23 the entrance, there is a guard stationed there, and I
24 believe the guard will be able to indicate where the
25 closest available place for smoking would be.

26 I would also note that we have sign-in
27 sheets. I know that's a hassle, particularly after
28 you have gone through the main lobby, whichever
29 direction you came in, and that sort of slows you
30 down. But we would really appreciate it if you would
31 complete the sign-in sheet at some point before you
32 leave. That will be helpful to us.

33 I might note, too, that we have -- and I'm
34 very grateful to all my managers as well as my co-
35 workers that are participating in various time slots
36 over the next three days, and I just want you to be
37 aware that on occasion some of them, because of other
38 commitments, may have to leave, but we really
39 appreciate the help and the support.

40 Just briefly on my background and location
41 with NRC, you can certainly tell from my nametag that
42 I am with NRR, and I am in the Operator Licensing
43 Branch, and Mr. Glenn Tracy is out Branch Chief, and
44 within the section of the Reactor Safeguards Section
45 it just seems like we are involved in quite a bit of
46 rulemaking activities these days, and Vonna Ordaz is
47 our Section Chief.

48 I am the person that is the focal point,
49 if you will, for the fitness-for-duty rule. So if you

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1 have questions, as many of you have had in the past
2 and I am sure you will continue to have in the future,
3 I'm the person that you eventually want to contact,
4 either by phone or e-mail.

5 I thank you for this opportunity for me to
6 learn that the e-mail address for fitness-for-duty
7 wasn't working. I was wondering why it was so silent,
8 but through your responses and giving me feedback that
9 you weren't able to use it, we have gotten that
10 straightened out. If I'm incorrect on that, let me
11 know either by phone or sending a message to my
12 regular e-mail address.

13 As John mentioned, over the next three
14 days we are going to devote the first two days, today
15 and tomorrow, to the changes to the Part 26, the
16 larger rule, and then by design we have a break with
17 respect to the third day, totally separate; because
18 sometimes when you go through these changes, it's
19 confusing enough and, if you are sort of commingling
20 changes with a larger rule and you've got an amendment
21 sort of nested into one of the same days, it gets even
22 more confusing.

23 So we decided we would just separate the
24 treatment of those two efforts by having the third day
25 solely devoted to the amendment to reducing the scope
26 of random testing.

27 I might emphasize that the purpose of
28 today's and tomorrow's workshop is to take you through
29 the changes and, hopefully, the hand out materials we
30 have provided will be helpful in this regard. So that
31 on one hand, you have a clean copy of the new rule
32 and, on the other hand, you have essentially and
33 redline and strikeout that makes visible through the
34 bold print what the changes are.

35 So we'll go through those literally sort
36 of section by section, and we have received questions
37 in advance on implementation, and that is the focus,
38 as we see it, for these workshops, the first two days
39 at least, implementation type questions that we will
40 be addressing some of them -- most of them that we
41 have received.

42 We received them from various
43 stakeholders, from NEI as well as even our Regional
44 inspectors, and we've been so busy working on the
45 first set of questions that we have neglected our
46 regional questions. But we will eventually get to
47 those and, certainly, in instances where we have a
48 redundancy we will pull the questions together and
49 just answer them once.

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1 So my point is that we will step through
2 each section of the rule, indicate what the changes
3 are, and then, as appropriate for questions that we
4 received in advance, we will address those questions.
5 Then at the end of that section, we will provide an
6 opportunity for any comments.

7 I might add, I would envision that we will
8 probably potentially get some new questions. We are
9 not proposing to answer the new questions on the spot
10 but, as you can certainly tell, the workshops over the
11 next three days will be transcribed, and if we get any
12 new questions, we will certainly have them by way of
13 the transcript, and we will eventually address them.

14 If you are wondering, for either questions
15 that will be new or we haven't addressed, how we are
16 going to eventually pull everything together, the
17 bottom line answer is that our goal and our plan is to
18 eventually come up with a NUREG type document that the
19 NRC would publish that would be in the format of
20 questions and answers with respect to the various
21 sections of 10 CFR Part 26.

22 That's in the long term. In the short
23 term, what we would envision downstream of the
24 workshops over the next two days, we would provide as
25 the answers are available on the fitness-for-duty
26 website.

27 Just to revisit the status of the rule at
28 some level of detail, as John mentioned, the
29 Commission has approved the rule. We are waiting for
30 the OMB clearance, and we recognize that we have a
31 task there with respect to comments that we received
32 on the OMB clearance, which is certainly appropriate.

33 I might add, and I think you would be
34 certainly interested, our original date for
35 essentially, roughly speaking, publishing the final
36 rule in the Federal Register was April 4 of this year.
37 However, we asked for and received an extension. So
38 now we are slated to, roughly speaking, publish the
39 final rule in the Federal Register on July 4.

40 Connected with that, of course -- Excuse
41 me, that's July 5. Connected with that is the fact
42 that, once the final rule is, in fact, published in
43 the Federal Register, then it would have a 90-day
44 clock on it with regard to implementation.

45 So that gives you an overview of where we
46 are at and what our target dates are with respect to
47 the implementation of the rule. That roughly works
48 out to be sometime in the time frame of October.

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1 Just a few remaining points. The answers
2 that we are going to give today -- and I might add on
3 the front end, the approach we took, we have the
4 advance questions from stakeholders, and we wanted to
5 have the maximum amount of time to develop the
6 responses to the questions we received.

7 So what you are going to see here today,
8 you'll see the questions, and I will give the
9 responses verbally. We did that, because again we
10 needed literally right up until the last hour to have
11 the benefit of working on and refining the responses.

12 So we would characterize the responses
13 that we are going to give today as provisional
14 responses, and I might go further and say that I think
15 you could certainly contrast that with -- and I'll
16 have a slide on this at some point with respect to the
17 rule -- The legal interpretations would, in fact, come
18 from our Office of the General Counsel. They would
19 have to be submitted in writing. They would have to
20 be then in turn provided in writing.

21 I just throw that out to make it known
22 that, again, what we are going to provide today are
23 provisional answers. They will be captured in the
24 transcript, and I would be the first to admit that you
25 will undoubtedly have some delta perhaps between what
26 we'll present today and what will finally be captured,
27 let's say, first opportunity on the website, the
28 fitness-for-duty website, and then ultimately
29 downstream of that in the NUREG document that I
30 mentioned earlier.

31 I noted that we are transcribing the
32 workshop, and just for your interest, the transcript
33 will certainly be available in the form of a hard
34 copy. I can provide additional details on that with
35 respect to putting something up on the fitness-for-
36 duty website.

37 It is also my understanding that an
38 electronic version will be available, and that
39 certainly lends itself very easily to putting it on
40 the external Web. So you can have the benefit of that
41 as well.

42 Then lastly, I would just ask that, as we
43 go forward and get into the changes to the rule and
44 particularly at the point where you have to either ask
45 a question or to make a comment for the benefit of
46 making sure that it is accurately transcribed and so
47 on, we would ask you to speak into the various mikes
48 that we have provided, at least one over here and at
49 least one over in the other aisle.

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1 That's the overview, and at this point
2 unless there are questions or comments, I would
3 propose to go right into the various rule sections,
4 essentially starting with the first one and then just
5 working through over the next couple of days.

6 At this point, are there any comments or
7 questions?

8 So here you have the first section of the
9 rule that we will be dealing with. As we previously
10 noted, we are going to have a workshop on proposed
11 changes to the scope of the rule on Thursday. That's
12 certainly relevant to the scope section.

13 This morning we are only going to cover
14 the implementation questions regarding the changes in
15 the final rule. As I noted also, we are expecting
16 that those changes -- the final rule, that is -- would
17 be published sometime in the July time frame.

18 Here there weren't any changes to this
19 particular section. It's more in terms of just being
20 complete and at least briefly reviewing what the areas
21 are that are included in this section. Certainly, it
22 is relevant to nuclear power plants.

23 It is also relevant to the second category
24 of licensees that either possess, use or transport
25 special strategic nuclear material. That's what that
26 acronym stands for. We won't be devoting any time to
27 that latter category.

28 (Slide change)

29 MODERATOR WEST: Now still with the
30 Section 26.2 under Scope of the rule, we will start
31 working toward -- Here you have a mixture. You have
32 those things that are essentially the same in the rule
33 where no changes were made. Individuals continue that
34 would be required, if they have unescorted access to
35 the nuclear plants protected area, would still be
36 covered under the fitness-for-duty program.

37 Similarly, licensee, vendor or contractor
38 personnel would be required -- those that would be
39 physically required to report to the Technical Support
40 Center -- that's the TSC -- and the Emergency
41 Operations Facility would still be covered under the
42 new rule. And as I mentioned on the previous slide,
43 the strategic -- special strategic nuclear material
44 licensee and transporter personnel would continue to
45 be covered under the Scope.

46 Here we introduce one of the first changes
47 in the rule, which you see in bold where we have
48 broadened the coverage with respect to -- under the

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1 scope of the rule, with respect to fitness-for-duty,
2 FFD -- fitness-for-duty program personnel.

3 Then the next slide will start to get into
4 the specifics of what is included under this category
5 of fitness-for-duty program personnel.

6 (Slide change)

7 As you can see, this category would
8 include fitness-for-duty program personnel that can
9 link the test results with the person who was tested
10 prior to determination of a fitness-for-duty policy
11 violation.

12 Secondly, it would include program
13 personnel that make medical or management
14 determinations of fitness. Third, it would include
15 fitness-for-duty program personnel that can make
16 removal or return to work decisions or it would also
17 include fitness-for-duty program personnel who are
18 involved in the selection or notification of employees
19 for testing or in the collection of on-site testing of
20 specimens.

21 (Slide change)

22 MODERATOR WEST: This slide just further
23 notes what is currently in the rule. The regulations,
24 under Scope, do not apply to NRC employees, to law
25 enforcement personnel or off-site emergency fire and
26 medical response personnel.

27 Much later in the slides, there are some
28 appropriate aspects of the rule with respect to NRC
29 employees, and we'll get into that, as well as
30 contract personnel.

31 Then lastly on the slide, certain
32 regulations in this section -- part, actually -- apply
33 to licensees holding permits to construct a nuclear
34 power plant.

35 Further, the scope of the rule would
36 continue to apply to the corporation required to
37 obtain a certificate of compliance.

38 This section (e), which is not uncommon
39 with rules, whether they are existing rules or new
40 rules like this one that are about to be published,
41 they have certain sections that are reserved for
42 potentially future efforts. In this case 26.2(e)
43 would be reserved for any future efforts with regard
44 to decommissioning.

45 This also helps to just summarize in brief
46 terms where we are at with regard to the issue of
47 decommissioning plants and their coverage on the rule.
48 As you can see, the applicability of decommissioning

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1 plants has not been resolved with respect to the new
2 rule.

3 In fact, it is going to be dealt with as
4 a part of a much larger effort that is underway that
5 cuts across not only this rulemaking effort but others
6 within our agency as well, and it is through that
7 effort that this issue would be addressed.

8 Further under the Scope, persons
9 performing activities under this part who are covered
10 by a program regulated by another Federal agency or
11 State need be covered by only those elements of a
12 licensee's fitness-for-duty program, as long as such
13 persons -- we would expect that they would have to
14 meet -- the program that they are trying to take
15 credit for would have to meet certain standards.

16 I might add that the intent of this change
17 is to reduce the burden of testing on individuals
18 covered by multiple Federal and state programs.
19 Unfortunately, most programs do not meet or come close
20 to the NRC standards.

21 Having individuals working in the same job
22 with different standards for their fitness-for-duty
23 program was not felt to be acceptable, and the NRC
24 retained the new section with the provision that all
25 workers must be under a program meeting NRC standards.
26 Any component of a program meeting such standards can
27 be accepted.

28 With that in mind, we then go into, as we
29 do here with the first bullet, some of the particulars
30 of what would be expected if a licensee was trying to
31 take credit for individuals participating in another
32 Federal program.

33 So you would have the aspect of it that
34 you would expect to have, the pre-access or pre-
35 employment testing, random testing, and for-cause
36 testing for the drugs that are specified by HHS.

37 Then you would also expect -- These would
38 be additional standards that we would be looking at.
39 You would expect to have urine specimens tested at a
40 laboratory certified by HHS or the College of American
41 Pathologists or other comparable certification
42 programs, and you would expect awareness training as
43 well.

44 In addition, the expectation would be that
45 impartial and objective procedures would be provided
46 with respect to appeals and appealing any findings of
47 a fitness-for-duty violation, and we would expect that
48 our provisions for notification of the licensees
49 granting unescorted access of any Federal FFD

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1 violation by the testing agency or organization must
2 be in place. So the notification here is the key in
3 the event someone does test positive for drugs or
4 alcohol.

5 (Slide change)

6 MODERATOR WEST: So that essentially steps
7 through the various changes and, certainly, as I did
8 that, touches on some of the things that have just
9 rolled over from the current rule. Now I'll go into
10 the specific question that we received with respect to
11 this particular section of the rule.

12 The question that you have before you is
13 as follows: Personnel who meet the criteria defined
14 in (i) through (iv) but are not FFD, fitness-for-duty,
15 personnel -- for example, a corporate manager who
16 might make a management determination of fitness, an
17 emergency medical physician who determines whether
18 someone is fit, or an off-site manager who is involved
19 in scheduling of random testing of his or her workers
20 -- covered under the Scope.

21 So that's the question. Our response is
22 this: Individuals who perform one of these functions
23 on an ad hoc basis are not FFD program personnel --
24 fitness-for-duty program personnel -- and therefore,
25 not included in the scope of the rule.

26 I might, just before I go further in the
27 response, just mention a little caution here.
28 Certainly, we want to add some clarification on this.
29 On the other hand, we don't want to give the
30 appearance, by any means, that this would be -- in
31 making this statement, that this would be a way to
32 just sort of have people sort of in and out of the
33 categories of whether they are fitness-for-duty
34 program. That's certainly not the intent. But,
35 hopefully, the distinction here will become a little
36 bit clearer as I go on.

37 Specifically getting back to the question,
38 an emergency medical physician should not make a
39 medical determination of fitness unless trained and
40 qualified in accordance with the Part 26.3 definition
41 of medical determination of fitness. There in that
42 section we have defined medical determination of
43 fitness.

44 In some cases, such as a corporate manager
45 who makes management determinations of fitness, or an
46 off-site manager involved in the scheduling of random
47 testing, the licensee will have to make a judgment
48 regarding whether the individual would be considered
49 an FFD, fitness-for-duty, program personnel.

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1 One consideration would be whether the
2 individual's actions could jeopardize the integrity of
3 the fitness-for-duty program.

4 The rule requires that provisions of
5 licensees' FFD policy apply to FFD program personnel.
6 The NRC expects that individuals who have routine
7 and/or ongoing fitness-for-duty program
8 responsibilities of the type described in
9 26.2(a)(4)(i)-(iv), which is essentially just the
10 larger list that I covered before of expanding the
11 scope of fitness-for-duty program personnel covered
12 under the rule, would be included under fitness-for-
13 duty program personnel.

14 I would be the first to admit, that's
15 somewhat of a long-winded answer, but I think the long
16 and the short of it is that we are trying to answer as
17 precisely as we can the question, and I think the
18 overarching aspect of what I said is with respect to,
19 certainly, the individuals that are listed out in the
20 Section 26.2(a)(4)(i)-(iv), which is sort of the focus
21 of the question, those individuals that are performing
22 those functions on some consistent, routine basis. No
23 question, they would be covered.

24 Getting back to the question again, those
25 that would not be covered would be more in the
26 category of infrequent, ad hoc basis, with the
27 caution, if you will, of perhaps not expecting that
28 that would be -- the ad hoc basis would be a routine
29 kind of happening.

30 Are there any questions or comments on
31 26.2? Yes, please?

32 MR. NOEL: James Noel from BWX
33 Technologies. We are one of the two Category SSNM
34 facilities that were listed in the scope. You said we
35 would not be addressing that during this workshop.

36 Are there any significant differences in
37 how this rule change is going to affect material
38 licensees?

39 MODERATOR WEST: I think that's -- which
40 I didn't say. That's the bottom line answer on why we
41 are not really putting a whole lot of time on that,
42 because there weren't any fundamental changes in that
43 area.

44 MR. NOEL: Thank you. Has there been a
45 determination made whether the MRO -- off-site MRO
46 will be involved in the scope of the rule?

47 MODERATOR WEST: I think, again, the
48 approach I would like to take is we will consider that

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1 to be a new question, and we'll capture it in the
2 transcript, and we will give attention to it.

3 MR. NOEL: Thank you.

4 MODERATOR WEST: Certainly. The next
5 section concerns definitions. I'm sorry.

6 MR. BRAZIL: Scott Brazil. I'm with
7 Dominion. I have a question regarding where you
8 would draw the line on a manager or a supervisor being
9 involved in the scheduling of random testing to the
10 extent that they would be considered fitness-for-duty
11 program personnel?

12 I have a number of folks who are non-
13 nuclear employees who are badged for access at one of
14 my sites. Their supervision is trained to perform CBO
15 on these folks, and I contact those supervisors when
16 these people are selected for random testing. They
17 are the folks who notify the worker he's been selected
18 and send him for testing.

19 He is involved in the scheduling of those
20 workers for random testing. Must I now consider him
21 as fitness-for-duty program personnel or is that an ad
22 hoc level of involvement?

23 MODERATOR WEST: Okay. Again, I
24 appreciate the question, and we will take that as a
25 new question, and we'll give attention to it.

26 I might add, so that I won't neglect any
27 other related questions for 26.2, if you have
28 additional ones, let us know.

29 MR. DAVIS: Garmon, Jim Davis, Nuclear
30 Energy Institute.

31 MODERATOR WEST: Good morning.

32 MR. DAVIS: I have an application kind of
33 question, the use of other programs. As I read the
34 restrictions in there, I personally have a little bit
35 of difficulty finding a place where they would be some
36 practical applicability to that.

37 Do you have some examples of other
38 programs that are acceptable and you see where we
39 would reduce this burden at the sites or does anybody
40 else in the audience know of a place where we actually
41 can take credit for another program in some sort of
42 practical sense? Is it really there?

43 MODERATOR WEST: I think you raise a
44 legitimate point. I think the intention of this
45 particular section at the outset has probably not
46 fulfilled what the goal was, and I think it is largely
47 due to the fact that the NRC standards, let's say with
48 respect to DOT as one example, are somewhat higher
49 with respect to cut-off levels and so on.

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1 I think I was alluding to this as I
2 presented that particular part of the rule, but I
3 think you are right. It certainly hasn't done what we
4 may have originally intended for it to do when this
5 whole rulemaking process was first started.

6 Along the lines of your question, if there
7 is anyone in the audience that has any insights on how
8 this could be applied, we would certainly be open to
9 that, if you want to mention it.

10 MR. NOEL: I'm one of the other guys, but
11 there are a lot of guys in this room who are strictly
12 NRC licensees whose scope of work at their site is
13 changing, such as those involved in the MOX fuel
14 projects and the like, who are soon going to be
15 somewhat dually regulated perhaps or at least on some
16 regulation that's based on more than one Federal
17 agency's requirements.

18 At our site, we are dually regulated both
19 by the NRC and by the Department of Energy due to the
20 nature of the work that we are doing.

21 MODERATOR WEST: Sure.

22 MR. NOEL: And one of the early concerns
23 I had when fitness-for-duty was implemented at our
24 site was how we were going to accommodate those DOE
25 resident personnel who were our regulators and, as
26 such, it would be a tremendous conflict of interest in
27 us subjecting them to licensee testing.

28 This is one of the provisions that was
29 made early on for us in that the DOE programs and DoD
30 programs in some cases were deemed to be the
31 equivalent to the NRC and, as such, we did not have to
32 test those DOE and DoD personnel on our site. They
33 were subject to their own agencies' testing program.

34 My concern is I do not know the details of
35 that program in terms of cut-off levels and so forth
36 and whether or not this new provision of the rule may
37 be placing that in jeopardy at our site.

38 MR. DAVIS: So again -- Jim Davis -- So
39 perhaps the question for you is does the NRC consider
40 the DOE program equivalent? I mean, we might as well
41 get that question on the table.

42 Then in the second place, do any of the
43 power reactors know of any place where there is any
44 applicability of this provision for us? So we
45 shouldn't waste a lot of time with that. We'll just
46 test them all. Right? Okay. Thank you.

47 MODERATOR WEST: Thank you for your
48 question.

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1 We will now move on to the next section of
2 the rule, which concerns definitions, 26.3.

3 As you see here, what we have done, we've
4 tried to take the definitions and group them in
5 categories with respect to the new rule. So on one
6 hand, we have new definitions, revised definitions,
7 relocated definitions, and omitted definitions.

8 The new definitions tend to support other
9 rule revisions or clarify other parts of the rule.
10 The revised definitions increase clarity or accuracy,
11 and the relocated definitions -- these are definitions
12 of terms used in the rule itself that are now located
13 in the rule section where they first appear. Then
14 there were certain definitions that have been omitted,
15 because -- in the definition section, that is --
16 because they are defined elsewhere.

17 Here, although they are lumped together,
18 you have both the new and the revised definitions,
19 some of the more prominent ones. We have divided
20 these changed or revised definitions into three
21 categories, and you will see those categories in a
22 moment.

23 They include the testing process
24 definitions, changes that improve the accuracy or
25 clarity of the rule, and changes that support other
26 rule changes, which I previously mentioned.

27 So the first category, testing process
28 definitions, would include these terms, and these
29 definitions were changed to make the terms used for
30 the outcomes of testing more accurate and mutually
31 exclusive.

32 The next category, improved accuracy for
33 increased clarity, would include these terms. I might
34 note that the terms on this slide are not
35 significantly different from the interpretations that
36 have been used for the last 12 years or so in the
37 implementation of the fitness-for-duty rule. They
38 have been either added to clarify a meaning or have
39 been revised slightly to, hopefully, improve
40 accuracy.

41 Next we have the supporting definitions
42 for various rule changes, and you would have this set.
43 These definitions are relevant to some of the rule
44 changes we will be discussing later.

45 We have some presubmitted questions, as we
46 have covered to some extent already, on some of these
47 definitions which we will be covering later during the
48 workshop.

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1 You might just want to look over the
2 various definitions in the definitions section,
3 perhaps the redline, strikeout version. That will
4 give you a sense of even some that I may not have
5 covered here, just what the various definitions are.

6 (Slide change)

7 MODERATOR WEST: Now I'll shift to --
8 still with this same section on definitions -- to some
9 specific questions that we received in advance.

10 The first one for Section 26.3 is as
11 follows: With regard to the definitions of abuse of
12 legal drugs and substance abuse, how are licensees
13 supposed to obtain records on the abuse of legal drugs
14 and substance abuse in light of privacy requirements?

15 Our response is as follows: The current
16 suitable inquiry requirements for fitness-for-duty as
17 well as for access of the authorization should provide
18 adequate tracking and access to records of legal and
19 employment actions.

20 I note that the NRC recognizes that
21 licensees will not be able to independently verify
22 that an individual did not, for example, use, sell or
23 possess illegal drugs if there is no legal or
24 employment action.

25 The next question we received is as
26 follows: In the definition of medical determination
27 of fitness, what are the standard clinical procedures
28 referred into the definition?

29 Our answer is as follows: Clinical
30 procedures are part of a licensed physician's
31 training. More specific procedures are discussed in
32 the medical review officer's handbook, and I would
33 note that this is a particular item where we will and
34 plan to do some additional follow-up through
35 discussions with HHS in order to provide any
36 additional details that we can provide on this
37 particular question.

38 Before I move forward to the next section,
39 which will be 26.4, are there any new questions on the
40 definitions section of the rule, 26.3? If so, we will
41 entertain those now. Please, you should go to the
42 mike, please. Thank you.

43 MS. HAUCK: My name is Lynn Hauck from
44 Rochester, New York. I have a question about the
45 custody and control form.

46 DOT has indicated as of August 1 that we
47 are no longer able to use their form. Non-DOT tests
48 cannot use the Federal Custody and Control Form. I

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1 was just wondering, is there something available to us
2 other than that?

3 MODERATOR WEST: Okay. We will take that
4 as a new question, and I'm optimistic that we can
5 provide you some specifics on that -- not optimistic;
6 I know we can provide you some specifics on that.
7 That shouldn't be difficult.

8 The next section, 26.4 -- Sorry.

9 MS. TECHAV: There's a lot more questions
10 in here that haven't been covered.

11 MODERATOR WEST: You are speaking of the
12 advance questions we received? Yes. Maybe a point
13 that I didn't make as clearly as I should have.

14 It's not the expectation that we are going
15 to cover all the questions in this setting that we
16 have received in advance. Some, we haven't gotten to.
17 We did attempt to get to as many as we could. So you
18 are certainly right. There are some others that are
19 not going to be covered.

20 There will be others that may be in other
21 sections that we received in advance that we haven't
22 covered. The short answer is that, for those that we
23 haven't covered by the end of the session tomorrow,
24 the first opportunity would be as those answers become
25 available, we will put them up the fitness-for-duty
26 website.

27 The long term answer, for those questions
28 not covered over the next couple of days and questions
29 in general that we received would be captured in the
30 NUREG type document. So you are right. Some won't be
31 addressed today, but eventually they will be.

32 MS. TECHAV: Hi. Sue Techav with Exelon.
33 Under the medical determination of fitness it talks
34 about a licensed physician needs to examine and
35 interview an individual. I would like that defined on
36 how that is supposed to be met. Is it an expectation
37 that the MRO is going to have to be on site with a
38 face to face type interview for individuals that have
39 a history of substance abuse?

40 MODERATOR WEST: Okay. Thank you for the
41 question. Under -- Yes, please.

42 MR. BURRELL: Mike Burrell, Constellation
43 Energy. Just as a point of clarification, all the
44 questions will be addressed before publication?

45 MODERATOR WEST: Yes.

46 MR. BURRELL: Okay, thank you.

47 MODERATOR WEST: And just to -- not to
48 belabor this point, we will certainly address, not
49 necessarily here in this setting, all the advance

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1 questions we have received, and eventually the
2 questions and the answers will be captured in the
3 NUREG document, and we will use the fitness-for-duty
4 website such that we don't have to then hold off
5 giving you responses, particularly for the ones that
6 we can't cover and won't cover today. We don't want
7 to hold off the responses to those waiting simply for
8 the NUREG type document.

9 I might add, too -- and again, not to
10 belabor this point, but the only -- I don't think the
11 number of questions we've received so far, even if you
12 combine the ones we see from stakeholders in general
13 and specifically our regional inspectors, would be of
14 the number that would be impossible to include in a
15 NUREG type document.

16 The only caveat I would add is that we
17 would certainly -- If you don't see a one-to-one match
18 between everything being in the NUREG document
19 eventually, the only criteria we would be using would
20 be that if we looked at an item, looked at a question,
21 and we didn't find that it had any generic
22 applicability, then that would probably be the only
23 reason we wouldn't include something, such as you
24 wouldn't have a one-to-one match. But except for
25 that, I think that's -- The answer would be, if we
26 received the question, it will eventually appear in
27 the NUREG type document. Please?

28 MS. MATULA: Lisa Matula, STP Nuclear
29 Operating. On the abuse of legal drugs you had said
30 earlier that we would get that through the suitable.
31 The question is: Is that a conviction of legal
32 action?

33 MODERATOR WEST: Okay. We will take that
34 as a question. Thank you.

35 For the next section under 26.4, there is
36 nothing new there. This is part of what I mentioned
37 briefly at the beginning of the session today, simply
38 trying to point out the distinction between (a) the
39 provisional answers that we are giving you here today.
40 Ultimately, what you will find on the website and the
41 NUREG, the answers there, which I would characterize
42 as staff positions, and then lastly what is captured
43 here in terms of what truly is a legal interpretation.

44 There weren't any changes to this section,
45 and we didn't receive any presubmitted questions.

46 (Slide change)

47 Next we would have several sections that
48 are covered here together, the exemption section,

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1 26.6, communications, 26.7, and information and
2 collection requirements, 26.8.

3 The exemption section deals with the
4 various considerations the NRC would have with regard
5 to entertaining exemptions. 50.12 would be one
6 particular type of licensee, power reactors, let's
7 say, and then 70.14 would be another type of licensee,
8 materials licensees. But generally speaking, these
9 sections would deal with the various considerations
10 that the NRC would have in mind if it were considering
11 exemption requests.

12 In the communications section,
13 clarification of where to send communications and
14 reports have been added. In the information
15 collections requirements section there has been a
16 removal of the estimate of hours. We didn't receive
17 any presubmitted questions on these sections. But if
18 there are any new questions in either of those areas,
19 we would entertain them now.

20 MR. DAVIS: Garmon, I've got a question
21 for you.

22 MODERATOR WEST: Certainly.

23 MR. DAVIS: Jim Davis, Nuclear Energy
24 Institute. I thought I saw somewhere you were trying
25 to close your L Street office or have closed it.

26 MODERATOR WEST: That's correct.

27 MR. DAVIS: Then you need to change the
28 rule.

29 MODERATOR WEST: You are exactly right,
30 and I appreciate that feedback, which we received and
31 we'll give attention to that.

32 The point here is that the -- it's just
33 been stated, the L Street office has, in fact, been
34 closed, and the public document room is now located
35 here in the other building opposite of this one, in
36 White Flint One.

37 The next section deals with general
38 performance objectives, which is 26.10. As you can
39 see here, the first two general performance
40 objectives, they are essentially the same. That's
41 items (a) and (b), (a) dealing with reasonable
42 assurance that personnel covered by the fitness-for-
43 duty program are reliable and trustworthy, and (b)
44 reasonable measures for early detection of persons who
45 are not fit to perform activities. The emphasis there
46 is early detection.

47 The third has been removed, because it is
48 not a part of the NRC's mandate, and we didn't receive
49 any presubmitted questions on this section.

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1 Would there be any new questions regarding 26.10?

2 MS. TECHAV: Sue Techav, Exelon. In
3 regard to having individuals perform their tasks in a
4 reliable and trustworthy manner that are not under the
5 influence of any substance, legal or illegal, we are
6 constantly getting challenged from the ADA, from EEOC
7 about people that are under prescription medications,
8 specifically from Marinol.

9 We just recently lost a case that an
10 individual that was using Marinol would have to be
11 provided reasonable accommodation when they are on
12 that type of prescription medication. Could the NRC
13 address that issue and how we are supposed to respond
14 to that type, because it's going, to me, continue to
15 snowball into other areas of this are of where we are
16 denying unescorted access for individuals because we
17 feel that they are not in a safe condition to perform,
18 even though they do have a legal prescription for
19 different types of medication?

20 MODERATOR WEST: I think that's a fair
21 request, and we can and will certainly try to provide
22 that as one of the questions we will address in the
23 NUREG. I might add further that the point you make is
24 certainly the case.

25 MR. MIZUNO: Garmon, can I just interject
26 here? Gary Mizuno, Office of General Counsel for the
27 NRC.

28 I think that we might -- We will have a
29 discussion. I'm not sure we are going to completely
30 address your question. I think one thing that we will
31 say is that once the licensee makes a determination,
32 a medical or management determination, that the person
33 is not fitness to perform, I'm assuming they have a
34 reasonable basis for that. Then our requirement
35 under Part 26 are satisfied.

36 Anything beyond that with respect to the
37 licensee's responsibilities or liabilities under the
38 ADA or any other Federal statute or state statute is
39 something that the NRC would not normally speak to,
40 because it is beyond our regulatory purview.

41 MODERATOR WEST: And I think there
42 certainly would be a need for me to coordinate
43 whatever we could do in this area with OGC, and if we
44 can provide our position within the context of the
45 NUREG, then we will certainly do that.

46 The next section, which is 26.20, deals
47 with written policies and procedures. Here we have
48 several newly specified areas that licensees'
49 policies and procedures must cover: Off-site

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1 involvement with illegal drugs, subversion of the
2 testing process, refusals to provide a specimen, and
3 use of prescription and over-the-counter medications
4 that could cause impairment. It's not to say that
5 some licensees may not, in fact, be doing some of
6 these, if not all, already, but under the new rule it
7 would be required.

8 Here you can see with the bold type with
9 respect to policies and procedures what has been
10 added. A clear and concise written statement of this
11 policy must be prepared, and then the portion that is
12 currently in the rule, and be in sufficient detail to
13 provide affected individuals with information on what
14 is expected of them and what consequences may result
15 from the lack of adherence to the policy, and then
16 lastly the new addition, this statement must be
17 readily available to all persons subject to the
18 policy.

19 (Slide change)

20 MODERATOR WEST: Further on the written
21 policies and procedures, you see again in bold what's
22 been added with respect to requiring a statement to be
23 made by a called-in person, and the addition would
24 speak to whether he or she considers himself or
25 herself fit to perform the task assigned and whether
26 he or she has consumed alcohol within the length of
27 time stated in the pre-duty abstinence policy.

28 (Slide change)

29 MODERATOR WEST: In the section under
30 26.20 that you have there before you, yet another new
31 section which allows licensees to credit verified
32 fitness-for-duty program coverage from another
33 licensee when granting unescorted access pursuant to
34 73.56 and, as is stated, licensees seeking to grant
35 unescorted access under 73.56 to personnel covered by
36 another licensee's fitness-for-duty program that
37 complies with this part may credit that licensee's
38 program through verification that the individual is
39 currently or will continue to be subject to random
40 testing, behavioral observation programs of either his
41 or her employee or those of the host licensee. Yes,
42 sir?

43 MR. DiPIETRO: Nick DiPietro with First
44 Energy Nuclear Operating Company. The requirement of
45 a statement to be made by called-in personnel -- I'm
46 looking for some clarification on that as it relates
47 to individuals as part of an emergency response
48 organization.

49 MODERATOR WEST: I see.

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1 MR. DiPIETRO: And if there has to be an
2 affirmative statement made by what I would consider an
3 EP call-up type situation where most people have
4 beepers or some type of paging mechanism and there
5 isn't any real face to face question and answer type
6 situation when you're calling out the whole EPT type
7 team.

8 MODERATOR WEST: For emergency type
9 personnel? Okay. We'll take that as a question that
10 we will give you an answer to. Thank you.

11 (Slide change)

12 Here we have the first presubmitted
13 question that we have in this area under 26.20. The
14 question is: Does the clear and concise written
15 statement have to be provided to current holders of
16 unescorted access or can they be grandfathered in and
17 only new employees be given such a statement?

18 Our response is that the clear and concise
19 written statement must be made available to all
20 holders of unescorted access.

21 The next question under 26.20 that we
22 received: Does the clear -- related to the previous
23 one: Does the clear and concise written statement
24 have to be posted in a public place? Do copies have
25 to be provided on demand? Is readily available
26 sufficient if it meets the licensee's normal practice?

27 Our response is as follows: Licensees are
28 in the best position to determine the specific means
29 of making their policy statements available to their
30 employees.

31 Currently, just to give some examples --
32 Currently, some licensees are using brochures or
33 posters for this purpose. Others provide such a
34 statement as part of awareness training. Policies
35 that are only contained in fitness-for-duty procedure
36 manuals are not provided in a summarized format, would
37 not be readily available to employees.

38 The next question: This section requires
39 -- again under 26.20 -- verification that the
40 individual will continue to be subject to random
41 testing and behavioral observation at another
42 licensee's site. What is the expectation for
43 verification? Is it acceptable to use the industry's
44 personnel access data system, PADS, which already does
45 this for active at-a-site individuals?

46 Our response is as follows: The licensee
47 must verify that the person continues to be tested.
48 It is not the job of the NRC to evaluate whether PADS

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1 is adequate, but if you use it, will check if it
2 accurately verifies.

3 Licensees must evaluate whether the PADS
4 system provides adequate verification or whether
5 another source of verification such as a call to the
6 other licensee is required.

7 Lastly, the NRC would expect that the PADS
8 would be verifiable and inspectable with regard to
9 these FFD aspects.

10 If there are any additional questions
11 relative to 26.20, we will receive those now.

12 MR. ALBERT: Garmon, could I ask a
13 question here?

14 MODERATOR WEST: Please, go ahead.

15 MR. ALBERT: Just as a poll, is everybody
16 -- Does everybody participate in the PADS program? Do
17 we have 100 percent participation, all licensees?

18 PARTICIPANT: Yes. All nuclear power
19 plants are involved with PADS.

20 MR. ALBERT: Okay. Thank you.

21 MODERATOR WEST: Yes, thank you, Ron.
22 That was very helpful to us. We weren't 100 percent
23 definitive on that question. We've discussed that
24 quite a bit.

25 The next section concerns policy
26 communications and awareness training, which is
27 Section 26.21. You will note here that training
28 completed on a -- is now completed on a -- required to
29 be completed on a 24 instead of a 12-month frequency
30 and, further, generic portions of training under the
31 sections that are cited there are completed in the
32 last 24 months can be accepted from another licensee's
33 program.

34 We didn't receive any presubmitted
35 questions on this section. If there are any other
36 additional thoughts on this section, you could mention
37 them now before I go on to Section 26.22.

38 26.22 deals with training of supervisors
39 and escorts. As you note, training must be completed
40 before assignment except for initial supervisory
41 assignment which must be completed within three months
42 of assignment for licensee employees and within ten
43 days of assignment for contract employees.

44 Secondly, a written exam in lieu of
45 training may be used in two of the three years, but
46 not in the third year, I might add.

47 Then lastly, generic portions of training
48 under the sections that are noted there would be

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1 completed in the last 12 months can be accepted from
2 another licensee's program.

3 This is the first question that we
4 received in this section, one of the questions we
5 received in this section. The question is as follows:
6 Does "employed by the licensee" limit this section to
7 licensee employees only or does it also include
8 contractors?

9 Our response to this question under 26.22
10 is as follows: If you look at that section that is
11 being referenced with regard to the question, you will
12 note that the first part of the section covers
13 licensee employees, and the second part covers
14 contractor employees.

15 Further under 26.22 we received the
16 question: Is classroom training every 36 months
17 required or can the refresher training include methods
18 such as computer based training, also referred to as
19 CBT, specified reading material, and so on?

20 Our response is: The NRC has not in the
21 past prescribed a specific method of training and did
22 not add specifics regarding the method of training to
23 the new rule.

24 Would there be any other questions you
25 might have on 26.22?

26 MR. CASEY: Ron Casey with the Tennessee
27 Valley Authority. Going back to the question before
28 that, I just need clarification. Are we talking here
29 about if you are a licensee employee, you can have
30 refresher training every 36 months; if you are a
31 contractor employee you have to have refresher
32 training every 12 months? Is there a difference?

33 MODERATOR WEST: Okay. We will take that
34 as a question that we will clarify. Thank you.

35 (Slide change)

36 MODERATOR WEST: The next section, 26.23,
37 deals with contractors and vendors. As you see here
38 in the bold type, the only change to this section is
39 the addition of "a known history of substance abuse,"
40 such that it now reads, "Personnel with a known
41 history of substance abuse or having been denied
42 access or removed from activities within the scope of
43 this part at a nuclear power plant for violation of a
44 fitness-for-duty policy will not be assigned to work
45 within the scope of this part without the knowledge
46 and consent of the licensee."

47 With respect to the questions that we
48 received in this area, the first question is as
49 follows: Does the NRC expect contractors to pre-

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1 screen workers to determine if they have a history of
2 substance abuse prior to requesting unescorted access?

3 Our response is as follows: Contractors
4 are expected to assure that they are not referring
5 workers with a history of substance abuse into the
6 protected area without the knowledge and consent of
7 the licensee.

8 Would there be any further questions in
9 this area under 26.23?

10 MR. CASEY: Garmon, I have a comment.

11 MODERATOR WEST: Certainly.

12 MR. CASEY: You will also be happy to know
13 I'm leaving shortly. Jim Davis, Nuclear Energy
14 Institute.

15 In considering your answers to the
16 questions that have been asked in this last part
17 concerning contract employees, I think you need to
18 consider very carefully how you respond. If we
19 develop a process that treats licensee employees and
20 contract or vendor employees differently in any
21 respect as far as access to the facility and the
22 treatment under the fitness-for-duty rules, I think we
23 are going to have some significant legal problems out
24 there in the industry.

25 I don't know what your answer is on the
26 training issue, but to pretend that there is a
27 different training requirement for contract employees
28 as opposed to the licensee employees gives me some
29 great concern. If the licensee can do the refresher
30 training at the three-year cycle, then the answer
31 better say the contract employees follow the same
32 criteria.

33 Your answer on that question is evasive.
34 So I hope you at least clarify that in the final
35 process and give a definitive answer that, yes,
36 contract employees follow the same training program
37 used by the licensee, and that they can test out at an
38 annual basis and have refresher training on a three-
39 year process.

40 The screening for history of drug abuse
41 better be exactly the same for the contract employee
42 as it is for the licensee's employees, and we better
43 be applying exactly the same criteria on that
44 individual. If we start pre-screening people before
45 we recommend them for the access of the facility and
46 we are screening people out on different criteria,
47 somebody is going to have a significant problem in the
48 legal arena. We can't do that.

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1 MODERATOR WEST: Thank you, sir, for your
2 comments. We'll certainly factor them into our final
3 answers. Thank you again.

4 MS. TECHAV: Sue Techav with Exelon. I
5 just wanted to go back to also what Jim was talking
6 about, Section 6.21 on the awareness training and
7 Section 26.22 for training of supervisors and escorts.

8 The NRC took a substantial credit for a
9 savings that was going to be recognized by reducing
10 this, and I know that us and a lot of other utilities
11 combine that and train everybody to the supervisory
12 level. So no savings is going to be recognized. I
13 just wanted to make that comment. I didn't know how
14 many other utilities already are doing that
15 established practice also.

16 MODERATOR WEST: Okay. Thank you for your
17 comment. Appreciate it.

18 The next section is 26.24.

19 MR. BURRELL: Excuse me.

20 MODERATOR WEST: Yes, please.

21 MR. BURRELL: Mike Burrell, Constellation
22 Energy. Just in support of Jim's comment, as well as
23 I have another, but in support of Jim's comment, when
24 8901 was written, you took a point in your exception
25 in .566 to guaranty that we didn't treat contractors
26 differently than you told the employees with regard to
27 appeals.

28 Certainly, I think we see this as no
29 difference with regard to training. It was clear in
30 566 that the regulatory expectation was we treat
31 licensee employees and contractors exactly the same
32 for the purpose of appeals. So for the purpose of
33 training, it seems only consistent we do the same
34 thing.

35 MODERATOR WEST: Okay, thank you.

36 MR. BURRELL: That's part one. Part two:
37 Under known history of substance abuse under 26.23,
38 again this comment or this new language begs the
39 definition or clarification of the definition under
40 history of substance abuse, particularly part 6 where
41 we talk about any legal or employment action taken for
42 alcohol or drug use.

43 I think we need some specific
44 clarification on what the expectation is there, since
45 we see this language appear throughout this document
46 with regard to "known history of substance abuse."

47 I think one of the comments -- one of the
48 early comments, the example was a conviction for a
49 DUI, but it says by example. So once again, we really

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1 beg for clarification here so that we all know what we
2 are expected to do.

3 MODERATOR WEST: Okay, thank you. We'll
4 certainly provide that clarification.

5 I think we are showing on the agenda a
6 break at 10:30. I think it would probably be
7 appropriate to take it before getting into the next
8 section. So we'll take a 15-minute break.
9

10 (Whereupon, the foregoing matter went off
11 the record at 10:19 a.m. and went back on the record
12 at 10:40 a.m.)

13 (Brief housekeeping remarks by Mr. West.)

14 MR. TRACY: I beseech you to please not
15 worry about formality when you start talking about
16 taping and microphones and formal settings with all
17 these tables with 20 NRC employees and only two mikes
18 for the other stakeholders, it's not the perfect
19 layout necessarily for a workshop. We can perhaps fix
20 that tomorrow. But the crucial aspect is that senior
21 NRC members here right now is that we need to
22 basically hear the concerns and the need for the
23 clarities with this very prescriptive rule, and we all
24 admit in this risk-informed world it is rigid. It is
25 legalistic, and it's important, and it needs to be
26 exact, because we're dealing with very personal issues
27 for people.

28 so while I certainly respect Garmon's
29 desire to get a very detailed and appropriate answer
30 bought off by management and the attorneys, the bottom
31 line is he knows the answers to a lot of the questions
32 that were asked, and so do these regional folks and
33 inspectors.

34 So what I'm asking you to do is continue
35 to ask your questions, and we are going to start a
36 dialogue, allow Garmon to give his best answer that he
37 has, and a lot of region folks who are here as well to
38 express themselves in terms of their views.

39 I would ask those of you in the audience
40 to please just say, hey, that doesn't make sense, I
41 don't understand what you are saying, and that will
42 allow us as managers to make an informed decision
43 ultimately when the NUREG comes out.

44 I would also ask that if a person asks a
45 question that, if a person knows a good answer to it,
46 one they would like to ultimately see the NRC write,
47 you should, in fact, express that; because that's a
48 smart thing, in fact, in making an informed decision.

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1 So we apologize for your first hour and a
2 half, but we need to make the next two days
3 worthwhile. Let's move forward and allow this to be
4 a lot more interactive and a lot less rigid than it
5 currently has been. Thanks.

6 (Applause)

7 MODERATOR WEST: So with Section 26.24 you
8 can see here the various types of testing that are now
9 defined.

10 MR. TRACY: Excuse me, Garmon. I think we
11 have someone who wants to make a comment.

12 MODERATOR WEST: I'm sorry.

13 MR. BURRELL: That's okay. Thank you,
14 Garmon. Thank you, Glenn, as well. I appreciate it.
15 Mike Burrell, Constellation Energy.

16 Will you go back to 26.20(e)(1) for a
17 moment.

18 MODERATOR WEST: I'm sorry, 26.21.

19 MR. BURRELL: 26.21 (e)(1) where we have
20 added the language there "he or she considers himself
21 or herself fit to perform the task assigned."
22 Frequently, when people are called in, the task that
23 they are going to be working on is not known, I would
24 say especially in the radiation section in the
25 maintenance area.

26 Is the expectation that during this call
27 -- is it your expectation that during this call one
28 know exactly what they are going to be doing?

29 MODERATOR WEST: I think the intent of
30 that new language was along these lines. I don't
31 think it necessarily speaks precisely to your question
32 in terms of just trying to get from the individual
33 some knowledge of whether they know what they are
34 going to be doing, but the broader concern here, I
35 think, has to do with the fact that there were other
36 areas perhaps that might speak to an individual not
37 being fit for duty that would fall outside of the
38 context of alcohol and drugs.

39 I think the intent here was to expand the
40 question to the individual with regard to fitness to
41 take into account some of those areas. For example,
42 whether the individual is fatigued, whether the
43 individual is going through some emotional kind of
44 crisis.

45 Those would be perhaps some examples where
46 it wouldn't be the traditional kind of concern, and
47 that perhaps the traditional kind of response
48 necessarily that you would have received in just
49 focusing on alcohol and drugs.

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1 MR. BURRELL: So we are not task specific
2 here?

3 MODERATOR WEST: Well, as I understood
4 your question -- let me just repeat it -- it seems to
5 me that you were asking with regard to that language
6 whether it was intending to try and have some sense of
7 whether the individual knew precisely what they were
8 going to be doing on the job, HP, EP and so forth.

9 My sense is that it wasn't necessarily to
10 tie the question to the expectation of whether the
11 individual knew what they were going to be doing once
12 they got to work, but rather the interest was with
13 respect to broadening what it really means to be fit
14 for duty; whereas, traditionally it has been with
15 respect to drugs and alcohol.

16 I think that language was put in, in order
17 to broaden what that really means and to give the
18 individual an opportunity to express that, hey, I'm
19 not fit for duty, and it may not simply be drugs and
20 alcohol, could in fact be some other areas.

21 MR. ALBERT: Mike, let me ask you to
22 clarify the question. Are you saying that certain
23 jobs require a different level of fitness?

24 MR. BURRELL: No, I don't believe certain
25 jobs require a certain level of fitness. My real
26 concern is, when we say perform the task assigned,
27 there seems to be an expectation that on a call-in
28 sheet there's a list of those things that somebody is
29 going to be expected to do after they are called in.
30 Those decisions haven't been made in many cases when
31 the call is actually executed.

32 In other words, I could call in a
33 maintenance person and say I need you to come in to do
34 some work on the reactor vessel head. Now there may
35 be a variety of work tasks associated with that
36 evolution.

37 MODERATOR WEST: I see your point.

38 MR. BURRELL: And I don't need -- I don't
39 think that we need to be so specific in saying I need
40 you to come in to do this, this, this and this. But
41 when it says "to perform the task assigned," that
42 gives me some concern, certainly, from a QA
43 perspective.

44 MR. MIZUNO: (COMMENT)

45 MR. BURRELL: Okay. So just to paraphrase
46 that, what we are seeking to achieve here is an
47 affirmative statement from the person called that they
48 are fit to come to work. Is that correct?

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1 MODERATOR WEST: Yes. I think along the
2 lines of the question you were asking, I think it's
3 certainly reasonable, even though I acknowledge and
4 once you talked about it in more detail I understand
5 it a little bit better, the person may not necessarily
6 know precisely what they are going to be doing once
7 they get to duty or their employer may not be able to
8 tell them precisely, but I would think, though, that
9 historically the individual has some general sense of
10 what they have done in the past relative to the type
11 of job that they perform, health physics or whatever.

12 Even that could be connected with -- and
13 I agree, the general interest here is to find out
14 whether the person is fit for duty, but that general
15 interest could be tied to what the person has in their
16 historical experience done on the job and whether they
17 are fit to do that. But I think the long and the
18 short of it is again what you have said, that the
19 interest is whether the person is fit for duty and not
20 trying to tie it precisely to the details of what the
21 person is going to do once they get to the job.

22 MR. BURRELL: Okay. Thank you.

23 MODERATOR WEST: Under chemical and
24 alcohol testing, as you can see, there's certainly
25 nothing new about pre-access testing for drugs, random
26 drug and alcohol testing for cause, follow-up testing.

27 We have made a serious attempt to clarify
28 much better what we mean by return to duty testing so
29 that we will have sharp distinctions, hopefully, with
30 regard to these various categories of testing.

31 (Slide change)

32 On the next slide, you note that pre-
33 access testing for drugs and alcohol must be conducted
34 within 60 days before granting unescorted access to
35 the protected area or assignment to activities within
36 the scope, unless -- and then you have the
37 qualifications in bold -- the individual has been
38 covered by a program meeting the requirements of this
39 part for 30 of 60 days, and has no history of
40 substance abuse, which you recall we have defined in
41 the new rule.

42 Then lastly, any negative test meeting
43 standards of this part performed within 60 days may
44 serve as a pre-access test. Further under the same
45 section, you note a negative test must be obtained
46 before granting unescorted access unless the
47 individual has no history of substance abuse, and
48 that's the important part there, no history of
49 substance abuse, and has either had a negative test

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1 result on a test meeting the standards of this part
2 performed within six months before granting unescorted
3 access or has been covered by a program meeting the
4 standards of this part for two consecutive weeks
5 during that period.

6 MS. TECHAV: Okay. Sue Techav from
7 Exelon. There's a lot of questions surrounding this
8 whole area. I guess one of the first, I'll start with
9 the no history of substance abuse. We are going to
10 have to go back to that definition, because within
11 that definition it talks about within the last five
12 years any legal employment, action taken against any
13 -- what is it, employment or legal action taken
14 against an individual for something within the last
15 five years, and that's just one DUI.

16 If a person has had a history of substance
17 abuse within the last five years ago, are we going to
18 be able to grandfather these types of people in that
19 already had unescorted access, that we've already
20 adjudicated based on the old rules and regulations
21 that we had, and then move forward; because somebody
22 -- If we try to apply this moving forward, somebody
23 that comes to us that had unescorted access within 30
24 of the last 60 days that they don't need the test or
25 six months and two weeks, and we have to look at their
26 PHQ or whatever the person uses when they come in, a
27 lot of them don't even ask for that information back
28 five years, because we are just reinstating that
29 individual.

30 So we need to have some type of a
31 grandfathering of people that have had unescorted
32 access and we move forward based on the definition of
33 history of substance abuse.

34 MODERATOR WEST: Okay. Let me see if I
35 can characterize your question properly. I think I
36 would also add, too, that it even came up perhaps in
37 another context, this whole issue of grandfathering.

38 I think in the response we gave to that
39 question, it was that we weren't considering
40 grandfathering on that one. I guess you are
41 essentially asking the same thing. In applying this
42 definition of history of substance abuse, are we going
43 to allow you to grandfather individuals that you've
44 dealt with in the past and whether we are going to
45 draw a line and expect you to use the definition
46 forward in time. Is that fairly close?

47 MS. TECHAV: Well, yes, because if an
48 individual is coming that was with less than -- well,
49 usually greater than 30 days, less than 365 days,

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1 that's what we consider a reinstatement or a transfer
2 if they are coming from another utility.

3 They complete a questionnaire, but they
4 don't go back five years to get their history of
5 substance abuse. So that whole philosophy of how we
6 do that would have to change to capture that to get it
7 to go back unless we just grandfathered them based on
8 our old rules. They were good before; why aren't they
9 good now, and let's move forward for anybody new
10 coming in.

11 MODERATOR WEST: Okay. I guess my quick
12 answer is that (a) we haven't really thought through
13 grandfathering. I think that's the general answer.
14 So it certainly sounds as if it's something we need to
15 give some attention to, not necessarily just specific
16 to this question but maybe even some others where you
17 are going to have this kind of overlap between what
18 you are currently doing versus what you propose to do
19 in the future with the new rule.

20 Beyond that, I guess, if I base it just
21 simply on the previous answer that we've given to yet
22 another question in a different area where we didn't
23 consider grandfathering appropriate, I guess my quick
24 answer would be that we are not entertaining
25 grandfathering.

26 I guess, beyond that, I would probably ask
27 for some help on this with respect to maybe the Office
28 of the General Counsel in terms of -- As I see it,
29 it's a broader issue of grandfathering.

30 MR. ALBERT: Okay. Before that, could I
31 jump in a second? Let me see if I understand your
32 question. The simplicity of your question is, is the
33 rule going to be retroactive? Is that your question?

34 So in other words, if you have already
35 adjudicated someone today while the current rule is in
36 effect, what you are asking then is, when the new rule
37 goes into effect, does it become retroactive? That's
38 your question?

39 MS. TECHAV: Correct.

40 MR. ALBERT: Okay. Garmon, and Geary, you
41 could jump in at anytime, I would say no in the short
42 end, because you have already gone through your
43 process where the person is, in fact, good today.
44 That person should still be good when the new rule
45 goes into effect.

46 I don't think it's designed to be
47 retroactive, but I'll let OGC take a shot.

48 MR. SMITH: Let me -- Can I say something
49 here, too? That's fine right now, but the guy goes to

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1 another site. You have a five-year window you're
2 looking back on, on data you don't have. The DUI may
3 have been adjudicated three years ago, and he's fine
4 where he is now. But when he goes down the road, that
5 data is not available. You are going to assume they
6 would let him in, but in fact you are not going to be
7 complying with this if he goes back, you know. Unless
8 you put a five-year window on the grandfathering, it's
9 not going to do a lot of good. Is that correct?

10 MS. DURBIN: Can I say something here that
11 kind of takes it back a little bit?

12 Right now the rule requires that anyone
13 who comes to your site that doesn't have access has a
14 pre-access test within 60 days and waits until that
15 result comes back before they can go on-site.

16 You don't have to worry about history of
17 substance abuse to continue doing that. So the only
18 time you have to worry about history of substance
19 abuse is if you want to allow people to go to work
20 either without a pre-access test because they have
21 been covered by a program meeting requirements of this
22 part for 30 of the last 60 days and they have no
23 history of substance abuse.

24 So those people can go to work without any
25 pre-access test, or they can go to work without
26 waiting for the negative test result if you know they
27 have no history of substance abuse, and they -- There
28 are a couple of others. I'd have to go to the next
29 slide -- and they have been covered by a program
30 meeting the standards of this part for two consecutive
31 weeks during that period, or had a test meeting the
32 standards of this part within the last six months.

33 So basically, you only have to worry about
34 the history of substance abuse if you want to take
35 advantage of these relaxations. You don't have to
36 worry about the history of substance abuse if you want
37 to continue doing things as you are now.

38 I just think it's worth starting with that
39 basic underlying understanding. If you want to
40 continue to pre-access test everyone and wait until
41 the negative test result comes back, you don't have to
42 find out about somebody's history of substance abuse.

43 If you want to allow them to take
44 advantage of the relaxations, then you have to have no
45 history of substance abuse. If they have a history of
46 substance abuse, they just do what they are doing now.

47 MS. TECHAV: And I think everybody in this
48 room realizes that and understands that, but in order
49 for us to take credit or even look at what's been put

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1 in here, added, and what the NRC is taking credit for
2 in millions of dollars of savings to the industry
3 based on this criteria, we have to look at the history
4 of substance abuse in order to take care of it.

5 What I'm saying, basically, is that we
6 don't even ask for it for a person that is coming in
7 on a reinstatement back five years. It's only since
8 their last unescorted access. So we don't have that
9 information to make the determination.

10 We have streamlined our processes to the
11 point where everybody is prescheduled before they even
12 arrive to us based on the information that's in PADS
13 at the time. For us to sit down, look at a personal
14 history questionnaire, evaluate whether or not they
15 have had it in the past, then reschedule everybody,
16 we've just lost the time, and it's not going to be a
17 benefit to us whatsoever.

18 I mean, that's basically the point. It's
19 really not a benefit to the industry at all if we have
20 to go back and look back five years on one DUI that
21 the person may have had five years ago that we don't
22 even look at somebody who has had a DUI within the
23 last 12 months based on the expertise of our MRO who
24 is an expert in substance abuse.

25 I mean, that's what we are taking our
26 recommendations from, but now we've got a rule in here
27 saying we have to go back five years based on the
28 definition for just one DUI, and I think that's a big
29 problem that this part of the industry has with this
30 particular part of the definition of history of
31 substance abuse and then how it's pertained to this
32 part of the rule.

33 MR. EARNEST: Well, when someone transfers
34 in -- Let me make sure. I'm like Ron now. I'm a
35 little bit unclear as to what the concern is.

36 Number one, it's an advantage to the
37 utility if someone comes in and, say, you don't want
38 to give him -- you don't have to give him a drug
39 screen, because they just had access at another
40 facility. They were in good shape.

41 Now when you transfer that individual in
42 there, you're going to have to look at the PADS
43 information. And if the individual hasn't had a hit
44 on PADS, and it would be in there if he had -- correct
45 me if I'm wrong --

46 MS. TECHAV: No, not for history of
47 substance abuse.

48 MR. EARNEST: Okay. Then you're going to
49 have to look at your background screening information

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1 and get that information, unless you want to give him
2 the test. So you're going to have to look to find
3 out. You're correct on that.

4 MS. TECHAV: And for utilities that do
5 testing on site, it's only a two-hour turnaround. So
6 by the time you are doing all that, there's no benefit
7 is the point we are trying to make, because of the
8 definition of history of substance abuse.

9 It's been changed and added to the rule,
10 and it's binding us now even more.

11 MR. MIZUNO: -- I think everyone here
12 acknowledges that that point will have to be looked at
13 clearly. We'll have to look at that.

14 MS. TECHAV: The second point under (a),
15 it talks about pre-access testing for an individual
16 that during the previous 60 days that had unescorted
17 access for at least 30 days. I mean, currently, if
18 somebody's drug test isn't valid within the 60 days
19 and they leave our site and they come back after 30
20 days, we will drug test them. But if they go back
21 beyond the 60 days but they didn't have unescorted
22 access for 30 days, we're going backward, because this
23 is saying that a person had to have unescorted access
24 for 30 days within the last 60 days to take advantage
25 of that.

26 I mean, it's just getting shorter and
27 shorter. These contractors are only badged for maybe
28 five days. Even if you take it out 90 days, we're not
29 going to be able to take advantage, because people
30 aren't having unescorted access for 30 days anymore.
31 So it's another part that we are just not going to be
32 able to take advantage of, and actually we are going
33 backwards.

34 MS. THIEL: That kind of leads into my
35 comment. I'm Janet Thiel with South Carolina Electric
36 and Gas.

37 This whole part of the 30 of the 60 and
38 the six month and the two week, during that period, we
39 want to know what that period is. But it's very
40 confusing to us in the industry, and a lot of us have
41 talked about this 30, 60, two week periods, that we
42 don't even have a clue how to write a procedure, much
43 less track this type of situation, and it's going to
44 be very burdensome for us to try to figure it out when
45 the guy is standing in front of us exactly what this
46 guy needs.

47 So it's going to take us all the way back
48 to drug testing everybody.

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1 MODERATOR WEST: Do you think the
2 difficulty -- and I'm trying to better appreciate it
3 myself. Do you think the difficulty is simply that
4 the way the rule is written or is it some aspect of
5 trying to better clarify what we intended in the way
6 that it's written? Is it a clarification issue or is
7 it an issue of, the way the rule is written, you're
8 just not going to be able to get any substantial
9 benefit from it?

10 MS. THIEL: Exactly. There will be no
11 benefit.

12 MR. SMITH: That sounds like an NRC
13 answer.

14 MS. THIEL: Well, it was good. It is so
15 unclear, when we have talked in task force and
16 meetings, everybody sees it differently. Everybody
17 reads it differently. Everybody sees "that period"
18 as a different period. We are all very, very, very
19 confused, and for us to have to sit down and write
20 procedures to this, we're having a hard time.

21 MODERATOR WEST: Any suggestions on -- I
22 mean, the rule has been approved. So that's part of
23 what we are wrestling with, but using that as the
24 frame of reference, do you have any thoughts on what
25 we could do in the context of, for lack of another way
26 to put it, implementation through the NUREG type
27 clarification, through the NUREG type implementation
28 document that we are contemplating, or specific
29 suggestions on how we could better give you something
30 that you might be able to better match with your
31 procedures in particular?

32 MS. THIEL: I think, as my utility, what
33 we would like to see is any access within the past 30
34 days and any pre-access or drug screen within the past
35 60, to be able to accept them into the workforce.

36 MODERATOR WEST: Okay. Thank you for your
37 comment.

38 MR. SMITH: That would require a rule
39 change, I believe.

40 MODERATOR WEST: Yes, that's why I was
41 trying to sort out whether it's just the way it's
42 written versus something we could do to better clarify
43 things.

44 MR. SMITH: I don't think you can
45 interpret the rule back the way that it needs to be.

46 MR. EARNEST: We can give examples. For
47 example, in a NUREG examples that might clarify
48 wording in it, that might be of some help. But like

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1 Greg said, the rule is already out. Can't go back to
2 30 days and 60.

3 MR. BURRELL: But, fortunately, it hasn't
4 been published yet. So there is an opportunity for
5 clarifications.

6 As far as a suggestion, I would suggest
7 that we work together, get some industry
8 professionals, if you will, working with regulatory
9 professionals to try to clarify some of what the
10 expectation is and produce some kind of a document
11 that everybody understands and can apply. I believe
12 that --

13 MODERATOR WEST: Well, we certainly --

14 MR. BURRELL: The industry representatives
15 in this room all want to do what you expect to have
16 done. It's just hard to get there from here.

17 MODERATOR WEST: We'll certainly take you
18 up on that offer.

19 MR. BURRELL: I think there are three
20 points to this that really beg for some explanation.
21 First, as Ms. Techav indicated, there are very few
22 conditions where there are periods of access now that
23 span a 30-day period. We have outages that don't go
24 30 days anymore, and you only have utility workers
25 coming through your cycle for the period of time they
26 absolutely need to be there.

27 In many cases, that is substantially less
28 than 30 days -- a week, two weeks. So they never an
29 opportunity to meet Part (a) of that definition. part
30 (a) of that definition then combines itself by the
31 word "and" with Part (b), "and has no history of
32 substance abuse."

33 So you've got the combination of those two
34 elements in that definition that create a problematic
35 condition.

36 Third is the definition in and of itself
37 where we still haven't defined what "history of
38 substance abuse" means. Go back to that Part 6 of the
39 definition. What does that mean? We have legal or
40 employment action, underscore action. That can be
41 almost anything.

42 When we add to that the limitation imposed
43 in 73.56 in the statement of considerations that we
44 can't do any of these things related to unescorted
45 access prior to a person's employment, we compound the
46 problem even further.

47 I would ask you to look back at the
48 statement of considerations for 73.56 where it
49 addresses the expectation of the regulator that we not

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1 involve ourselves in pre-screening activities. That's
2 fundamentally what you are asking us to do here, not
3 only asking us to do it, but you're driving the vendor
4 population to do that as well, and according to the
5 statement of considerations of 63.56, we're not
6 supposed to do that.

7 I hope that's provided some clarification
8 from our perspective.

9 MODERATOR WEST: I think it was very
10 helpful, and I would just reiterate your offer to try
11 to dialogue outside of this setting with the industry
12 to try to have a better bridge between what we are
13 requiring and the problems you have in implementing
14 it. Thank you for your comment.

15 MR. DAVIS: Jim Davis, NEI. You are
16 probably regretting now having opened the thing up.

17 MODERATOR WEST: No, not at all. I think
18 it's certainly the right thing to do.

19 MR. DAVIS: Let me give you a point that
20 may help you understand why this provision is of
21 minimal use to the industry. I don't think that's
22 been brought out yet.

23 When an individual, for the very first
24 time, goes to a facility for employment, he gets a
25 five-year investigation, a fingerprint check, and all
26 these other things, and the reviewing official
27 adjudicates that record and makes a decision that that
28 individual can have access to the facility. They
29 grant him access, and that access is documented.

30 The industry accepts that decision as
31 being a good decision. If a year later this
32 individual tries to access another facility, we do a
33 check for the year that's in between, and we presume
34 that the other utility did their job correctly and we
35 do not ask for the record from that facility unless
36 there is some adverse information that would require
37 adjudication against the rest of his history.

38 A preponderance of the people we see in
39 that case will have no history, no arrests, nothing in
40 that one year time frame and, therefore, you don't
41 have the history of drug abuse that may be preexisting
42 and has been adjudicated in years two through four.

43 So all of the transfers that we are doing
44 in the industry will force you to continue to do the
45 drug screening, get the results, and then allow the
46 individual access. So although this looks like a
47 relaxation of the rule, in fact, it is not.

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1 It will require the same level of effort
2 from the industry, and there will be no savings in
3 this area.

4 MODERATOR WEST: And the reason it's not
5 is because the rule is going to require that you are
6 going to have to look back over a five-year period?

7 MR. DAVIS: Because we will have to be
8 aware of this guy's drug history for a five-year
9 period. If you get into the legal arena and start
10 looking at transfer of potentially adverse information
11 on individuals, it becomes very difficult in putting
12 that into a global system and transferring that from
13 facility to facility. It becomes very, very difficult
14 to move that information around.

15 So just adding somewhere that we put all
16 the adverse information in that you can then access is
17 not going to work. We'll just test all the people.

18 I mean, the premise is, once the
19 individual's record is adjudicated by a licensee, we
20 should accept that adjudication and move on with
21 history and not continually have to go back and review
22 and consider past history.

23 We've got a number of people who have had
24 a DUI who have been through the remediation. The
25 facility has accepted that individual for access at
26 that facility, and other facilities based on that
27 decision will grant that individual access, and will
28 not go back and look to see whether that DUI is there.

29 MODERATOR WEST: Thank you. Please.
30 Would you use one of the mikes. Would someone get the
31 mike over there to Geary. Thank you.

32 MR. MIZUNO: Can I respond? I think that,
33 given the parameters of the workshop where we're
34 saying that we're taking the rule as is, and unless I
35 hear from the NRR managers that they are willing to
36 pull back the rule because it is, in fact, legally
37 true that the rule hasn't been published yet and so
38 there is still the possibility for it to be changed,
39 pulled back and changed, I will leave that and just
40 assume that that's not going to happen.

41 I guess my only comment is that I
42 understand your point. We are going to have to go
43 back, clearly, and look and see whether the so called
44 burden reductions are, in fact, illusory.

45 My only comment, though, is that what your
46 are proposing does not sound as an unreasonable system
47 or concept for dealing with pre-access testing. My
48 only response is that, while it may on its face be
49 reasonable, I do not recall the industry raising this

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1 in the context of the proposed rule or in the many
2 interactions that we've had.

3 So while it sounds reasonable and I guess,
4 if the NRR managers and, I guess, the EDO and the
5 Commission still see it as being something that they
6 want to do, I guess they could pull the rule back, it
7 comes somewhat late at this point in time to say,
8 look, we think that there is another better way of
9 dealing with the system .

10 I'm not saying that it doesn't sound
11 reasonable. In fact, I understand the approach that
12 says -- it's like hearing. Some licensee has done the
13 initial five year screening and all those things, and
14 now let's build upon that sounds like a reasonable
15 approach.

16 My only point is that it comes very late
17 now in the process to talk about that, because that
18 clearly is not the conceptual approach that is
19 embodied in the current final rule.

20 MR. CASEY: Ron Casey from Tennessee
21 Valley Authority. Hopefully, I'm not beating a dead
22 horse here, but I wanted to kind of take this into
23 another angle. That is, if we -- and just make sure
24 I'm understanding this. If we cleared an individual
25 at one of our plants who had a DUI or substance abuse,
26 we tested them and, let's say, 62 days later -- which
27 I know that's not common anymore, but we do have some
28 contract workers that had the DUI that we did clear
29 that terminated our Sequoyah plant on a Friday
30 afternoon, because the job was done and we pulled
31 their unescorted access.

32 Monday morning they showed back to Brown's
33 Ferry on another job assignment with the same
34 contractor or another. I would have to go in and say,
35 well, they held access 30 in the last 60, but he has
36 a history of substance abuse. So, therefore, I've got
37 to retest that person again before I can grant them
38 access, and maybe even have another medical
39 determination of fitness when we have just dealt with
40 that, you know, over 60 days ago.

41 MODERATOR WEST: Let me see if I can
42 repeat your question. You have an individual at,
43 let's say, Licensee A where you've, through your
44 background check and suitable inquiry, you've
45 identified that the individual has a DUI which would
46 fall into the category of history of substance abuse,
47 and you've taken the appropriate actions that the rule
48 would call for.

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1 Now the individual is moving on to yet
2 another licensee?

3 MR. CASEY: Yes, a plant within our own
4 system, but they check out on a Friday from that job,
5 and the following Monday they may show up as
6 pipefitter on another job and are checking back in,
7 getting hired back in, getting re-requested for
8 unescorted access at our other facility.

9 The way I'm reading that, now do I have to
10 retest that person again and put them back through a
11 medical determination of fitness?

12 MODERATOR WEST: If I understand it
13 correctly -- and my colleagues can help me with this
14 -- the individual under Licensee A was covered by the
15 program, and now is going to Licensee B and is still
16 covered by the program. I guess your question is can
17 Licensee B take credit for what's been done by
18 Licensee A?

19 MR. CASEY: Actually, we're still talking
20 about Licensee A, just at plant -- like we have
21 Sequoyah and Brown's Ferry plants under TVA.

22 MODERATOR WEST: Okay. Still the same
23 utility.

24 MR. CASEY: Still the same utility. We go
25 through all of this, the medical determination, the
26 good drug test. We grant access. Friday afternoon,
27 again my scenario is, the job ends. We terminate
28 unescorted access and terminate that person at
29 Sequoyah.

30 The following Monday he shows back up or
31 she to our Brown's Ferry plant, hires back in for
32 another job assignments, gets re-requested for
33 unescorted access. Now we've got to look at it and
34 say, well, they had 30 and 60 days, but they have a
35 history of substance abuse.

36 Now am I understanding this correctly? In
37 that scenario, I cannot -- I have to retest that
38 person. I have to wait for the drug test to come back
39 again, and I have to send them to a licensed physician
40 to determine their medical fitness.

41 MR. MIZUNO: The short answer is yes.

42 MR. CASEY: That's what I was afraid of.

43 MODERATOR WEST: That is the correct
44 answer.

45 MS. DURBIN: Can I ask a question, just to
46 clarify for these issues? What proportion of your
47 workforce do you think has some kind of history of
48 substance abuse, if it was defined as, say, a
49 conviction for drunk driving would be a legal action

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1 and being fired for being drunk on the job would be an
2 employment, just as an example?

3 MR. CASEY: Well, I'm glad you asked that
4 question.

5 MS. DURBIN: What proportion of your labor
6 force would --

7 MR. HARRIS: Excuse me just a moment. I'm
8 Neil Harris from TXU Electric. You just brought up
9 one of the points that a lot of us have been
10 discussing, the legal action. You said conviction.

11 If I'm not convicted of it, however it is
12 on a record somewhere, where do we stand, or it's been
13 adjudicated? That legal action, that's what we're
14 trying to find out. Is a legal action actually a
15 conviction or is it just an action taken?

16 If I go to a judge and the judge says,
17 Neil Harris, what we are going to do is we're going to
18 put you out there and we're going to make you do
19 public service; we're going to remove this from your
20 record in 20 days.

21 I now still have to go and tell my
22 management about it. However, that's going to be
23 adjudicated from my record. It will be expunged after
24 a period of time. It will never show up. However,
25 that's -- Where do we stand? There's too many
26 questions right there without actually having legally
27 -- you know, the word legal used or defined within the
28 rule.

29 MODERATOR WEST: And your reference point
30 is -- and correct me if I'm wrong -- is with respect
31 to the latter portion of the definition that we have
32 provided in the new rule on the history of substance
33 abuse, and I'll just mention that for the benefit of
34 all of us.

35 The last part of that, Part 6 states, "or
36 had any legal or employment action taken for alcohol
37 or drug use." As I understand, your question is
38 whether or not this reference to legal action, in
39 particular, in terms of a DUI, whether that means
40 simply stopped and given a DUI versus you actually
41 went to court and you were convicted.

42 MR. EARNEST: I think the key to this one
43 here is how do you define legal action.

44 MR. MIZUNO: And I guess our -- at least
45 my understanding was that being stopped, in and of
46 itself, does not constitute a legal action, and given
47 the ticket. I mean your conviction is the legal
48 action that's involved there. But by the same token
49 --

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1 MODERATOR WEST: I might interject on
2 this. Excuse me for interrupting, Geary. I think
3 it's fairly clear what your question is. I wouldn't
4 necessarily -- We can discuss it as much as we like,
5 but I wouldn't necessarily see that we can give you a
6 clear answer to it in this setting, but I think it's
7 clear that there is need for an answer on this one,
8 and we'll attempt to address that.

9 MR. MIZUNO: You know what might help us.
10 I understand this thing about being ticketed and
11 stuff, but what are the other situations that are of
12 interest or raise a question as to whether it
13 constitutes a legal action, I guess.

14 If you are going to -- Garmon, are you
15 going to allow them to submit some further amplifying
16 comments in writing in the near future or something?

17 MODERATOR WEST: Yes. I might suggest
18 that the way to do that -- and correct me if I'm wrong
19 through some feedback -- but you certainly have
20 available to you several means. You have the fitness-
21 for-duty web page. You have my own personal e-mail
22 address, gxw@nrc.gov, and you also have the fitness-
23 for-duty mailbox, which is simply
24 fitnessforduty@nrc.gov, and you also have available my
25 phone number, which is 301-415-1044.

26 So I think the answer clearly to Geary's
27 question is that we would envision anything that's
28 downstream of this workshop that we would want to hear
29 about it. So you have some possible ways of
30 communicating that.

31 MR. MIZUNO: Garmon, let me just go back
32 to that legal thing again, because I didn't finish.
33 I don't think the intent was to be anymore Draconian
34 than what the law would otherwise require with respect
35 to the civil --

36 MR. EARNEST: Access authorization rule,
37 for example.

38 MR. MIZUNO: Yes. I mean, someone raised
39 this thing about a record being expunged. Okay? I do
40 not think that we would -- If it's expunged legally
41 from the record, I don't think that it would be
42 something that we would, you know, expect the licensee
43 to make a FFD determination based upon that.

44 MR. EARNEST: One of the things that --
45 You know, going back in the history -- and I mean,
46 this changes this rule. I looked at Loren back there,
47 and he almost made a career out of it. It's gone back
48 several years.

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1 In my memory, I keep thinking about how
2 did this get in the rule, and one of those was we were
3 trying to reduce some of the burden on you that the
4 good guys who were the "nuke nomads" out there moving
5 from plant to plant, that we would be able to quickly
6 get them in and not have to test them every time. But
7 at the same time, some of this was put in there, if my
8 memory serves me right, that (1) if they had just been
9 tested, then a short period of time and there is no
10 history of substance abuse, you could go ahead and get
11 them in, and you still can.

12 However, if there is a history of
13 substance abuse, then that's a person that you would
14 want to test, because you don't want somebody in there
15 that is going to be a problem to you once he gets
16 there.

17 So, you know, the definition of legal --
18 to me, I have to agree with Geary that, you know, you
19 are going -- you know, when you apply that to, for
20 example, the access authorization rule, someone may be
21 arrested but not convicted. Well, you don't hold that
22 against them as far as the access authorization rule.
23 You adjudicate it. You move in.

24 So I think that Geary is pretty much right
25 on as far as the legal aspects of it.

26 MR. CASEY: But I think -- To try to get
27 to your question just in a second, though. I think
28 what we are saying is that, yes, we understand a
29 person that has a DUI, but we've already adjudicated
30 and put them through that process and, if they've
31 broken a period of time and come back, you're having
32 us to go back and do that again under what basis,
33 because four years ago they had a DUI. But since that
34 time we've put them in. They have been under our C-
35 BOB. There has been no additional history, you know,
36 that we don't have that period of time, which we
37 typically do. It's 30 days for right now, as far as
38 not testing.

39 You asked me the question about the
40 percentage. We've just started to try to look at that
41 because, quite frankly, we had never tracked that
42 before. So, you know, I can give you a 20 percent,
43 which I'm probably not going to be too far off. It
44 could be higher in some cases. In some, it could be
45 lower.

46 You've also got to remember, along with
47 the legal history you've greatly expanded the suitable
48 inquiry written questionnaire from the individual when
49 you say have you ever possessed, used all those

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1 others. Yeah, I smoked marijuana four and a half
2 years ago. Well, now we have another issue here on
3 this same individual that I just described that now I
4 can't take credit for any waiving pre-access testing
5 from either a Monday to a Friday or from another
6 utility coming in here until I go back and find out
7 what all of that is, you know.

8 Then if it was just -- Then you say, well,
9 we just test them. Okay, well, I mean, that's what
10 we're going to do. We're going to test everybody now,
11 because there's no way I can go and have 200 people
12 checking in with clerks sitting out there in the
13 badging office doing the best they can, when I'm
14 worrying in the corporate office them making the
15 decisions out there whether this guy gets to go tested
16 or not.

17 We're just going to have to test them.
18 But I know that's the way it's got to be. It's the
19 way it's got to be. I don't know any way around it,
20 you know, to get around what we are doing right now.

21 Again, you have expanded this. Then I
22 still have the question. Even the guy that said he
23 smoked marijuana four and a half years ago that got
24 cleared somewhere else, is that still a legal history
25 in the sense that, if he comes to me again, then am I
26 going to have to send him back through my MRO or
27 medical review officer?

28 MR. MIZUNO: The answer is yes.

29 MR. CASEY: Each time?

30 MR. MIZUNO: Each time. The reason why --
31 I mean, it's no different than what you are subjected
32 to now. The concept here is this. Okay? Once you've
33 had an incident of drug abuse -- okay? -- the NRC made
34 the determination that successfully performing, i.e.,
35 not being tested positive during a time of employment,
36 is still not a basis for removing the requirement for
37 pre-access screening when that guy goes on to another
38 site or to another licensee. I mean, that is the
39 basic concept.

40 Now I understand that you guys have some
41 problems with that, but that was something really to
42 have been raised at the proposed rule stage, and we
43 are beyond that point now. So --

44 MR. CASEY: So I guess what you're saying
45 is we do have this obligation that we have to go out
46 and obtain all of this history each time before we
47 grant --

48 MR. MIZUNO: No. You can either -- The
49 regime is test everyone for pre-access screening

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1 unless they fall into these categories, and we assume
2 that, you know, this -- You have to be careful that
3 we're talking about pre-access screening as opposed to
4 -- What's the other kind of screening?

5 MODERATOR WEST: For cause or return to
6 duty.

7 MR. MIZUNO: Yes, return to duty. I mean,
8 we make the assumption that we are not talking about
9 return to duty. Okay? So if you're not in a return
10 to duty status, then you are in pre-access
11 authorization testing, and the concept here is that
12 one hit, for five years you are now in a suspect
13 category, and normally that person needs to be tested
14 every time they move on to a new licensee or to a new
15 site.

16 MR. CASEY: One other comment, too, and
17 then I'll yield to the gentleman behind me. It's
18 another problem I've experienced. When you go over
19 the access rules and access management, we talk about
20 reinstates, updates, transfers.

21 When you go over to this rule, it's just
22 not meshing in and trying to determine exactly what
23 category you're talking about, because I have to make
24 those decisions and communicate that on down to our
25 sites and then within our office.

26 So when you are talking return to duty
27 testing, is that a reinstatement less than 365 days or
28 is that somebody that's been out more than a year
29 where we then go back to the beginning of the rule and
30 have to collect all of this initial data again?

31 I'll just say this personally. It's
32 confusing to me when I'm trying to read this rule,
33 mesh that with 73.56, which they go hand in hand, and
34 determine what do I require for this individual.
35 Thank you.

36 MODERATOR WEST: Thank you. And I'll make
37 some comments on return to duty either separate from
38 the slides, but certainly when we get to a future
39 slide. Loren?

40 MR. BUSH: I want to make a couple points.
41 I'm Loren Bush. First of all, those of you that are
42 crying about having to go back and obtain a five-year
43 history, if you haven't been doing a five-year
44 history, you've been violating the current rule,
45 because the current rule requires you to obtain a
46 history on a best effort basis for the past five years
47 but no less than three.

48 If you go in saying all I'm going to do is
49 three -- right, on the initial granting, not every

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1 time out. Okay? But what I'm hearing is that, geez,
2 we did it for three years; now we have to go back for
3 five. No? Okay.

4 The other point is, when we wrote the
5 legal and employment history, we intended that legal
6 included arrest and conviction as two separate legal
7 actions. Part of that is that in some cases it takes
8 some considerable time between arrest and conviction.

9 So you're going to have an individual
10 showing up who was arrested a couple of weeks before,
11 and if you interpret it as only reporting conviction,
12 then you have the possibility of placing somebody on-
13 site without having a clear understanding of what the
14 situation is and being afforded an opportunity to do
15 whatever you want to do about it.

16 As far as employment actions are
17 concerned, that was intended to cover the spectrum of
18 actions from suspension to termination. Okay?

19 MODERATOR WEST: Thank you, Loren.
20 Appreciate your comments. Unless there's some --
21 please.

22 MR. BURRELL: I'm glad that Loren
23 clarified that for us. As a former member of the law
24 enforcement of the community, I can assure you the
25 legal action does begin with an arrest. As part of a
26 prosecutor's office for a period of time, I can
27 further substantiate that. It does begin with an
28 arrest. So we're on the same page there, Loren.

29 That gives us some other issues, however.
30 You have only given us the opportunity to determine
31 this information by virtue of submitting fingerprints
32 to the FBI. It takes an awful long time to get that
33 return back. So we've asked for some relief in the
34 context of being able to acquire this information much
35 sooner, given that legal action does begin with an
36 arrest.

37 Many of you who have worked for the FBI
38 realize that, not only do they make mistakes, but they
39 are a little bit slow, and the information is
40 obtainable through other resources that we should have
41 access to.

42 This definition of history of substance
43 abuse also lends itself to the abuse of legal drugs.
44 So we are driven to go look at another definition as
45 well. That then drives us to a medical determination
46 of fitness.

47 So again -- and I just offer to you for
48 your consideration the use of some industry expertise
49 in helping refine this to some degree, so that we can

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1 all come to a common conclusion and meet with what the
2 real objective is, keeping the plant safe.

3 MODERATOR WEST: Thank you.

4 MR. DiPIETRO: Nick DiPietro, First
5 Energy. Just trying to put it into perspective from
6 an access manager's view. Basically, a lot of these
7 things come into play when we are going into an outage
8 situation.

9 Now I've done a lot of research on this
10 myself. Typically, in an outage situation plants will
11 bring in approximately 1,000 workers. Thirty or 35
12 percent of those workers are what we consider
13 transferable, which means that they have been working
14 at a nuclear facility within the last 30 days and been
15 covered under all elements of a program.

16 Thirty to 35 percent of the people are
17 reinstatable, which means they have been in the
18 environment within 365 days, and 30-35 percent or it
19 could be up to 45 percent, depending on what jobs they
20 are going on that area, you may get new employees
21 coming into the nuclear industry. Okay?

22 Now -- and this has been a practice that
23 we've been doing in the past. If somebody is
24 transferable, they leave one of my sites, Davis,
25 Bessie or Perry, and they come to Beaver Valley, if
26 it's less than 30 days and they have been subject to
27 testing, we're not doing a pre-access test, whether
28 they had history or not, and they are coming in and
29 going to work. Okay?

30 If they are reinstatable, which means 30
31 to 365 days, they are given a questionnaire to update
32 us from when they last held unescorted access, and we
33 look at when they actually had the last drug test. If
34 it was less than 60 days, they can go ahead and go to
35 work.

36 If it's been over 60 days since the last
37 drug test, we'll give them a drug test, update the
38 background, let them go to work. Then naturally, the
39 new people coming in, you're going to do all the
40 elements of the temporary and follow up with the
41 elements of full.

42 Now if we go back to what Geary said, that
43 an individual has a history of substance abuse, that
44 we need to go ahead and test them again and have a
45 medical determination made again, you're going to
46 completely -- You'll probably get us all fired in this
47 room, because we've been doing these things in the
48 past, and now it seems like we're going to take a step
49 backwards. Okay?

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1 If I have a person that comes to Perry and
2 they adjudicate -- you know, they'll ask the
3 suitable inquiry questions; they will ask all the pre-
4 employment type questions. Perry makes the medical
5 and management determination, that individual meets
6 the minimum requirements for unescorted access. They
7 grant the individual unescorted access.

8 They leave Perry, and six months later
9 they come to Beaver Valley, I'm not going to go back
10 and rehash a DUI, you know, an underage drinking that
11 they had four years ago and go through that whole
12 process again. It does not make sense.

13 If there is a change in status from when
14 the individual leaves Perry and comes to Beaver
15 Valley, yes, absolutely, we will look at that, and we
16 will make another determination on whether this person
17 has an added problem. But if there is no change in
18 status from when they last held unescorted access at
19 an approved program, it doesn't make sense for us to
20 go back and revisit all of that.

21 That's what I think everybody has been
22 doing in the room. Now we're going to take a huge
23 giant step backwards when there is more -- and I don't
24 want to say pressure, but there's more obligation,
25 more responsibility for us to make these processes,
26 especially in an outage, as efficient as possible.
27 I'd like that to be taken under consideration.

28 MODERATOR WEST: I think what you are --
29 If I've heard you correctly, basically, what you are
30 doing in practice is looking at the delta, if
31 something is changed from one plant to the next.

32 MR. DiPIETRO: The individuals, at least
33 at our plant, still fill out a suitable inquiry, and
34 we know that they may have had a DUI four years ago,
35 but if they are transferring from another licensee,
36 we're saying that that's been taken into
37 consideration, and we're taking their professional
38 opinion that they meet the minimum requirements.

39 MODERATOR WEST: You're basically taking
40 credit for what's been done previously.

41 MR. DiPIETRO: Absolutely. In regard to
42 what Nancy's question is, I could say from research
43 you are talking about 50 percent or more of the people
44 are coming in and having an FFD type event. Okay?
45 Past drug or alcohol abuse or use, a DUI, underage
46 drinking -- you know, now, especially with the craft
47 population, you're looking at about 50 percent of the
48 individuals that are coming in fall into that
49 category.

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1 MODERATOR WEST: Thank you. Those
2 percentages are very helpful.

3 MR. ALBERT: Garmon, could I make a
4 comment?

5 MODERATOR WEST: Please, Ron.

6 MR. ALBERT: Okay. I want to get to the
7 heart of this. I want to break it down so I'll
8 understand it.

9 Okay. Let's talk about the two
10 populations. Let's talk about happens the day the
11 rule goes into effect. What you're saying is
12 everybody who has unescorted access and is good to go
13 is transferable or whatever their status is at that
14 point -- they should be good to go in the future, and
15 you shouldn't have to look back. That would work for
16 you.

17 Okay. On the other hand, from that day
18 forward, once the rule goes into effect, with the
19 understanding now that you are going to do all of
20 those things that the new rule now requires for
21 persons getting initial access -- you're going to do
22 all of those things. Initial -- we're talking about
23 initial. We're not talking about people who have
24 already been granted unescorted access.

25 It's two different populations. People
26 who are already good to go; they are working in the
27 industry right now. They have unescorted access.
28 They are transferable. They qualify for all of those
29 things that you have been doing. That's one
30 population.

31 The day the rule goes into effect, now
32 people who have not had access before, now they are
33 going to have to do all of those things. But your
34 main concern is how do you process those people who
35 have already been granted unescorted access from point
36 A to point B without having to go back.

37 MS. TECHAV: Well, eventually, they are
38 going to turn into the same thing, though.

39 MR. ALBERT: No, not if they are going
40 from plant A to plant B at some point. It's not going
41 to be initially, and they are going to still have
42 access. You're just transferring them. Correct?

43 MR. TECHAV: But if we apply this rule --

44 MR. ALBERT: But what I'm saying, I'm
45 asking. My question is should you have to apply it to
46 people who are already in that category when the rule
47 goes into effect?

48 MODERATOR WEST: It gets back to the
49 grandfathering issue.

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1 MR. ALBERT: Right. And that's what you
2 don't want to do. I guess your question is then, how
3 do we come up with some mechanisms for making that
4 happen that's acceptable to us, acceptable to you, so
5 that you don't have to go back and do all of those
6 things, and still be able to use those people as you
7 have used them in the past.

8 MS. TECHAV: That's part of it.

9 MS. THIEL: And use those people in the
10 future on the new initial access.

11 MR. ALBERT: That's what I mean. After
12 you have used them in the past and the future.

13 MS. THIEL: And keep them rolling without
14 having to go back.

15 MR. ALBERT: Okay. That's what I'm trying
16 to understand. That's where you want to get -- and if
17 you are able to do that, then that would be the burden
18 reduction then, if you are able to do that, to use
19 these people without having to go back to meet the
20 newest requirements of the rule.

21 MS. THIEL: There would be no burden
22 reduction, because that's what we're doing now. The
23 thing that is going to hurt us and the burden to us is
24 the medical determination. None of us do that now.
25 None of us send our people through an MRO for an
26 interview and examination. Now we're going to have to
27 do that. The MRO is going to have to come up with a
28 set price of what that is going to cost.

29 MR. ALBERT: Okay. So I misspoke. So it
30 wouldn't be a burden reduction. It would be business
31 as usual. It wouldn't be anymore additional burden.
32 Okay, I got that. I understand that.

33 So but that's what you're looking at, and
34 that's where you want the guidance from us on how you
35 can do that and make the program work without having
36 to go back. If we come up with some things that can
37 accommodate that, then that's something that we can
38 look at, I would think.

39 MR. MIZUNO: I guess -- I don't think that
40 it can be accommodated under the language of the rule
41 as now written, the rule that the Commission has sent
42 over to OMB for resolution.

43 So I think it's up to the staff to
44 determine whether they are willing to pull that rule
45 back. I mean, I tried looking to see whether we could
46 reinterpret return to duty testing in a way that would
47 allow that, and I do not think the language would
48 allow you --

49 MR. ALBERT: And we couldn't get there?

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1 MR. MIZUNO: No, because it talks about
2 under that site licensee's program, and that's not
3 going to cover the situation where they are moving
4 from one licensee to another or even conceivably a
5 same licensee but one site to another site.

6 So I did look at the language to see
7 whether we could accommodate you under the rule. I
8 don't think it can, and I think it's up to the
9 management and the Commission ultimately to decide
10 whether they want to pull the rule back or not.

11 MODERATOR WEST: I think the -- just to
12 interject a point here. I think the challenge we are
13 going to have, not only with this section but with all
14 the sections over the next two days, as I see it, is
15 twofold.

16 We are going to have some issues, and we
17 will entertain all of your comments and concerns and
18 so on, but inevitably we are going to end up where we
19 are going to have a certain set of issues that are
20 going to be in the category that we can't -- we have
21 the rule, and it's written.

22 We are going to have another set, and it
23 seems to me this is the more appropriate aspect of
24 what we can accomplish in this setting over the next
25 couple of days and downstream of this, of things that
26 we can have some impact on: Clarifications that are
27 interpreting the rule for you in some various means,
28 whether it's the website or a NUREG type document.

29 I don't see in the context of the way the
30 rule is written in certain areas that in some
31 instances we are going to be able to address your
32 issues and concerns.

33 MR. MORIARTY: Garmon, I think that's the
34 challenge. John Moriarty from Maine Yankee. Not to
35 be presumptuous to suggest guidance in the NUREG, but
36 if you could show us ways in the NUREG how we will
37 determine no history of substance abuse in cases where
38 we're talking about reinstatements and transfers, that
39 kind --

40 Currently, under the access rule we
41 require people to report to us in a statement of
42 activities if they have been arrested or -- That's
43 what sets forward that assessment. If in the
44 reinstatement process we could do something similar,
45 ask for a statement of activities or include it in the
46 suitable inquiry -- "have you in the last 365 days, by
47 reason of the definition of a history of substance
48 abuse, developed one?"

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1 I think, if we had a mechanism to ask the
2 question quickly in the process that is acceptable to
3 you and gets the information to us, we could move on
4 off of this point without --

5 MODERATOR WEST: I think, if I heard you
6 correctly, some aspects of what you are proposing gets
7 down to maybe some way of operationalizing what the
8 definitions means and some aspects of even what's
9 folded into definitions, particularly this one on
10 history of substance abuse.

11 MR. MORIARTY: An acceptable way of making
12 the determination that the history of substance abuse
13 has not developed during this period of time that we
14 are talking about here, without having to go back to
15 square one.

16 It's right in step with the access rule,
17 because we do rely on people who have been granted
18 access within the last 365 days to be reinstated, and
19 these are folks that we rely on to bring the arrest to
20 us, in the first place, some of us.

21 MODERATOR WEST: We certainly are
22 receptive to that suggestion, and I thank you for
23 that. We are also receptive to specific aspects of
24 trying to better define what we mean by some of these
25 definitions.

26 MR. MORIARTY: From a process standpoint,
27 I think it would enable us to get what you want very
28 quickly and for our process not to bog down. Thank
29 you.

30 MODERATOR WEST: Thank you very much.

31 MR. MIZUNO: I mean, I don't want to give
32 you a false sense of hope. I mean, looking at the
33 language again of the definition of history of
34 substance abuse, it would take a magician to change
35 five years into 365 days.

36 MODERATOR WEST: But again, I think the
37 point and the challenge is one of, if there are
38 aspects of clarification that we can provide that's
39 going to better serve the regulatory side of this and
40 at the same time there's some benefit with respect to
41 the implementation, and if we can accomplish that, we
42 can attempt to do it. But inevitably, we will also
43 have a certain set of issues and concerns that will
44 undoubtedly fall into the category that the rule as
45 written, which you well know, is fairly prescriptive,
46 that we may not be able to address. But we will do
47 what we can when we can. Please?

48 MR. CLEVELAND: Randy Cleveland with the
49 Nuclear Management Company, NMC. One of the things I

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1 would invite the NRC to take a look at is maybe
2 putting out a regulatory guide which would clarify
3 that on the date that the rule is published and goes
4 into effect that all individuals that hold current
5 access would effectively be grandfathered, and that we
6 would apply the new requirements of the rule to
7 individuals requesting access subsequent to that.

8 That would enable us to continue the
9 existing practices with respect to transfers,
10 reinstatements where we would apply the new rule
11 provisions to the period subsequent to the last access
12 forward. Where an individual hasn't had access in the
13 last five years, then we are going to go back and do
14 that full five-year.

15 That would be a more workable situation.
16 I would also like to share with the NRC some operating
17 experience that exists out there in the industry right
18 now with respect to substance abuse as we define in
19 legal or employment action.

20 Some of the licensees already have worked
21 through their medical review officer's acceptable
22 criteria for when we would refer an individual for a
23 medical evaluation, and some of us might have a
24 matrix: Well, if an individual has had two DWIs
25 within five years, we are now going to go and formally
26 seek that medical assurance of fitness.

27 One of the things you could consider doing
28 is leaving to each licensee, in concert with their
29 medical review officer and/or EAP, a determination of
30 those situations, be it legal -- for example, I don't
31 think it's going to serve any of us to take somebody
32 that had an open bottle four years and nine months ago
33 and put them formally through this process. We're not
34 going to gain anything as an industry. But if we had
35 criteria that our MRO had agreed to with the FFD
36 managers at a site where we would prompt this review,
37 then it's going to make a little bit more sense.

38 We could effectively, I think, take what
39 you've got there roughly in the rule and apply it, if
40 left the flexibility to establish those types of
41 criteria.

42 MODERATOR WEST: Okay. Thank you for your
43 comment and your suggestions.

44 MR. DAVIS: Garmon, one closing comment.
45 Jim Davis, NEI. It seems to me the biggest danger
46 here is that you may be generating a requirement to
47 divide the workforce into two categories of people,
48 one of which would be those with a drug history.

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1 I will tell you that we are going to have
2 major difficulty in that arena if that's what the
3 intent of this rule is, in that we track a certain
4 portion of the population as it moves around from
5 facility to facility and transfer this concept that
6 this is an individual with a history of drug abuse.

7 We are going to have some major problems
8 with the rest of the world if we start transferring
9 information on that area.

10 So I guess my question for the record is:
11 Does the licensee have to determine whether an
12 individual has a five-year history of drug abuse
13 before they give you a sample, get the results of the
14 sample and grant him access? In other words, they do
15 it the way they were doing it in the past without
16 trying to figure out years two through five. Are you
17 now requiring that the licensee determine whether this
18 individual has a history of drug abuse independent of
19 how your sampling is?

20 You see the problem I've got?

21 MODERATOR WEST: Yes. And I think the
22 answer is that the rule is looking with respect to
23 that five-year window regarding whether the individual
24 has a history of substance abuse.

25 MR. DAVIS: It says, if he doesn't have a
26 history of drug abuse, you can exempt from something.
27 I think most of the industry would just say we're not
28 even going to look at that part of it. We're just
29 going to test everybody and wait the two to four
30 hours. We're going to get the results and put them in
31 the plant.

32 Are you going to come back and say you've
33 got a problem, because you didn't determine whether
34 the individual has a history of drug abuse? I looked
35 at the last year. I didn't look at the five years.
36 I looked at the last year, because I'm not required to
37 do a full five-year background investigation to
38 reinstate this individual. He had prior access, and
39 he has no history in the last year. I can grant him
40 access.

41 MODERATOR WEST: And you are only looking
42 at the past one year window? Is that what you are
43 saying?

44 MR. DAVIS: That's all the history I have
45 at my sites, the last year. I'm relying on Carolina
46 Power and Light to have done it correctly or Dominion
47 Resources or -- what are the names? -- Progress
48 Energy. I can't even keep the names straight.

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1 MODERATOR WEST: I think the way the rule
2 is currently written, under the new rule it would be
3 a five-year window in terms of considerations of
4 whether the individual has a history of substance
5 abuse.

6 MR. DAVIS: Okay. So I think some of us
7 missed that. So the cost to the industry has just
8 gone up significantly. Our estimate that we provided
9 to OMB was incorrect, because we didn't consider this
10 added cost.

11 MR. TRACY: Could I ask a question on that
12 note? Jim, you may want to stay. The comments on the
13 proposed rule -- is it just that there was a
14 miscommunication and it wasn't understood what this
15 section of the proposed rule stated? Geary has
16 already mentioned that, but I didn't get a definitive
17 answer so that I can talk to my management and the
18 Commission.

19 I don't understand, when it is the way it
20 is written -- and those of us that are new to this
21 area now reading it and now seeing, okay, we're not
22 doing that. I understand, but why wouldn't we have
23 heard comment in the proposed rule?

24 MR. DAVIS: Well, I think in 1996 we made
25 substantial comments on this particular area, and I
26 admit that that's long enough ago I can't remember
27 exactly what we said. But we had some significant
28 issues in this particular area.

29 I think part of the problem is the words
30 have changed somewhat since that 1996 time frame, and
31 the nuances of that is significant. We were sort of
32 taking this in the same context as it was presented in
33 '96 where, if you want to take this exemption, then
34 you can do the following items.

35 Now you have rewritten it so you now have
36 -- It appears in the discussion, you are saying you
37 have an obligation to determine whether this
38 individual has a five-year history of substance abuse.

39 MR. MIZUNO: No, you don't have an
40 obligation. I mean, let's just be clear. The only --
41 Your obligation under the rule, the default is test
42 everyone. Okay? If you don't want to do the five-
43 year thing, you don't have to do it under this new
44 rule. Default is test everyone. Okay?

45 MODERATOR WEST: So you just go with
46 status quo.

47 MR. MIZUNO: Now what I'm hearing is that
48 that's not the status quo.

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1 MS. DURBIN: Can I insert something here?
2 There are two issues that are being discussed, I
3 think. One is the pre-access testing. Under pre-
4 access testing, I think that Geary is correct.
5 However, I think you are bringing in the changes that
6 are in 26.27 under Management Actions and Sanctions as
7 well.

8 So it may be worth waiting until we get to
9 that section of the rule to talk about the suitable
10 inquiry requirements, since even though they are
11 linked, I think part of the difficulty is that we are
12 not looking at the right section of the rule in terms
13 of what the changes are.

14 So just a comment that in 26.27 there has
15 always been a requirement for a suitable inquiry for
16 the last five years. There have been some changes,
17 but the access -- the pre-access testing requirements
18 are, if you don't want to test someone, you have to
19 know about their history of substance abuse. So in
20 that sense, I think it might be more useful if we move
21 forward and discuss the access of the suitable inquiry
22 in that section.

23 MR. DAVIS: I would like to get the answer
24 to the opposite part of that question. If I don't
25 care and I test the individual, I don't have to go
26 back and try to build the history of substance abuse
27 on that individual.

28 MR. MIZUNO: No. I think that was a good
29 comment, because you've got -- Right now, all we are
30 focusing now on was the pre-access testing, which is
31 completely separate from the suitable inquiry
32 determination.

33 It was always a requirement for conducting
34 the suitable inquiry determination. The pre-access
35 testing was only a question of whether you were going
36 to allow him access before you completed our suitable
37 inquiry determination. Okay?

38 MODERATOR WEST: That's an important
39 point, I think, and a very good distinction. Thank
40 you.

41 MR. DAVIS: People have been waving pieces
42 of paper behind me, and just to put one issue: You
43 know, why didn't we raise this issue? History of
44 substance abuse was not a definition in the '96 rule
45 when it was issued for comment. It's been five years
46 almost, and somebody else showed me that the extensive
47 comments we made on this section when we submitted our
48 comments in 1996, this is not a new issue. From what
49 we had access to, we commented on that part.

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1 You have made significant changes to the
2 rule in this particular area, and very clear from the
3 discussion today, the industry is having great
4 difficulty figuring out what this means and what the
5 implications of this particular piece of the rule are.

6 I'm hearing, and I'm still not sure I've
7 gotten an answer, that you have added a significant
8 burden in developing these two classes of people
9 within the industry.

10 MR. MIZUNO: Well, let me respond to that,
11 respond to the thing about the public comment. I
12 agree that the history of substance abuse was
13 something which was added post-rule, but my comments
14 originally with respect to hearing the industry on a
15 concept of pre-access testing -- that was in the
16 proposed rule.

17 What I was -- I was not referring to that,
18 the history of substance abuse. I was rather focusing
19 on this overall process which we are talking about,
20 this alternative process of taking advantage of the
21 previous inquiry and a history for a subsequent
22 licensee's pre-access testing and for also, I guess,
23 transfer to a different site of the same licensee.

24 That's the portion that I would have
25 expected you to raise an issue about. Like I said, I
26 don't recall those kinds of comments being raised.
27 Now perhaps you did not understand what the proposed
28 rule was actually proposing to do in terms of pre-
29 access testing, and so you didn't really quite
30 understand the implications of the proposed rule
31 language.

32 I can understand that, but I guess I can
33 say from my perspective that I do not understand that
34 the industry had any significant comments on what the
35 NRC was proposing with respect to pre-access testing,
36 and we really did understand that what we are
37 providing here was some relaxation over what we
38 thought was the existing requirement for pre-access
39 testing of every person.

40 MR. SOUTHWORTH: Bob Southworth from PPL.
41 I'd like to make one comment real quick. I think
42 what's happening here -- I think I speak for most of
43 the people here -- is this was like the end of the
44 road here. Everybody is coming here now, and this is
45 -- Everybody is starting to interpret it, trying to
46 see what's going to happen to us, and this has ben
47 dragging out for year after year after year.

48 I started in this business six years ago,
49 and they said, oh, the new rule is going to come out

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1 any day now, and it's six years later. Now it's
2 coming out, and reality is starting to hit everybody
3 here, and we're starting to read it more carefully.

4 We're seeing what the final rule is here,
5 and now we want to know what we're supposed to do with
6 it. Maybe it was there before, but I think a lot of
7 people are busy. They didn't have a chance to really
8 look at it closely until now when they see they really
9 have to do it. It may be possible, I don't know, but
10 I think it's really hitting a lot of people here and
11 they starting to look at it more closely and interface
12 with you people with how we're supposed to interpret
13 it. I think that's part of the problem.

14 MODERATOR WEST: Thank you for your
15 comment. Good comment.

16 MS. HAYES: Lori Hayes, Progress Energy.
17 I have a direct question. If an individual reports on
18 reporting of arrest that he was arrested for DUI, does
19 he now have a history of substance abuse; and if so,
20 how is that conducive with letting individuals report
21 under 73.56 and keep that trustworthiness going where,
22 if now they have a history of substance abuse, they
23 may be put in a follow-up program, and this may carry
24 with them for the next five years?

25 MODERATOR WEST: Well, I think the answer
26 to your first question of whether, as I would reword
27 it, whether a DUI is considered to be a data point
28 regarding a system's history of substance abuse, I
29 think the answer would be yes, given the way the
30 current rule is written and the definition of history
31 of substance abuse.

32 I don't know clearly the link with respect
33 to 73.56, but I think in the context of our Part 26,
34 the answer would be yes, that would be considered and
35 relevant.

36 MS. TECHAV: In the actual text of the
37 rule, it talked about pre-access testing and what is
38 required, and it had a statement of history of
39 substance abuse. I think the contention here is that,
40 back to the definition of how to interpret that was
41 not there in 1996. It's been added.

42 So now it's being interpreted totally
43 different. So that's why we have these concerns. We
44 couldn't comment on it back in 1996, because it wasn't
45 there. It is there now, and the NRC is taking over a
46 \$6 million credit for this part that it's going to be
47 a reduction to us, and it's not. It's a burden.

48 That's our whole point. It wasn't there
49 to comment on before, because you're saying this is

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1 it, this is final, you've commented on it. But we
2 didn't comment on the definition.

3 MR. TRACY: You said it's a burden, but
4 you would have to be testing anyway. Am I incorrect
5 in that statement? So while it's not a savings, and
6 I fully understand that argument, your point -- it's
7 a burden -- could you explain that for me?

8 MS. TECHAV: It's a burden because when
9 Mick was up and saying the whole process of how we
10 currently test, if anyone had unescorted access within
11 less than 30 days, we wouldn't initially test somebody
12 or retest them when they are coming back for
13 unescorted access.

14 If it was greater than 30 days but less
15 than 365, we would retest somebody unless their actual
16 fitness-for-duty drug test date was within 60 days.
17 So based on this definition that's been added in here,
18 it's saying that we would not have to test somebody
19 unless they had a history of substance abuse, and
20 before this all the discussion was that, if they went
21 from one licensee to the next licensee to the next
22 one, even if it was from one actual plant to the next
23 -- We've got 17 different units, 11 different plants
24 that a person can go to, and if we've got to redo and
25 readjudicate and retest somebody every single time,
26 that's going to create a burden which we currently
27 don't do.

28 MS. DURBIN: Can I ask you what changed in
29 the rule that allowed you to do that in the past and
30 does not allow you to do that now?

31 In other words, I don't recall the
32 language in the rule that said that you did not have
33 to do a pre-access test on someone who was moving from
34 one site to another within 30 days. This is just a
35 point of clarification, because I didn't realize there
36 were significant numbers of people that could move
37 from site to site without being tested.

38 MR. DIPIETRO: I may need some back-up
39 from Loren on this, but I remembered Loren saying in
40 a meeting one time that, if an individual terminates
41 his unescorted access and they walk out in the parking
42 lot, then all of a sudden there's a determination made
43 that they need to have the unescorted access back,
44 they need to be drug tested to be put back in the
45 fitness-for-duty pool and meet the requirements of
46 unescorted access. Okay?

47 We said that's burdensome to do that. We
48 have a number of people that transfer from site to
49 site, especially the professional employees, the

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1 Westinghouse, Framtone, B&W, Bartlett. They are
2 moving from site to site, outage to outage. Okay?

3 We asked Loren at the time what was
4 reasonable, because there were words -- and I may be
5 in 1385 -- that a three to five-day period was
6 reasonable. Okay? That was the standard until we
7 said, okay, when you're talking about continual
8 behavior observation, it's a 30-day window is what
9 most people are dealing with.

10 So that kind of migrated into the industry
11 standard, that if a person was subject to random
12 testing within the last 30 days, they could come into
13 your site without having the need for a pre-access
14 test. Okay? That's been the standard -- I mean, I've
15 been doing this for many years, like I said, and
16 that's been the standard from back, I think, when we
17 had the conference back in St. Louis. Loren could
18 help me out with that.

19 That's what everybody has been doing.
20 Okay?

21 MODERATOR WEST: Correct me if I'm wrong.
22 This is the same issue that would be related to
23 whether you would have to do a suitable inquiry for
24 less than 30 days. I guess what I'm hearing is that
25 you -- It would be different?

26 MR. DIPIETRO: It's not the same issue.

27 MS. TECHAV: In NUREG 1385, Number 7,
28 Infrequent Access, it talks about if a
29 contractor/vendor's program has been reviewed and
30 accepted by more than one licensee under provisions of
31 10 CFR 26.23, then any of the contractor/vendor
32 employees may transfer between the licensee's
33 facilities without having to repeat the pre-access
34 test, if all the provisions of the rules have been
35 met. To illustrate, if a pre-access test was
36 administered before unescorted access was initially
37 granted at the first facility, and if the employee was
38 continuously covered by both behavioral observation
39 program and a random testing program while he or she
40 worked for and transferred between the two licensees,
41 another pre-access test is not required when an
42 employee starts to work at a different site.

43 Then in parentheses it says, "The NRC
44 staff recognizes that in some cases, i.e., an employee
45 my need to travel between job sites, a reasonable
46 short period of time to accomplish such a transfer
47 need not be included in the continuous coverage."

48 Then contract employees who are not
49 covered by a program reviewed and approved by a

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1 licensee under the provisions of 10 CFR 26.23 should
2 be tested again before being granted unescorted access
3 to a site. Any pre-access or random test conducted
4 under a program covered by the rule at the previous
5 site and completed within the last 60 days will
6 satisfy 10 CFR 26.24(a)(1).

7 I think what the discussion was back in
8 Houston -- I wasn't there, but I heard all about it --
9 was that the reasonable time was 30 days because the
10 individual was covered under CBOP during that time,
11 and it kind of went back, and that date kind of in
12 conjunction was picked because of the 30-day CBOP
13 issue. So the 30 days was picked at that point. At
14 least, that's what I believe happened back in Houston.

15 MODERATOR WEST: Well, certainly, what you
16 have read from 1385 is relevant, and we'll take that
17 into account. Thank you very much.

18 MR. BRAZIL: Scott Brazil, Dominion. Two
19 comments. One, I agree with Ms. Durbin up front that
20 my source of concern regarding all of this work you
21 have to do to determine before you grant the access,
22 we've been talking about it in terms of pre-access
23 testing, whether or not you can excuse someone. But
24 I think you're right.

25 When we get to 26.27 we're going to have
26 a lot of heartburn about that, because that's where,
27 I think, most of our consternation is coming from,
28 because we're going to have to deal with it when we
29 get there. It just applies here, and it's our first
30 opportunity to talk about it.

31 Second of all, with respect to the
32 gentleman a couple of speakers ago, I've been doing
33 this since 1990, and I am not worked up over this,
34 because I haven't had time to look at it. I'm worked
35 up over what's different here than what we talked
36 about in '96.

37 Specifically, one example would be our
38 addition of a definition for history of substance
39 abuse, because that is going to throw up an entirely
40 new bunch of requirements that we perform, once we get
41 to 26.27, and we'll get there. Thank you.

42 MODERATOR WEST: Thank you. I would
43 propose that we could either proceed -- We have a fair
44 amount left. We were originally thinking of having a
45 lunch break at 12:30. We still have a fair amount to
46 wrap up on 26.24.

47 I would propose that perhaps we have the
48 lunch break now, and after lunch within an hour --

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1 it's 12:10 -- let's say at 1:10 then we would pick up
2 26.24 again.

3 Could I just mention before you leave for
4 lunch, just to remind everyone again if you would
5 remember to sign in on the sign-in sheets, and also to
6 point out that we do have public meeting feedback
7 forms that are available out in the entrance to the
8 auditorium. Thank you.

9 (Whereupon, the foregoing matter went off
10 the record at 12:11 p.m.)
11
12
13

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:12 p.m.)

MODERATOR WEST: My apologies. Before we went out to lunch, I had intended to give you some sense of maybe what some possibilities might be for lunch, but I'm sure you are probably familiar with this area as much as I am. But certainly, we have the cafeterias here in this building and the other building and a fair number of places up and down the Pike that are within walking distance.

I had mentioned earlier, while we are waiting for folks to get back -- I had mentioned earlier that there were a couple of pages missing in the handout on the presubmitted questions that we had received from NEI, pages 4 and 9, and they are now out on the handout table.

I wanted to -- We'll pick up with Section 26.24 starting with page 37 of the slides, but before I do that, I wanted to at least for one question I can remember that I received this morning in the first session that I can give you an answer to and, hopefully, I recall the question clear enough that I'm going to give you the answer that matches the question that you had in mind.

This is the one that had to do with the custody and control form. I think the general question -- and correct me if I'm wrong -- had to do with whether you can use that Federal form.

I think the answer is within the definitions that we provide on the custody and control form, but my interpretation of that would be that, if you have an identical match with the HHS guidelines in terms of the panel of drugs and cutoffs and so forth, that form would be appropriate; and if you don't, which is probably, certainly, the case for most of you, if not all of you, you would have to use something that would be a look-alike or comparable form to the Federal form.

Okay. We'll now get into random testing.

MR. DIPIETRO: Can I ask one other question? I just got a question on -- There was an opportunity there for us not to test somebody that's coming back for a pre-access. Give me a cookbook of a guideline of when we would not have to test somebody.

Obviously, when there is no history of substance abuse and 30 days -- that's where I'm missing a little bit.

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1 MR. MIZUNO: Are you talking under the new
2 rule or under the existing rule?

3 MODERATOR WEST: I think he's talking
4 about the new rule.

5 MR. DiPIETRO: Do you understand my
6 question, what I'm asking?

7 MODERATOR WEST: I think what you are --
8 Just to repeat your question and see if we've captured
9 it correctly, the question is: The regulation under
10 the new rule is written such that there is presumably
11 some opportunity to take advantage of some relaxation.
12 So what would be the instances for taking advantage of
13 that relaxation.

14 MR. DiPIETRO: Yes.

15 MODERATOR WEST: I guess you've certainly
16 mentioned the one that's the one that will come to
17 mind, first of all, if you don't have a history of
18 substance abuse. Can anyone think of any others?

19 MS. DURBIN: If you don't have a history
20 of substance abuse, as is right up here, and you've
21 been covered by a program meeting the requirements of
22 this part for 30 of the last 60 days. So this would
23 mean if you are moving from one licensee to another
24 and you have been continuously employed, you wouldn't
25 have to have one.

26 The other thing that's changed here -- and
27 this addresses another question that came up -- was
28 any negative test meeting the standards of this part
29 performed within 60 days may serve as a pre-access
30 test. This means, if you are coming from another
31 licensee and you have had a pre-access test or a
32 random test within the last 60 days and you have a
33 record of it, you can use it as your pre-access test.

34 So that's now specified in the rule as
35 something that is, in fact, approved, and you can do
36 it. Okay? Does that answer your question?

37 MR. DiPIETRO: Yes. Thank you.

38 MODERATOR WEST: Thank you. What I would
39 also ask before I get started with the remaining parts
40 of 26.24 -- We want to continue with this interactive
41 kind of dialogue, but what I would ask you to do is
42 to, if you can -- we don't have to be super rigid on
43 this, but generally speaking, if you would hold your
44 questions and your comments to the end of the section,
45 then we can use that as the window, and we can spend
46 whatever time is needed and, even if we have to back-
47 pedal to some of the slides.

48 (Slide change)

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1 MODERATOR WEST: So here under random
2 testing we have increased the focus on unannounced,
3 unpredictable aspects of randomness. Certainly, this
4 is not a new topic, by any means. I think someone
5 mentioned the NUREG 1385 document and, certainly, we
6 give a fair amount of attention in that document on
7 random testing.

8 Then secondly, specific information
9 regarding how to deal with persons unavailable when
10 selected for testing has been added. Again, that is
11 also something that's been dealt with in the future.
12 We are trying to be a little bit more focused and
13 explicit on some of these issues in the new rule.

14 So we have here the reasonable efforts
15 must be made to test persons selected for random
16 testing. I know this issue comes up quite a bit.
17 Persons off-site when selected for testing and not
18 reasonably available for testing in a timely manner
19 must be tested at the earliest reasonable and
20 practical opportunity.

21 I think the emphasis there is certainly on
22 the earliest reasonable and practical opportunity.
23 This slide carries over to 39.

24 (Slide change)

25 MODERATOR WEST: "And without notification
26 to the individual until immediately prior to his or
27 her reporting to the test." And it is also noted that
28 these tests will fulfill any return to duty testing
29 required for these persons and would be reported as
30 random tests.

31 Now we go to for-cause drug and alcohol
32 testing. There are two points here. First of all, if
33 a person is tested under for-cause, unescorted access
34 must be suspended until the individual is pronounced
35 fitness-for-duty by management and medical
36 determination of fitness.

37 Then secondly, there would be instances
38 where an individual tests negative under for-cause,
39 and there wouldn't be any requirement for a medical
40 and management determination of fitness, perhaps with
41 the exception that we are trying to note there where,
42 unless you had an impaired individual and with respect
43 to 26.27 be one independent of the for-cause test,
44 perhaps the consideration that there was some reason
45 to question the individual's fitness.

46 (Slide change)

47 MODERATOR WEST: Then on slide 41 for-
48 cause drug and alcohol testing must be conducted as
49 soon as practicable after the occurrence of the event

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1 except under documented unusual circumstances. We try
2 to give an example of this. Such testing must be
3 conducted within no more -- don't give a specific
4 example, but at least some sense of what the time
5 frame would be. such testing would be conducted
6 within no more than two hours when alcohol test and
7 eight hours for specimen collection for drug testing.

8 Now we shift to follow-up testing.

9 (Slide change)

10 MODERATOR WEST: Follow-up testing must be
11 conducted on an unannounced and unpredictable basis to
12 verify continued abstention from the use of
13 substances, and an individual must have a tailored
14 program and tested not less frequently than once every
15 30 days for four months and once every 90 days for the
16 next two years and eight months if unescorted access
17 is or will be reinstated, essentially covering a
18 three-year period.

19 (Slide change)

20 MODERATOR WEST: Then under return-to-duty
21 testing on slide 43, after a person seeks to regain
22 access after an absence from the possibility of being
23 tested under that site licensee's program for more
24 than 60 days, any test conducted within 60 days can
25 serve as the return-to-duty test.

26 When a person seeks to regain access after
27 being denied access under 26.27(b), they must be
28 tested and a negative test result obtained.

29 (Slide change)

30 MODERATOR WEST: Then we have on slide 44
31 that a testing process must conform to the guidelines
32 set forth in Appendix A.

33 (Slide change)

34 MODERATOR WEST: Now under selection and
35 notification, the period of time between notification
36 of the individual and actual collection must be kept
37 at a minimum consistent with operational constraints.

38 Further, the alcohol testing changes: You
39 will note here in these two bullets a blood alcohol
40 content of .04 when an individual arrives at the site,
41 at .03 one hour after arriving at the site, and .02
42 hours after arriving at the site is a violation.

43 Then lastly, blood tests for alcohol are
44 for additional information that could be considered in
45 an appeal. Clearly, in the first bullet the direction
46 we were initially going was some sort of
47 extrapolation, and we eventually ended up with this
48 way of addressing this concern about the condition of

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1 the person with respect to alcohol when they first
2 come on shift.

3 We were hoping that this would be in some
4 ways better, particularly for the medical review
5 officer who would perhaps have to actually do the
6 extrapolation, if that was the approach we had taken.

7 (Slide change)

8 MODERATOR WEST: So now we would shift to
9 the specific questions that we received in this area
10 under 26.24.

11 The first question is as follows: What is
12 the difference between pre-access testing and return-
13 to-duty drug and alcohol testing requirements? Please
14 clarify the parameters spelled out in 26.24(a)(1).

15 Our response is as follows: Pre-access
16 testing is required of all individuals before granting
17 of unescorted access to protected areas or assignment
18 to activities within the scope of this part, unless
19 the individual has been covered by a program meeting
20 the requirements of this part for at least 30 day
21 during the 60 days immediately previous to the
22 granting of unescorted access and has no history of
23 substance abuse.

24 We've certainly gotten into that
25 previously. In contrast, return-to-duty testing
26 applies to individuals who have either been denied
27 access under 26.27(b) or to those individuals who are
28 employees of the licensee with unescorted access but
29 have been aware from any possibility of being tested
30 for 60 or more days. So certainly, in this latter
31 category, individuals that are still employed by the
32 licensee but, for one reason or another, they have
33 been away from the -- maybe for detail or something of
34 that sort.

35 This second category, as I've stated,
36 applies to licensee employees who are away from the
37 program for extended periods, and for that reason or
38 in this instance, wouldn't be covered by -- wouldn't
39 necessarily be covered by a FFD program.

40 Further, on the return-to-duty testing, it
41 is not applicable to individuals who are not in either
42 of these categories. It would not apply, for example,
43 to an individual who had been employed by the licensee
44 in the past and either left the licensee's employ or
45 continued to be employed by the licensee but was
46 reassigned to another job and did not have unescorted
47 access to the protected area and was reapplying for
48 access to the protected area. These individuals would
49 be covered by pre-access testing.

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1 Another question we received in this area:
2 Does return-to-duty testing have to be conducted for
3 those individuals who have no history of substance
4 abuse and were under an FFD program for two
5 consecutive weeks prior to granting of access or
6 within six months?

7 Our response is as follows: Return-to-
8 duty testing only applies to individuals being
9 reinstated after being denied access under the
10 provisions of Section 26.27(b) or to those individuals
11 who are licensee employees with unescorted access but
12 have been away from any possibility of being tested
13 for 60 or more days.

14 This second category applies to licensee's
15 employees who are away from the program for extended
16 periods of time and, therefore, have not in actuality
17 been covered by an FFD program, which I previously
18 mentioned.

19 This would apply, for example, to an
20 individual who had an extended illness, leave of
21 absence, or assignment to a non-nuclear facility.
22 When this individual returns, he or she must have a
23 return-to-duty test.

24 The individual can be assigned to duties
25 pending the results of this test, if the individual
26 has no history of substance abuse and had a negative
27 test result when a test meeting the standards of this
28 part performed within the past six months or has been
29 covered under an FFD program or two weeks during that
30 six-month period.

31 Another question that doesn't have nearly
32 the length of our response as some of these others
33 that I have mentioned had to do with, first of all:
34 What is no history of substance abuse? Is it a lack
35 of hits of any of the six items listed under the
36 definition?

37 Secondly, does behavioral observation
38 coverage for two weeks during a previous six-month
39 period allow for unescorted access without waiting for
40 a negative test result?

41 The quick answer for the first one is yes,
42 the first bullet; and the answer for the second bullet
43 is as follows: The individual must be covered under
44 a program meeting the standards of this part during a
45 two-week period in the previous six months. This
46 would require inclusion in a random testing program,
47 awareness training and so on, as well as behavioral
48 observation.

49 Further question -- Yes, sir?

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1 MR. BUSH: Garmon, you said that the
2 answer to that first bullet was yes?

3 MODERATOR WEST: Let me go back to that.
4 Yes.

5 MR. BUSH: It says "on any of the six
6 items," which means if one of the six items is a hit,
7 that still means, according to what you said, if I
8 understand it correctly, it's no history. I think
9 that should be lack of hits on all of the six items.

10 MODERATOR WEST: That's a good point.
11 Thank you. I appreciate that.

12 MR. MIZUNO: If you hit on any of the six,
13 then you have a history. To not have a history, you
14 cannot have anything. You cannot come up on any of
15 those. I think everyone understands that.

16 MODERATOR WEST: The next question: If
17 the individual was not available for random test when
18 selected and returns to duty when FFD personnel are
19 not scheduled to be available, what is the requirement
20 for testing at the next reasonable and practical
21 opportunity?

22 What we provide here is as follows: This
23 would be the first opportunity when both the
24 individual and the FFD personnel are available such
25 that, if the individual came back on a Monday and the
26 testing is not done until Wednesday, then in this
27 example the Wednesday would be the first available
28 opportunity.

29 NRC expects that licensee will assure that
30 the period between the selection and testing is
31 reasonable, and we give some example of what is the
32 criterion for reasonableness, within two or weeks of
33 being selected, and that the individual does not
34 receive prior notification of the test; that is, that
35 the test remains unannounced. That's the key there.

36 Licensees that have inappropriately
37 selected another person when the first person selected
38 was not available, and not tested the first person
39 selected, are not meeting the requirements. I
40 mentioned earlier this issue is discussed with respect
41 to the current rule in NUREG 1385.

42 This does not provide a random selection.
43 As those who are rarely available, they are not
44 subject to testing at the same rate -- and that's the
45 issue -- as those who are always available.

46 At one site the individual successfully
47 used the licensee's policy of only selecting and
48 testing those who were scheduled for work to subvert

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1 the testing process by essentially just changing his
2 or her work schedule from one schedule to the next.

3 This individual traded shifts on a regular
4 basis. So he was never available for random testing
5 when selected.

6 The next question under this section --
7 please?

8 MR. EARNEST: You said wait until the end
9 or can we --

10 MODERATOR WEST: We don't have to be 100
11 percent rigid on it, if you've got something that's
12 really burning. Go right ahead.

13 MR. EARNEST: It says persons off-site
14 when selected for testing not reasonably available for
15 testing in a timely manner must be tested at the
16 earliest reasonable and practical opportunity. Well,
17 you defined that pretty well.

18 "And without notification to the
19 individual until immediately prior to his or her
20 reporting for the test." Now I've got -- On random
21 test out there I've got sites that, for example, an
22 individual reports for work is notified that they have
23 been selected for random, but yet they have two hours
24 which they can go in the plant before reporting over
25 to fitness-for-duty to take a test. Is that pretty
26 common out there?

27 Well, is that going to affect that? So
28 what's a good definition of immediately? I thought
29 you just said that's going to affect it. How is it
30 going to affect it? Do you want it up or down?

31 MODERATOR WEST: Why would they need tow
32 hours? I'd be interested in getting some insights on
33 that.

34 MR. EARNEST: Well, all you got to do on
35 that is just have the fitness-for-duty personnel
36 notify their supervisor.

37 PARTICIPANT: Well, there's a new rule
38 right here that the minimal number that I can see
39 that's even put into the rule is one hour for a .03
40 BAC. So isn't that enough? I would say one hour.

41 MR. EARNEST: That sounds reasonable to
42 me, too. But I'm saying that there's a spate, a good
43 number of you out there that are using two hours, and
44 I have a little problem with that being immediately.
45 I'm just looking for a little guidance here, a little
46 feedback as to what the NRC expectation is and what
47 your plants can handle.

48 MODERATOR WEST: Good question. Please?

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1 MS. SMITH: Monica Smith from TVA. We
2 don't use the two hours. We do what you say, and we
3 go through the supervisor, which allows him some
4 flexibility. If they are on a critical task, he can
5 delay notification, but once they are notified, they
6 report promptly. It works well for us.

7 MR. EARNEST: That's one thing, but what
8 if they are notified at the minute that they come to
9 site by, say, Security?

10 MS. SMITH: Well, that's why we go through
11 the supervisor. Security doesn't do it. There are
12 expected to begin coming to the collection site once
13 they are notified. You know, certainly, some people
14 may be further away from the collection site than
15 other people, but by going through the supervisor that
16 allows us to fit that into our work process.

17 MR. EARNEST: What did I do, leave the
18 corral gate open?

19 MS. MATULA: Lisa Matula, STP Nuclear
20 Operating Company. The question I have in this area
21 -- I don't know if it's a practice across, but we used
22 to call these people infrequents. What we do is we
23 put their badge on hold, because it may be the
24 elevator maintenance man that nobody knows when they
25 are going to get there.

26 I mean, the only time is when the elevator
27 goes out, and that might be two in the morning. So
28 how is that -- He's going to be notified when his
29 badge comes across, and they say, no, he's got to go
30 to fitness-for-duty. I mean, I don't know how we're
31 -- If we can't, he's not supposed to know. I don't
32 know how we are going to do that.

33 MS. THIEL: I have a comment on that,
34 exactly what she's saying. When we have those
35 infrequent type people, the only way for us to track
36 that they do need a test is to pull their badge,
37 because that's how we have that link. When everybody
38 comes back, they are going to know that they have to
39 go report. There's no way for us to track within two
40 weeks we get this person.

41 We have to pull their badge so that we
42 know when they come and say why can't I get in, here's
43 why. But on the other hand, if that happens and it's
44 two in the morning, we're not open. So it's not
45 unannounced now.

46 I don't know how you all expect us to do
47 that.

48 MS. MATULA: On this same note is the
49 vacation people, the people that are off-site for a

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1 long time -- this is going to close that window, and
2 they are going to know that every time I come off an
3 extended period, I will probably be subject to a test
4 within the next week.

5 So they are all going to know that,
6 because that's the pattern that this is going to
7 follow. It's too predictable.

8 MR. MIZUNO: Let me just be clear. The
9 fact that you have return-to-duty testing, in and of
10 itself, does not remove you from the random testing
11 pool. Right? So conceivably, you could get that
12 test.

13 I mean, there is no way -- I mean, yes,
14 the person who goes off on a vacation -- I mean, yes,
15 because of the return-to-duty requirement, they are
16 going to know that they have to be tested. I don't
17 think there is any way of avoiding that unless the
18 Commission were to change its mind and say, no, we
19 don't need return-to-duty testing. Okay? That's just
20 an unavoidable consequence.

21 The fact is that -- The fact that you are
22 still subject to random testing provides the
23 additional uncertainty that says, well, I don't have
24 a free window. Just because I've cleared return-to-
25 duty testing, I can't relax my guard and now start,
26 you know, dealing with my illegal drug, because I
27 still know that I'm subject to your random testing.

28 MS. MATULA: But on the other side of that
29 issue, why have return-to-duty for your employees that
30 are out on illnesses or they are somewhere else on
31 another job, if they are still in your random pool and
32 you can't excuse anybody.

33 They are still in your pool on your random
34 list. They are still subject to your program. So why
35 also subject them to return-to-duty when they are out
36 there?

37 MS. DURBIN: If they are covered by your
38 program, they don't have to have return-to-duty.

39 MS. MATULA: Even if they are out 60 days
40 and they are in my random pool and if their name comes
41 up, I'm going to collect them. So I do not have to do
42 a return-to-duty.

43 MS. DURBIN: When they come back, you do
44 the random, and it counts as a random, even if it's a
45 return-to-duty. You don't --

46 MODERATOR WEST: If they have been
47 selected.

48 MS. MATULA: Okay. But if they haven't
49 hit my random list, I have to do a return-to-duty?

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1 MODERATOR WEST: Here's the key. If they
2 are away from your employee for greater than 60 days,
3 if this is your question -- for greater than 60 days,
4 and if they have been covered by an acceptable
5 program, let's say another licensee's program, when
6 they return to duty you wouldn't have to subject them
7 to a return-to-duty test, because they have been
8 covered by another program. However, if they have
9 been away from your employee for greater than 60 days
10 and they haven't been covered by an acceptable
11 fitness-for-duty program, again the example being
12 another licensee's program, you would have to subject
13 them to a return-to-duty test.

14 MS. MATULA: Okay, but they are still in
15 my pool. They are still out there with the
16 possibility of hitting my random list while they are
17 out there. So that's not covered. Is that correct?

18 MR. EARNEST: I guess the point is they
19 are saying that, if the person is out -- say he's out
20 for three or four months and he's out there for --
21 he's ill. He has an operation. He has to heal up.
22 He comes back in three or four months.

23 One, you got to do a --

24 MS. MATULA: An evaluation for the CBOP.

25 MR. EARNEST: Right, and he got picked up
26 on a random. You only have to do the one test for the
27 two causes, regardless. He's going to get tested as
28 soon as he gets back, one way or the other.

29 MODERATOR WEST: I see your point. I
30 missed that. You are saying, if they are obliged to
31 have a return-to-duty test and also they have been
32 picked up in a dual fashion on a random.

33 MS. MATULA: Well, I'm still saying they
34 are covered by my fitness-for-duty program, because
35 they are still in my pool, is what I'm saying.

36 MODERATOR WEST: No, I heard that. But
37 they are still in the random pool?

38 MS. MATULA: They are still in the random
39 pool, even if they are gone 60 days. I'm saying they
40 are in my program.

41 MR. MIZUNO: Well, but the return-to-duty
42 only applies to greater than 60 days. Right?

43 MODERATOR WEST: Correct.

44 MR. MIZUNO: So if they are in your pool,
45 they haven't gone out for more than 60 days, then
46 there is no return-to-duty testing. Right?

47 MODERATOR WEST: Correct.

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1 MS. MATULA: So it's 75 days, but they
2 have been in my pool all 75 days. So they are in my
3 program. I do not have to do a return-to-duty?

4 MODERATOR WEST: No. Here's the deciding
5 factor on that.

6 MS. MATULA: I understand what you all are
7 saying. I got it.

8 MS. DURBIN: There are some more pre-
9 submitted questions on this area, and it might be
10 worth finishing those so that, in case we've already
11 answered your question, we can cover it, and then
12 going on to new questions.

13 MODERATOR WEST: I'll go on to the slide
14 52.

15 MS. DURBIN: We haven't -- We didn't do
16 51, although --

17 MODERATOR WEST: Fifty-one, I could
18 mention this. I don't think it adds any specific
19 insights that perhaps you are looking for in terms of
20 quantifying immediately prior, but it would be worth
21 mentioning the response here.

22 (Slide change)

23 MODERATOR WEST: What is meant by
24 "immediately prior to report," which we have been
25 discussing? is this the minimum time it would take an
26 individual to walk directly to the fitness-for-duty
27 station? So maybe there would be some insights here.
28 Under what conditions would there be leeway?

29 Then the second bullet: What is meant by
30 credible information?

31 The response to -- The answer to the first
32 bullet is as follows: The minimum time it would take
33 an individual to arrive at the testing station after
34 notification is a reasonable definition of
35 immediately.

36 The purpose of this requirement is to
37 reduce opportunities for subversion. So subversion is
38 the focus here. The licensee is expected to use
39 judgment with regard to what is a reasonable amount of
40 time to arrive at the testing station and to evaluate
41 whether an extenuating circumstance is justifiable.
42 They should assure that the individual has an
43 unannounced test after being selected for random
44 testing.

45 Then for the second bullet, what is meant
46 by credible information: The definition of credible
47 is reasonable. The rule has not changed in the use of
48 the term credible, and licensees have been
49 successfully interpreting it for over ten years.

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1 MR. EARNEST: You know, it seems like we
2 just raised another issue with the answer. I mean,
3 what's reasonable? I mean, we are asking everybody to
4 start using reasonable here. Well, what's reasonable?
5 Can anybody here tell me they can't get to the testing
6 station within an hour? What's reasonable? What's a
7 good reasonable --

8 MR. BRAZIL: I'm here to tell you that
9 there is at least one case where that can happen.
10 I'll go back to my -- Scott Brazil, Dominion.
11 Earlier, I talked about the people who are not nuclear
12 station employees who are badged for unescorted
13 access.

14 I work in the corporate office, for
15 example. I've got folks in a division office who are
16 linemen or work in the substation, who cover that
17 whole area. They happen to have to cover one of my
18 stations. So they are badged for unescorted access.

19 Now they are not doing that that often.
20 When they get picked out of my pool or testing, they
21 are going to come to the corporate office to be
22 tested. But they may be in a substation doing a job
23 by themselves or with another guy where, when I call
24 that supervisor to say that guy has been picked, he
25 needs to come to the office for testing, he's got to
26 find someone to go and replace him. That guy may be
27 more than an hour away from my facility.

28 Granted, as soon as he finds out -- is
29 told he is going to be randomly tested, he's going to
30 start the process to get over there and be tested, but
31 it may take more than an hour for him to get over
32 there, once he's been told he's been picked.

33 So there's just one example of where that
34 could happen.

35 MR. EARNEST: Well, that goes back to his
36 answer. You know, he's asking you to apply good
37 judgment as far as that, and that sounds like good
38 judgment to me. That's the way I would see it, if I
39 was reviewing an incident, for example, on a positive
40 hit or an allegation of some kind or something.

41 At the same time, where you say you are
42 coming to the site. The collection is done at the
43 site. You're a site employee. How long should you be
44 allowed before you go over and get a test, once you
45 are notified?

46 MODERATOR WEST: Except for extenuating
47 circumstances.

48 MR. EARNEST: If there's extenuating
49 circumstances -- I mean, if there's an emergency,

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1 okay, I don't think anybody is going to really care
2 how long it takes him to get over there for that hit.
3 Okay? That's that safety/safeguards interface coming
4 into play. But routine basis, all you do is call a
5 supervisor and say, hey, this guy has been picked up
6 for a random. He's going to testing. Shouldn't he go
7 directly there?

8 MR. NOEL: Excuse me. James Noel from
9 BWXT. My concern with going with a minimal reasonable
10 time frame is in the context of some of the other
11 changes that we're seeing in the proposed rule and
12 that of not accepting samples that don't have the
13 minimum quantity.

14 We have had scenarios where a supervisor
15 provides notification to the employee immediately upon
16 his exit of the restroom, and he comes to our site.
17 We are no longer able now to mix samples that don't
18 meet a minimum quantity. We are going to be
19 packaging, sealing and sending off all kinds of little
20 partial samples.

21 You get a positive on the first partial
22 sample. Where there wasn't enough in there for a
23 split and for an appeal, it comes back positive. The
24 second one comes back negative. The first one is one
25 with the ascension number that we are dealing with.
26 The employee doesn't understand why he doesn't have a
27 right to appeal. He's given me five bottles.

28 Now we can have some real issues with
29 this.

30 MR. EARNEST: Yes, and if that's the case,
31 then I got a little bit of a problem with your
32 program, to start with. Once you get -- The purpose
33 of this "immediately" is so that there won't be any
34 hydration and all the other things that they are
35 trying to do.

36 Once you get him over into your facility
37 for testing, you've got him under your control. Feed
38 him some coffee or some water, and wait him out. But
39 --

40 MR. NOEL: I have also gridlocked my
41 program in that I'm trying to test a lot of people in
42 a very short period of time, and I'm also trying to
43 keep the privacy issues in charge there, and with the
44 other thing we are talking about of testing everybody
45 as reasonably soon as we can, even if they are not on-
46 site at the time, I'm now going to have a backlog of
47 people I'm trying to test, while I'm trying to keep my
48 percentages up to meet my minimum quota for the year.

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1 It's going to be very complicated when you
2 add all of the changes together.

3 MS. DURBIN: I don't understand why this
4 issue arises. The supervisor, as one person
5 mentioned, can notify the person when it's appropriate
6 for them to go. There is no reason that everybody has
7 to be notified at the same time and sent.

8 I'm a little bit confused about why --

9 MR. NOEL: It may be that there are some
10 unique circumstances at my site in that we do not have
11 even a medium size fitness-for-duty staff. I have one
12 employee who is handing out notifications to
13 supervisors, who is also scheduling the arrival time,
14 if you would, working with the supervisor to
15 coordinate the arrival time of the employee and then
16 beating it back to the collection site to be there
17 when those people start showing up.

18 MR. EARNEST: It sounds to me like you've
19 got a staffing problem on your hands.

20 MR. NOEL: It sounds like --

21 MR. EARNEST: Not a problem with the rule
22 there.

23 MR. NOEL: It sounds like I'm going to
24 have a staffing problem as a result of the changes in
25 the rule, and that creates a burden for us.

26 There's another issue, as long as I'm here
27 and trying up everyone's attention for a moment.

28 MODERATOR WEST: Please, go ahead.

29 MR. NOEL: There may be some circumstances
30 at our site for people not on-site when selected that
31 may differ for some others, too, in that we have some
32 shifts that do work a A shift and a B shift, and they
33 change every two weeks.

34 We can draw a list today and, quite
35 honestly, no one would be there. It has happened to
36 us. We have some people who are permanent third-shift
37 workers. They are all in one pool. When we pull a
38 list, it's not unusual for us to get a list of five
39 names or ten names, and none of those people are
40 there.

41 They all go into a backlog at that point,
42 and we are going to have -- My fear, we are going to
43 have this continually growing backlog, and the machine
44 is going to be driving us to decide when the testing
45 periods are going to be, instead of us establishing a
46 testing period, pulling the names and testing the
47 people who are available there.

48 I don't have a problem with the seldom
49 people who are on-site, the off-site contractors or

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1 someone who works in a corporate office. It's the day
2 to day employees who at any given time, half of them
3 may not be there, and that can change. It can roll
4 over every two weeks, and does, and it is going to
5 create a burden for us.

6 I don't think that the burden that we are
7 going to be realizing from that is going to be worth
8 the increase in the public health and safety that we
9 think is going to come out of this. Thank you.

10 MODERATOR WEST: Okay. Thank you for your
11 comment.

12 MR. NOEL: Loren had the question of
13 whether any of those people were ever tested. Yes,
14 they are. One of the questions I had as a result of
15 that is: Is it feasible for us to have separate pools
16 for people that are in a third shift only program or
17 an A shift group and a B shift group, so that we can
18 reasonably say that we will stratify the testing
19 process so we draw from each pool on an equally
20 frequent basis, and everybody in that pool would be
21 tested if they are selected, because we would be
22 testing during the time of day that they are actually
23 there?

24 I think early on in the process there was
25 some discussion about people having their fitness-for-
26 duty random selection software tied into the access
27 control software. Did anybody ever do that? Okay.

28 Now what's happening with those sites is
29 before the fact the random selection computer is only
30 drawing from the people that are on site. No? Then
31 how was it tied into the access control? How do you
32 deal with that?

33 MODERATOR WEST: Does someone want to
34 provide some insights on that?

35 MS. THIEL: In my program, as soon as I
36 badge an individual for unescorted access, it
37 automatically goes into the fitness-for-duty pool. if
38 I terminate their access, they are out of the fitness-
39 for-duty pool. That is tied together.

40 MODERATOR WEST: Thank you.

41 MR. NOEL: Okay. There's no real time
42 reading of who is on site and who is not, as far as
43 the random selection?

44 MS. THIEL: No.

45 MR. NOEL: Well, I would be interested in
46 insight -- any insight you guys could provide, both
47 from the licensees and from the NRC, on how to do that
48 without creating a Big Mac log for us that may make it
49 difficult for us to keep our normal selection and

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1 testing process going forward while we are trying to
2 work off the backlog of people when we can have a very
3 high percentage of people not on site when selected.

4 MS. THIEL: We'll have a backlog, too,
5 same situation as he will. But if we pull people that
6 are on nights, weekends, holidays, then we send
7 somebody in to actually do those tests nights,
8 weekends, holidays, whenever. But there will be a
9 backlog of people that are gone for this week, because
10 they are at this meeting or whatever and, if we pull
11 them, we won't be able to put them back in the pool.
12 We'll have to wait until they get back and then try to
13 pull them, whether they are on nights, weekends,
14 holidays. We will get to them, but the backlog will
15 be a little bigger.

16 MODERATOR WEST: Thank you for that
17 suggestion.

18 MR. BUSH: Loren Bush. If my memory
19 hasn't failed me over the last couple of years since
20 I've been retired, my recollection is the NUREG 1385
21 has something in it about setting up small populations
22 for random testing, but you can't discriminate within
23 the population kind of thing. It has to be equal to
24 the other.

25 So some of you who have that can probably
26 quote chapter and verse.

27 MODERATOR WEST: That's correct. Yes.
28 The point there in 1385 is what we touched on, on one
29 of these slides, that you don't want to penalize folks
30 that are being tested with respect to not testing
31 individuals that have been pulled up for random
32 testing.

33 That's sort of what's driving this
34 emphasis on first opportunity for testing as opposed
35 to they come up, and they are not available, and they
36 just simply go back into the pool.

37 MR. CLEVELAND: Randy Cleveland, NMC. Is
38 the intent here on the return-to-duty testing with
39 respect to random selection, if we select a worker and
40 they are not on site and we can't collect them, we
41 would track that. At the point they go beyond 60 days
42 without completing that random collection, we would
43 then in effect move them into a return-to-duty test
44 prior to granting unescorted access?

45 MODERATOR WEST: Yes. I think the key
46 here is that, clearly, the person (a) is still in your
47 employ. They have reached the threshold of 60 days or
48 greater, and now they are coming back. So, clearly,
49 this would -- from trying to tighten up the

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1 definitions on testing, if you will, they would be
2 subject to return-to-duty testing.

3 MR. CLEVELAND: You would then call it a
4 return-to-duty test, no longer be considered a random.

5 MODERATOR WEST: Correct.

6 MS. DURBIN: No, no. It would be -- What
7 we did was we didn't want people to do both a return-
8 to-duty and a random test, if somebody had been
9 selected for a random test while they were away. So
10 you do one test, and we have it count as a random
11 test. So it would count as part of your 50 percent of
12 your population who are random tested.

13 MODERATOR WEST: I'm sorry. I misspoke on
14 that. You had originally selected them for a random
15 test. They have come up on the random testing.
16 That's correct. Thank you.

17 MR. CLEVELAND: Okay. If we select them
18 today for a random test, they are not available. We
19 track that for 60 days.

20 MS. DURBIN: Well, the return-to-duty --
21 I'm sorry. The return-to-duty is for somebody who is
22 supposed to be covered by this program, but they are
23 really not available for testing for 60 days, which
24 means they really weren't covered by the program.

25 So, yes, after 60 days you would have to
26 make sure they got tested, and you would test them.
27 But you would call it --

28 MR. MIZUNO: You would treat it as a
29 random test.

30 MR. CLEVELAND: You would still go on and
31 call it a random and not say it's a return-to-duty
32 test for this provision?

33 MS. DURBIN: Yes. It's just how do you
34 count it.

35 MR. CLEVELAND: Practically, as an
36 industry how are we going to define that someone is
37 not available for random testing? Well, the easiest
38 way to do that is at the point of selection, if they
39 are not available for 60 days.

40 MS. DURBIN: After you select them, if you
41 can't get them into a random testing facility for 60
42 days, it means they weren't available. Yes.

43 MR. CLEVELAND: Okay. So other than the
44 cases where we have denied somebody and we are doing
45 a return-to-duty test, let's say on a positive, when
46 would we be doing a return-to-duty test per the
47 provision here?

48 MODERATOR WEST: Putting aside any
49 considerations of random?

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1 MR. CLEVELAND: For the random.

2 MODERATOR WEST: It would be instances --
3 and this is what I was focusing on earlier. It would
4 be instances where you have someone in your employ,
5 and they are away from your employ, but you haven't
6 pulled their unescorted access, and they are gone for
7 greater than 60 days. Now they are coming back.

8 The concern here is that they haven't been
9 covered by an acceptable fitness-for-duty program.
10 They haven't been away on a detail, let's say, to
11 another licensee. So the concern here would be that
12 span of time that they have been away and they are
13 uncovered.

14 So then they would come back, and you
15 would conduct a return-to-duty test with respect to
16 the fact that they have been away for greater than 60
17 days.

18 MR, MIZUNO: Garmon, can I just add
19 something on that, and maybe the staff will have to
20 correct me. But my understanding is that -- Let's
21 suppose you had the employee, and during that 60 day
22 period he was -- he or she was selected for random
23 test. If that person, in fact, actually came back as
24 part of that and gave the test, he or she would be
25 covered under the test program.

26 So, therefore, when they came back, they
27 would not be subject too return-for-duty testing,
28 because --

29 MODERATOR WEST: If it was less than 60
30 days?

31 MR. MIZUNO: Yes.

32 MODERATOR WEST: Correct.

33 MR. MIZUNO: Or even if it was greater
34 than 60 days, because that person was in the random
35 access pool. That person was subject to possibility
36 for testing. In fact, that person was selected. That
37 person actually came in to be tested at the first
38 reasonable opportunity, with minimal -- you know,
39 meeting all the other requirements for a random test,
40 and was still in the pool after that test.

41 It just so happened that their extension
42 away from the site was longer than 60 days. From my
43 perspective, they were subject to coverage under the
44 licensee's program. So the fact that they were away
45 from the site for 60 days is not relevant, because the
46 words of the rule say away from coverage of the
47 testing program for more than 60 days.

48 MR. EARNEST: That's what she was saying
49 earlier. Exactly right.

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1 MODERATOR WEST: Thank you, Geary, for
2 that clarification.

3 MS. MATULA: Lisa Matula, STP Nuclear
4 Operating Company. That's what I was asking, because
5 they are still in my random and, if --

6 MR. EARNEST: And he answered it that way,
7 too, before.

8 MS. MATULA: But I thought earlier that
9 the other lady had said that, if that person didn't
10 hit my random list while they were 75 days out, I
11 would have to do a return-to-duty, even though they
12 were in my pool.

13 MS. DURBIN: The issue is that they are in
14 your pool, but they haven't been under behavioral
15 observation. They haven't been subject to for-cause
16 testing. If they are selected for testing, they know
17 they are not going to get a test.

18 If I were one of these people, if I'm an
19 employee of the licensee and I have unescorted access,
20 it hasn't been pulled, but I am off in the Caribbean
21 for two months -- you're all jealous -- and I know
22 that I can do whatever I want to do during that
23 period, because nobody can test me. I am absent from
24 the possibility of being tested for more than 60 days.

25 That's what we are looking at, people who,
26 because they have unescorted access, are supposed to
27 be covered by a program, but they are not being
28 covered by a program for more than 60 days. That's
29 the idea.

30 We want people who are supposed to be
31 covered by a program to be covered by a program and,
32 if they haven't been covered by a program for more
33 than 60 days, they have to take a test when they
34 return. That's the idea.

35 MS. MATULA: Okay. But I've got -- and
36 maybe I missed it, but I thought it was a different
37 answer, what Geary just said.

38 MS. DURBIN: Well, what Geary said is, if
39 you selected them for testing during that 60 days and
40 then when they show up again they get tested because
41 of that selection --

42 MS. MATULA: I count that as a random.

43 MS. DURBIN: You count it as a random.

44 MS. MATULA: But if they weren't selected
45 on my random pool in that 75 day period, then I'm
46 going to have to return-to-duty?

47 MODERATOR WEST: If they have been away
48 for more than 60 days and haven't been covered by a
49 fitness-for-duty program, the answer would be yes.

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1 MR. MIZUNO: You see, this is why we were
2 saying that all these answers are sort of preliminary,
3 because we, obviously, haven't discussed it. I mean,
4 from my perspective, if -- Let's assume that that
5 person was in the Caribbean. Okay? I mean,
6 obviously, you're not going to come back to the site
7 to get tested, but they went to an off-site place that
8 met the requirements for a HHS testing facility.
9 Okay?

10 From my standpoint, I think that the NRC's
11 interest is satisfied by the fact that they got
12 immediately tested. I guess the staff is concerned
13 that, well, yes, they were subject to the random
14 testing requirements, but they weren't subject to
15 behavioral observation and, therefore, not subject to
16 the potential for-cause testing. I guess that's where
17 we are trying to deal with that.

18 Is that sufficiently important in this
19 context such that it should not be considered to be
20 under that licensee's program? I think that's
21 something that we need to work out.

22 MS. MATULA: Okay.

23 MR. MIZUNO: And I think you're going to
24 get a definitive answer in the NUREG, but thank you
25 very much for raising it.

26 MS. MATULA: One other question, though,
27 on the infrequent. Really, there is nothing in here
28 that ever sees infrequent. But the way we handle
29 those, again like the elevator repairman only comes
30 out when -- and it could be anytime --

31 MODERATOR WEST: How do you handle that
32 situation?

33 MS. MATULA: Well, I put his badge on hold
34 in Security.

35 MS. THIEL: But our elevator repair is
36 under CBOP. He might not come for 75 days, but his
37 supervisor down an hour away is trained in our CBOP.

38 MODERATOR WEST: I see. So he's still
39 covered.

40 MS. THIEL: He is covered, and he's in the
41 random, but it's over 60 days. Is he going to need a
42 return-to-duty?

43 MR. EARNEST: Yes, if he was selected for
44 the random.

45 MR. BRAZIL: I think part of the problem
46 here is right here the regulation says one thing, and
47 you guys are saying a different thing. It says
48 return-to-duty testing must be conducted when a person
49 seeks to regain unescorted access to protected areas

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1 of the site in question after an absence from the
2 possibility of being tested. And you folks are saying
3 --

4 MODERATOR WEST: That's the key.

5 MR. BRAZIL You folks are saying out of a
6 program. You can be away from the possibility of
7 being tested, but still in the program because you are
8 in the random pool, and still be covered under CBO,
9 because the off-site supervisor has been trained.

10 So is it that he's not been there to be
11 tested or is it that he's not under a program?

12 MR. EARNEST: Read that section again, and
13 you said when he attempts to regain unescorted access.
14 Correct me if I'm wrong, somebody up here, because
15 when I read that, I took that to mean that the
16 individual had left the site and his unescorted access
17 had been terminated. Okay?

18 AUDIENCE: No.

19 MR. EARNEST: Okay? All right. Now you
20 got the question.

21 MR. BRAZIL: See, regain implies that
22 you've lost it at some point. We're saying you still
23 have it. You still have a badge. You still have
24 access. You're still covered under CBO. You're
25 still in the random pool.

26 MS. MATULA: And we ascertain the CBO when
27 they come back with an interview.

28 MODERATOR WEST: Loren?

29 MR. BUSH: Loren Bush.

30 MODERATOR WEST: Please.

31 MR. BUSH: Somewhere in that beast of a
32 package that I left behind when I exited, there were
33 words that talked about this specific problem, and we
34 basically said that the licensee basically had two
35 options.

36 One was this elevator repairman could be
37 notified by his supervisor to come in either to the
38 licensee's facility or some other facility and provide
39 a specimen, meeting the requirements to be tested, or
40 whenever he shows up on the site in the future kind of
41 thing and all that sort of thing.

42 So we tried to provide a little bit of
43 flexibility, but you guys seems to want to be very
44 inflexible.

45 MODERATOR WEST: Thank you for your
46 comments, Loren. Appreciate that.

47 MR. MIZUNO: I think -- I just found it,
48 Loren. It says here -- I'll just read it: "One
49 commenter stated that the rule addition to return-to-

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1 duty testing may cause inconsistency implementing
2 because of the various ways of interpreting the phrase
3 'possibility of testing for returning workers.'
4 Licensees must determine if the worker was absent at
5 the time selection or not reasonably available for
6 testing in a timely manner. It was recommended that
7 the section be revised," and it gives a thing.

8 Then our response is: Return-to-duty
9 testing covers two circumstances. One, someone has
10 been denied access under 26.27(b). Two, someone was
11 not at risk of being tested, regardless of reason.
12 The deterrence effect of random testing is lost if the
13 individual is free from the possibility of being
14 tested, whether for legitimate or illegitimate
15 reasons. Therefore, the NRC believes the two
16 circumstances covered by the rule are appropriate and
17 declines to adopt the comment.

18 The NRC will accept reasonable
19 inconsistencies arising from good faith efforts to
20 determine whether a person can be tested during an
21 absence.

22 See, to me, the response goes back to this
23 thing about being available for testing in a random
24 fashion. It's not really coverage under a program.
25 It really focuses on the fact that are you subject to
26 testing.

27 I do recall some situations where they
28 were talking about the employee being off-site, not
29 available for the on-site testing but possibly being
30 able to be tested at another facility that met the HHS
31 standards, and that -- I recall us internally
32 discussing it and saying, yes, that person is subject
33 to random testing and so, therefore, return-to-duty
34 testing would not apply if that person was, in fact,
35 tested as a random test during that period, you know.

36 MS. MATULA: But these people -- licensees
37 that are out sick are in the random pool. They are
38 subject and, if they hit that random while they are
39 out 75 days, they will be tested now, because there is
40 no excuse for random. They will go into the backlog.
41 So they are subject to it -- to the test.

42 If they get called while they are not
43 here, they will be put on the random list to be called
44 when they come in. Now they may not be called, but
45 they are in the random pool is my point.

46 MS. DURBIN: But during that period, they
47 are not at any risk of being tested, actually tested.

48 MR. MIZUNO: That's right. The coverage
49 was intended to be you're in the pool and you get

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1 tested. If you have to delay it for whatever reason,
2 then that's really defeating the purpose of seeing
3 that you are being subject to random testing.

4 Delaying it for whatever reason beyond 60
5 days takes you outside of that what I would call the
6 safe harbor of saying you are subject to testing.

7 MS. THIEL: I think where the confusion
8 may be coming in is there's two terms. One is
9 eligible for testing, which we as an industry say that
10 they are in a random pool. I think you are referring
11 to available for testing. Right?

12 I guess we've always said, if somebody was
13 in the pool, they are eligible. They are meeting the
14 intent of the rule. Like the elevator situation, if
15 somebody is off for 75 days, they are eligible. They
16 may not come up on the random test. Their name might
17 not be selected, but they are in a CBOP, because their
18 supervisor has been trained in that.

19 So why wouldn't they meet that intent, and
20 would not have to be tested when they come back?

21 MR. MIZUNO: I think they would.

22 MR. BUSH: Loren Bush here. I'd like to
23 make a comment. One of the reasons for this
24 particular requirement is that we had several cases
25 where licensees would select people for testing and,
26 because they weren't readily available, went on to
27 somebody else, and so forth.

28 A couple of things happened. In fact, I
29 witnessed this a couple of times myself, watching the
30 people on-site call 20 or 25 people, just trying to
31 get five to come in for a test.

32 The other thing that we had a couple of
33 times was we found that there were certain populations
34 of the on-site workers, because of the hours that they
35 were working, that kind of thing, they had been
36 selected for testing a number of times over a number
37 of years, but never tested.

38 So we said, if we change the requirement
39 so we put some leverage into the selection process
40 that it means something to be selected for testing,
41 and then the person is tested, it would solve a lot of
42 these problems, help the people who are getting tested
43 a number of times because other people aren't being
44 tested, that sort of thing. So that's the reason for
45 that.

46 MODERATOR WEST: Thank you.

47 MS. MATULA: But didn't you achieve that
48 when you went to the random and there is no excuse on
49 the random anymore? Didn't that achieve that? I

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1 thought that's what achieved that, that there's no
2 longer any excuse, if the random is going to be
3 tested.

4 MR. MIZUNO: Yes, but random is -- There
5 is no excuse if you're on site and you are actually
6 available for testing. The question here for return-
7 to-duty testing and whether you have to test them or
8 not is the person is, in fact, not "available" for
9 testing on-site. The question is at what point is it
10 that you say, look, the person is really not really
11 subject to coverage under your fitness-for-duty
12 program such that --

13 MODERATOR WEST: Or some other program.

14 MR. MIZUNO: -- or some other program such
15 that you need to have a "return-to-duty" testing. The
16 concept here -- Again, I have to go back -- is that if
17 you are within the random pool of tests and you
18 actually get selected --

19 MS. MATULA: You will be tested.

20 MR. MIZUNO: -- and you take the test, and
21 you take that test immediately. Okay? I mean, then
22 you are within coverage, and you are not really
23 separated from coverage of a fitness-for-duty testing
24 regime.

25 So, therefore, there is no reason to
26 single out that employee when they come back onto site
27 to be subject to return-to-duty testing. That is not
28 the case when the employee is off-site and is
29 reasonably not subject to random testing. At that
30 point, if it extends for greater than 60 days, at that
31 point you have two things, not subject to random
32 testing and that period of time is 60 days, and the
33 Commission made a determination. We can tolerate
34 something less than 60 days, but beyond 60 days we now
35 believe that we need to have testing, because the risk
36 of that person being potentially abusing an illegal
37 drug or misusing a illegal drug is sufficiently high
38 enough so that we feel that we need to do this return-
39 to-duty testing.

40 MS. MATULA: I know, but I was addressing
41 Loren Bush, that now that there's in the random -- you
42 all changed the random definition, that, you know, you
43 don't excuse people anymore. What he was saying,
44 that's going to fix a lot of that, that when you get
45 told that they are on two week vacation, we would
46 excuse them no longer.

47 If they are on two week vacation, they hit
48 that random, we are still going to collect --

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1 MR. MIZUNO: If they are on two week
2 vacation, they are not subject to return-to-duty
3 testing, because --

4 MS. MATULA: No, but they are going to --
5 But I mean, they are still in the random pool. That's
6 going to stop what Loren had --

7 MR. BUSH: If I can -- Okay, if you can
8 picture return-to-duty testing as a separate, unique
9 requirement. A person has been away from testing.
10 They come back. They get tested. Later in another
11 testing program, if you would, is random testing, and
12 they can be selected on Day One, ten, 15, 60, 80 or
13 90.

14 If they get selected during that initial
15 60 days when they are away from random testing, they
16 are going to be randomly tested, right, when they
17 return?

18 MS. MATULA: Correct. Under the new --
19 They are going to be tested. If they hit the random
20 list, they are going to be tested.

21 MR. BUSH: Now in your example of the
22 person comes back at 75 days, at 65 days he's been
23 selected for random testing. He's going to be tested
24 when he comes back, but as Nancy was pointing out
25 earlier, what we said was that test that you give him,
26 since he has been selected for random testing, for
27 statistical purposes you will call it a random test so
28 that you don't have to do another random test, if you
29 will. Okay?

30 MODERATOR WEST: Hopefully, that was some
31 clarity on this. I think it's certainly clear, and we
32 will entertain additional comments in a moment. But
33 I think it's certainly clear that we, the staff, need
34 to sharpen up our response to you in this particular
35 area, and we will certainly do that.

36 Your comment, please?

37 MR. CLEVELAND: Randy Cleveland again,
38 with NMC. So the expectation is that, if we select
39 somebody for a random test, and they go beyond the 60
40 days, now they are coming back to us. We are going to
41 collect them and call that a random?

42 MR. MIZUNO: Yes.

43 MODERATOR WEST: Correct.

44 MR. MIZUNO: For statistical purposes.

45 MR. CLEVELAND: And if there are other
46 people in our population that, by definition, as we've
47 defined our program, would know that they are away
48 from random testing, we have to track those people

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1 and, when it goes beyond 60 days and they come back,
2 do a return-to-duty test.

3 MODERATOR WEST: Irrespective of random
4 testing, right?

5 MR. CLEVELAND: Right. Irrespective of
6 random.

7 MODERATOR WEST: Irrespective of random
8 testing, you would have to track them with respect to
9 whether they have met the 60 day threshold and, if
10 they have exceeded the 60 day threshold and they are
11 coming back, given the caveat that they haven't been
12 covered by an acceptable fitness-for-duty program, you
13 would indeed have to test them as a follow-up test.

14 MR. MIZUNO: Yes, that is correct.

15 MODERATOR WEST: I'm sorry, excuse me.
16 Return to duty test.

17 MS. DURBIN: And if I can just add
18 something to make things more confusing, in the case
19 of the elevator repair person, if anytime during that
20 60 days they had been on-site, then the 60 days starts
21 all over again. I mean --

22 MODERATOR WEST: Right. The clock resets.
23 It's a good point. Thank you, Nancy.

24 MS. TECHAV: Maybe I missed it, but going
25 back to the elevator person, if they are gone from
26 site, they are still eligible because they are in a
27 pool. They don't come up random, just because it is
28 random and they haven't come up for 60-75 days. They
29 are in a CBOP, because their supervisor has been
30 trained. They don't need anything. They are still
31 good and they just come and go as they please.

32 MODERATOR WEST: If they have exceeded
33 the 60 days and they are covered by a program, then
34 they wouldn't have to be tested under the return-to-
35 duty testing.

36 MS. TECHAV: You said they would not.
37 Right?

38 MODERATOR WEST: They would not, if they
39 are covered by a program. They would not.

40 MS. TECHAV: Right. Okay.

41 MR. ALBERT: Let me ask you a question on
42 the CBOP program for your contractor. You've trained
43 the individual or somebody has trained the individual.
44 Right? That --

45 MS. TECHAV: That's not how we currently
46 practice, but there are some people that do that.

47 MR. ALBERT: Okay. But that elevator
48 technician is also subject to for-cause testing, if
49 need be. Correct?

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1 MS. TECHAV: Correct, because their
2 supervisor is trained in that. If they see any type
3 of behavior --

4 MODERATOR WEST: And that's a program that
5 you as a licensee have accepted?

6 MS. TECHAV: Correct.

7 MODERATOR WEST: And you audit the program
8 and so on?

9 MS. TECHAV: Correct.

10 MODERATOR WEST: It would be acceptable.
11 Okay, let's have some remaining comments, and then we
12 need to move on. I would suggest that we then could
13 have any additional comments at the end of this
14 section, which we haven't gotten to yet. Go right
15 ahead.

16 MS. TECHAV: Okay. To continue on with
17 the contractor, I guess just to give you a feel of how
18 some of the utilities do it is if we run reports on
19 our security computer of the last time an individual
20 has used their unescorted access. So they have been
21 inside the protected area and they are under the CBOP,
22 and we run reports that, if a contractor goes dormant
23 after 30 days, we cancel their unescorted access. We
24 retest them when they come back. We ascertain when
25 they come back. I mean, we do that now.

26 We do that for licensee employees, too,
27 who we know that they are on vacation for greater than
28 30 days. We apply the same 30-day period for CBOP.
29 If they are off on medical leave, if they are off on
30 disability, we take it even stricter to, I think, what
31 you are going to be allowing us to do.

32 I think that's been a common practice,
33 because we've always tried to marry the 30-day CBOP
34 with the fitness-for-duty test. But I'm not
35 complaining, but with the 60 days now, we are going to
36 still have to go back and do a 30-day CBOP on the
37 person, too.

38 So, you know, even though they're not
39 going to need --

40 MR. EARNEST Well, you don't have to. You
41 can get more stringent than what the rule requires.

42 MS. TECHAV: I know. I'm not complaining.
43 I'm just trying to let you guys
44 understand how we currently do business.

45 MODERATOR WEST: We appreciate that.
46 Thank you for the insight.

47 MS. TECHAV: Okay. And something else I
48 wanted to clarify is when I've been up speaking, I am
49 on a fitness-for-duty task force, and I don't think

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1 anybody would complain or say that I'm not speaking
2 for the task force, which is a representative of the
3 industry.

4 MODERATOR WEST: Okay. Thank you.

5 MS. THIEL: Let me talk a little about her
6 comment before that last one. I think I heard this
7 two different ways, back to the 60-day thing, and I
8 hate to keep bringing it up, but I swear I heard it
9 two different ways on the staff.

10 MODERATOR WEST: Okay.

11 MS. THIEL: Is that correct?

12 MODERATOR WEST: And you may have.

13 MS. THIEL: Give us one more clarification
14 on the 60 days. If I have the elevator guy -- poor
15 guy -- he's gone over 60 days, but he is covered under
16 my program. He has not been pulled for a random. He
17 is under CBOP. Does he need a return-to-duty test?

18 MR. MIZUNO: I think my view -- okay? --
19 is that he does not. He does not. Okay? But I think
20 the definitive answer is going to come in this written
21 thing, but my view is that he is covered by whatever
22 -- whatever way you want to do it and so, therefore --
23 I mean, the fact that he wasn't -- The fact that he
24 did not happen to be drawn during that greater than
25 60-day period for a random test is irrelevant. He was
26 subject to potential testing.

27 MODERATOR WEST: I think that's the
28 key, that he was under a program.

29 MS. THIEL: He's under the program. He's
30 under CBOP.

31 MS. DURBIN: If his supervisor found that
32 he was of questionable fitness and sent him for a for-
33 cause test, would he be tested?

34 MS. THIEL: Yes.

35 MS. DURBIN: So he's not absent from the
36 possibility of being tested.

37 MS. THIEL: Exactly. Okay. But what I
38 heard earlier -- thank you for that -- was that he's
39 away. He's away from your site, and I think that was
40 her point over there was, yeah, but the guy just -- We
41 can pull him at anytime. But he is away.

42 MODERATOR WEST: I think, again, the point
43 would be, even if he's away and covered by a program,
44 that he wouldn't have to be tested under return-to-
45 duty testing.

46 MS. THIEL: Okay. That was just to
47 clarify that.

48 MODERATOR WEST: Let's go to your comment,
49 please.

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1 MS. ADAMS: Dolly Adams rom Exelon. I
2 just wanted to put my two cents in and say, for the
3 last five years it's just been my practice to do a
4 random testing just the way that you have the rule
5 now, and it's not all that bad.

6 MODERATOR WEST: I see.

7 MS. ADAMS: And you don't get the backlogs
8 that you are going to imagine that you are going to
9 get. You are not going to have to drop access as much
10 as you think you are going to drop. There is a little
11 more tracking to do, but it works out fine.

12 I use the one-hour notification system.
13 I very seldom have a problem with that, because all of
14 my contact people understand what my rule is, and so
15 I just wanted to mention that it's not bad at all. It
16 works out fine. It's a great system. I've been using
17 it for five years, and it does work out fine.

18 The only situation that I ever ran into
19 where, if I dropped somebody's access -- and I very,
20 very seldom drop a licensee person; generally, your
21 contractors, because licensee people you can always
22 get them somewhere. Even if it's on the back shift or
23 weekends or whatever, you are able to do that -- is
24 when I have a fossil person that comes into nuclear
25 just for an outage, and now they go back home, and
26 they are still badged. So they are subject to the
27 random list.

28 That's one of the few times that I'll drop
29 their access, and when outages come up, they owe that
30 random test, and that also satisfied their pre-access
31 test. So they don't get tested twice.

32 MODERATOR WEST: I see.

33 MS. ADAMS: There are ways around it that
34 they will only get tested once. They will not get
35 tested twice, if you just know what you're doing with
36 it. It's just a matter of tracking it.

37 So I just wanted to mention that. I hope
38 nobody is going to throw anything at me, but it works.
39 It works out fine. I've been doing it for five years.

40 MODERATOR WEST: That's very helpful. We
41 appreciate that. We'll take this gentleman's comment,
42 and then we'll move on to the end of this section with
43 the remaining questions.

44 MR. CLEVELAND: Randy Cleveland, NMC.
45 Just a point of clarification. Your expectation with
46 respect to the return-to-duty testing is not that
47 licensees track protected area access and, if it goes
48 beyond 60 days, force a return-to-duty test. Correct?
49 You're not expecting us to do that?

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1 MODERATOR WEST: I'm sorry. Restate the
2 question again.

3 MR. CLEVELAND: If you have some -- You're
4 not expecting us, with respect to the return-to-duty
5 provisions in determining whether somebody is outside
6 a random program, to track protected area access.

7 MODERATOR WEST: I think the answer is
8 that, no, what we are interested in is the fact that
9 the individual is away from coverage under an
10 acceptable fitness-for-duty program. That's the
11 emphasis, and it's greater than 60 days.

12 MR. CLEVELAND: Thank you.

13 MODERATOR WEST: We will go to the next
14 question. This one has to do with: Would the FFD
15 program manager qualify as licensee management? Then
16 relatedly for the second bullet: Do MROs have to
17 review negative drug screen results?

18 The response we have for the first bullet:
19 The definition of licensee management, who should be
20 informed by the MRO of a confirmed positive test
21 result should be spelled out in the licensee's
22 policies and procedures. The intent of this
23 requirement is that an individual with the authority
24 to assure that an individual who has violated the
25 licensee's FFD policy is removed immediately.

26 If the FFD program manager can assure that
27 the person is immediately removed -- that is, 24 hours
28 a day, seven days a week -- then he or she would
29 qualify as licensee management.

30 The summary answer to the second bullet
31 concerning whether the MRO would have to review
32 negative drug screen results: Certainly, you would
33 expect the MRO to review the positive results.

34 With respect to the negative results, the
35 expectation, generally speaking, would be that the MRO
36 would review those results, not at the level of detail
37 that you would expect this individual to review the
38 positive results, but rather it would be expected that
39 that individual would look at the aggregate of those
40 results.

41 We may have provided some misleading
42 information in this area in previous guidance
43 documents but, clearly, that's the expectation in the
44 new rule. We can talk about that. Could I just ask
45 yo to do this. Could I just finish? We only have a
46 few more questions for this section. Then at that
47 point we can open it up for additional comments on
48 questions on this particular section, 26.24.

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1 The next question concerns: When does a
2 work status begin? For example, a worker normally
3 comes to work at 7:00 a.m. but has a doctor's
4 appointment and doesn't come in until 10:00 a.m. Does
5 the clock start at 7:00 a.m. or 10:00 a.m.?

6 Then the second portion of this: Does
7 off-site include individuals who are on annual leave,
8 sick leave or administrative leave?

9 The response to the first one would be
10 10:00 a.m. The NRC's concern here is that no
11 individual with a BAC above .04 be in the protected
12 area.

13 The answer to the second question is yes.

14 Next the question is as follows: What
15 does the NRC consider to be the earliest reasonable
16 and practical opportunity to test an individual who
17 returns to site and was previously selected for random
18 test?

19 We have certainly spent a fair amount of
20 time on that one already. So I'll move on to the next
21 one.

22 When does the NRC expect the licensee to
23 conduct a for-cause test on an individual who has a
24 DUI test? I know we talked a little bit about this,
25 but the response is as follows: For-cause testing
26 should be completed as soon as the individual returns
27 to the site after the license is informed of the DUI
28 arrest, since a DUI arrest would provide credible
29 information that the individual had a substance abuse
30 problem.

31 In addition, a conviction -- and we've
32 discussed portions of this as well. A conviction for
33 DUI would constitute a history of substance abuse, as
34 defined in 26.3.

35 Now that completes the advance questions
36 that we received on 26.24. Would there be any
37 additional comments or questions at this point on that
38 section?

39 MR. SOUTHWORTH: Bob Southworth from PPL.
40 I just want to make sure I understand you correctly.
41 Did you say that the MRO should review negative
42 results?

43 MODERATOR WEST: That's correct. However,
44 the clarification I was trying to point out is that we
45 wouldn't expect the level of time or attention to
46 negative results to be comparable to what we would
47 expect with positive results, but the answer clearly
48 under the new rule is that we would expect the MRO to
49 review those results. But it would be more in the

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1 fashion of looking at them in the aggregate rather
2 than going through the level of detail that you would
3 be looking at or the individual would be looking at on
4 positive results. Yes?

5 MR. SOUTHWORTH: What type of
6 documentation do you expect to see for this? Somebody
7 just asked me. Do you expect to see a signature by
8 the MRO that he reviewed each one of these? We don't
9 do this right now, I can tell you that. So this is
10 new.

11 MODERATOR WEST: Well, that's a good
12 question. I guess I don't have a specific answer to
13 that, but I would acknowledge that we probably would
14 need to give you something that is more of an
15 operational way of how do we acknowledge that that has
16 been accomplished. So we can give attention to that,
17 and thank you for raising it.

18 MR. NOEL: James Noel rom BWXT again. I'd
19 like to open just one brief and final clarification on
20 a point that I was asking about earlier in having
21 separate pools of employees to solve the issue that I
22 have at my site.

23 In looking at the statements of
24 consideration for the current proposed rule, it does
25 say that licensees may maintain separate selection
26 pools for any class or group of workers, but may not
27 discriminate within those pools -- in a pool.

28 We would like to explore that possibility
29 of perhaps creating a pool for that permanent third
30 shift and pool for that A shift and that B shift, not
31 discriminating within those pools or the frequency of
32 selection between those pools.

33 I would like to get your response to that.

34 MODERATOR WEST: I think -- and I
35 appreciate your acknowledging what is in the
36 statements of consideration. I don't think it's
37 probably something we can unravel right here in this
38 setting.

39 I would acknowledge that we have received,
40 I would say, over the past several months questions
41 along these same lines. I think it certainly is worth
42 the consideration at some generic level so that we can
43 provide an response addressed to generally what you
44 are raising here.

45 MR. SOUTHWORTH: Could you provide any
46 clarification of what NRC means by the statement?

47 MODERATOR WEST: I don't think I have
48 anything additionally to add, other than what you have
49 read. I think as long as it would be ensured that one

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1 group of individuals weren't being disproportionately
2 selected over other individuals, I think that would be
3 part of the criterion as to whether it would be
4 acceptable.

5 MR. SOUTHWORTH: That would be our mutual
6 intent, yes. Thank you.

7 MS. BURKETT: Kathy Burkett at American
8 Electric Power. Going back to the MRO review of the
9 negatives, we have an on-site screening laboratory,
10 and we do not send our negative results to our MRO for
11 review. Is the expectation that we will do that?

12 MODERATOR WEST: I think the expectation
13 is -- and if others have any insight on this -- I
14 think in the past, and I can't cite you the specific
15 document, I think we probably put out some inaccurate
16 information in this area. But I think under the new
17 rule it wouldn't matter whether it's being sent out to
18 an HHS certified lab or whether you are doing on-site
19 testing.

20 The expectation would be in the aggregate
21 -- and I underscore in the aggregate -- we would
22 expect -- Since the MRO is the key person in the
23 decision making process as to whether it's a confirmed
24 positive or not, we would expect some attention to
25 even the negatives.

26 MS. BURKETT: And are you going to provide
27 us with some insight as to how you propose we do that
28 with the MRO, what you would like to see going to him
29 for review? I mean, is it our analytical data that
30 shows to him that, yes, this is a negative test result
31 based on this, this and this?

32 MODERATOR WEST: I think maybe related to
33 even the previous question of how do we acknowledge
34 that what we are requiring has been done, we certainly
35 probably owe you a little bit more clarification in
36 this area. Certainly.

37 MR. PRIEBE: Hi. Mike Priebe from Palo
38 Verde. I have a question concerning the random pools.
39 At Palo Verde we previously used a composite random
40 generator. Concerns during an audit from our nuclear
41 assurance department caused us to become more
42 conservative and go to a simple random generator.

43 It had to do with the language that talked
44 about population subject to testing would have an
45 equal probability of being tested. They felt a
46 composite random generator took that equal part away.
47 But the new rule shows having approximately equal
48 probability, and I'm really hoping you are going to

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1 tell me that that means that the composite random
2 generator would be acceptable under this rule.

3 MODERATOR WEST: I think here again we
4 certainly haven't thought about this in terms of the
5 specific examples you've given, but I think the
6 overarching thing would be that it would have to be
7 such that one group wasn't being selected more often
8 than another group. As long as it's achieving that,
9 I think that would be our criteria.

10 MR. MIZUNO: Or the opposite, actually,
11 which is that there is a group that is being
12 significantly under-represented.

13 MODERATOR WEST: Under-represented as
14 well.

15 MR. PRIEBE: What we are seeing -- I don't
16 know if the terminology I am using is right. So
17 excuse me, but everybody starts off in one pool. As
18 you are selected, you are placed into a second pool.
19 I'm sorry. As you are selected -- Everybody starts
20 off in two pools that are selected equally. As you
21 are selected, you come out of the second pool.

22 So you have -- What this causes, the end
23 result would be that you would be getting a wider
24 range of people selected for the same number of tests
25 in a year versus what we are seeing since we went to
26 the simple random, which is the same people pop up
27 over and over again often, just because that's the way
28 statistics work.

29 So one person may be tested three times in
30 a year. What we would rather see is three different
31 people tested, because we feel that's more effective,
32 or one person twice and another one once perhaps.

33 MODERATOR WEST: Yes. I think to do
34 justice to your question, we would probably have to
35 think about these details a little bit more. But I
36 think the overarching thing would be, certainly, to
37 ensure that all persons in the pools would have an
38 equal chance, equal probability of being selected.

39 MR. PREIBE: Yes.

40 MODERATOR WEST: That would be the
41 criterion.

42 MR. MIZUNO: Garmon, let me just interject
43 here, though. If I understand what you are proposing
44 to do, it's a way -- I'm not sure that a situation
45 where you are throwing -- once they have been tested,
46 and then they are thrown into another pool for which
47 they are not subject to testing until the next period
48 comes out, I know that that is something that was --

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1 MR. PRIEBE: No, I didn't explain that
2 right. Actually, they start off in both pools. Once
3 they are selected, they come out of one of them. They
4 still stay in the other where they are always subject
5 to be tested again. But the second pool -- it slowly
6 shrinks. It's the population of people who have not
7 been tested and, you know, people come out of both
8 pools.

9 So it becomes you have a double chance to
10 be selected.

11 MR. MIZUNO: Yes, that would be
12 acceptable. I mean, I think that -- That was one of
13 the things that we thought about as a way of avoiding
14 the problem of assuring that everyone remained subject
15 to random sample, and yet you still ensure that you
16 have coverage of every person.

17 MODERATOR WEST: Okay. Since the line is
18 somewhat longer over here, maybe we'll just use the
19 fashion of this side and then that side. I think
20 after we receive all the comments on this section, we
21 will all be very deserving of a break. So, please.

22 MR. HARRIS: That's why I yielded the
23 floor. Neil Harris, TXU Electric. I heard you a few
24 moments ago say that the NRC's expectation was not to
25 allow anyone within the PA with a BAC greater than
26 .04. I'm assuming this also still applies to the TSC
27 and the EOF facilities. Is this correct? For your
28 emergency personnel?

29 MS. DURBIN: With unescorted access?

30 MR. HARRIS: Correct, with unescorted
31 access.

32 MODERATOR WEST: I think the answer -- you
33 want to jump in there, Bruce?

34 MR. EARNEST: Yes. You know, it's still
35 up to you. For example, if you really need somebody
36 in there. It's the only guy you've got in there that
37 can give you advice on how to fix a pump or --

38 MR. HARRIS: You still have supervisory
39 discretion?

40 MR. EARNEST: You can escort him in there.
41 The only thing you can't do is give him unescorted
42 access under any circumstances, if he's over the .04.

43 MR. HARRIS: If I were to have an
44 individual show up and that individual had been
45 drinking prior to the declaration, we would have to
46 have that person in. If that individual had been
47 drinking, however, when they did arrive they fell
48 underneath the random selection and they were randomly
49 selected, and they blew a .02, would they still --

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1 MODERATOR WEST: And you needed the
2 individual to perform some function?

3 MR. HARRIS: We could still use the
4 individual? You use supervisory discretion? Is that
5 correct?

6 MODERATOR WEST: I think the answer really
7 is more precisely the fact that you could, even under
8 the current rule, escort that individual.

9 MR. HARRIS: Yes. Yes, you can. I just
10 wanted to make sure that, since we are adding the .03
11 and .02 --

12 MR. EARNEST: Yes, but that's again if
13 he's not immediately tested upon arriving at the site
14 or when it was notified.

15 MR. HARRIS: All right.

16 MR. ALBERT: Let me make sure that I
17 understand the sequences here. The individual was
18 notified to come to the EOF or wherever he or she was
19 coming. Did you determine then if alcohol or
20 something had been used?

21 MR. HARRIS: That determination is a
22 question asked: Are you fit for duty? If that
23 individual says yes --

24 MR. ALBERT: Then you made a decision that
25 you needed an individual to come in anyway. right?
26 Is that correct?

27 MR. HARRIS: That's correct.

28 MR. ALBERT: Then you are saying, after
29 the individual gets there, he or she is selected for
30 random testing and blows positive or whatever?

31 MR. HARRIS: Right.

32 MR. ALBERT: Okay. So you made the
33 management decision on the front end. Right? You
34 escorted the individual in?

35 MR. HARRIS: No, because that individual
36 may not have told me how much that the person has
37 drank. You know, it's up to that individual to know
38 whether or not -- You know, we are all professionals.
39 We've all been in this game for a long time. We know
40 whether or not we are fit for duty or not.

41 If I've had one beer versus three beers,
42 I probably won't even mention -- shouldn't say I. The
43 individual wouldn't mention that they had had one
44 beer.

45 MODERATOR WEST: I think the point is, if
46 I'm correct, you don't know until you have actually
47 performed the test.

48 MR. HARRIS: That's right. You don't know
49 until you actually perform the test.

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1 MODERATOR WEST: Yes. And then at that
2 point, you have certain decisions to make as to
3 whether you need the individual --

4 MR. HARRIS: Well, we could still use
5 supervisory discretion in this case.

6 MODERATOR WEST: Well, if I understand
7 your question correctly, I think part of it has to do
8 with what the test results are. Certainly, if the
9 threshold of whatever the cutoff level has been
10 exceeded, whether it's by the .02 or the .03 or the
11 .04, you would still have the option of escorting that
12 person, if you needed their advice to perform a job.

13 MR. HARRIS: Thank you.

14 MR. ALBERT: But still, how would you
15 treat the individual, though, now that the individual
16 tested positive, even though you asked him on the
17 front end are you fit for duty. The individual said
18 yes. At that point, would you still consider that a
19 positive test under the random program? I just want
20 to know how you are going to manage this. You would do
21 that?

22 MR. HARRIS: Yes. That would be a
23 positive. But that doesn't mean that they would be
24 excluded from performing their activity.

25 MR. ALBERT: No, sir. I mean you can
26 still escort him. I just wanted to know how you were
27 going to treat it.

28 MODERATOR WEST: Thank you. Yes, please?

29 MR. BOISMENU: Brett Boismenu, Nine Mile
30 Point Nuclear. I have three questions, basically.
31 I'm looking for clarity here, and I guess the most
32 important to me is your requirement for review of on-
33 site testing.

34 MODERATOR WEST: For negatives?

35 MR. BOISMENU: For negatives.

36 MODERATOR WEST: Yes.

37 MR. BOISMENU: The whole benefit of doing
38 on-site testing is to have the immediate results. We
39 only have an MRO one day a week. Are we going to have
40 to somehow FAX all the results, the 150 per day, to
41 the MRO and have them review them before we allow
42 access?

43 MODERATOR WEST: I'd be the first to
44 admit, I don't know the specifics of the details of
45 how you implement it. I would also add I'm making an
46 assumption here relative to on-site testing. I think
47 it's correct, but we'll look at it. We'll look at it
48 further. If I'm incorrect, then certainly in the

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1 NUREG document -- and I think Loren is shaking his
2 head. So maybe I'm off-base on that one.

3 MR. BUSH: Let me --

4 MR. BOISMENU: That's not the on-site one.

5 MODERATOR WEST: So I think that answers
6 your question. Thank you.

7 MR. EARNEST: That could be a week or two
8 down the line.

9 MR. BOISMENU: So basically, you're saying
10 it's have the results reviewed, but not at that
11 immediate time? Not at all?

12 MS. DURBIN: It's only HHS testing
13 facility.

14 MODERATOR WEST: I think that's really the
15 clarification here. I misspoke when I said it would
16 be applicable to on-site.

17 MR. BUSH: We've made an assumption that
18 the on-site testing program is under the licensee's
19 quality control measures, they get frequently audited,
20 etcetera, etcetera, etcetera. We are hoping that the
21 negative results are looked at by somebody in the
22 program somewhere along the line.

23 So there's no need for the MRO to review
24 those particular results unless the licensee decides
25 that the MRO is the person that's going to be one of
26 the quality people involved. But as far as the
27 regulatory requirement, no.

28 MODERATOR WEST: I think the key thing
29 here -- I did, in fact, misspeak -- is that it's not
30 required. You have some additional questions. That's
31 right. Go right ahead.

32 MR. BOISMENU: With the requirement, if
33 somebody is selected randomly, they will be tested
34 upon return. With some of our plants in the proximity
35 of our plants, we can have people badged at two
36 plants. Is there any exemption if somebody is badged
37 at another plant covered under another program and
38 they are selected? Can we write that off or do they
39 need to be tested?

40 MODERATOR WEST: I think the answer is
41 that they need to be tested. I'm assuming here you
42 are talking about an individual's badge, which is not
43 uncommon, at Plant A and Plant B.

44 MR. BOISMENU: Right.

45 MODERATOR WEST: But it would seem to me
46 that, if they are pulled for the random at Plant A,
47 they would have to be tested there at Plant A.

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1 MR. BOISMENU: Okay, thank you. One more.
2 I keep hearing the return-to-duty testing only applies
3 to licensees.

4 MODERATOR WEST: Personnel that are
5 employed by the licensee. Correct.

6 MR. BOISMENU: So, therefore, it would not
7 -- We would continue to do it with the elevator man.
8 He would be a qual, a pre-access test if his badge was
9 terminated. It wouldn't be a return-to-duty test.

10 MODERATOR WEST: That's right. The
11 assumption here, too, with the way that we are trying
12 to sharpen -- although I'm not 100 percent confident
13 we've done this, but in our attempt to sharpen the
14 distinction for return-to-duty testing, the assumption
15 is that (a) the individual is in the employee of the
16 licensee and (b) at least the scenario that their
17 access hasn't been pulled, unescorted access hasn't
18 been pulled.

19 MR. ALBERT: Just one more comment I'd
20 like to add. When you talk about whether it only
21 applies to licensee, I think long term contractors
22 would fit into that category as well, people who work
23 at the site all the time but they are just not
24 licensee employees. We needed to make that
25 distinction.

26 MODERATOR WEST: Thank you, Ron. Could we
27 go over here, please.

28 MS. HAYES: That was my question, since
29 most long term employees are contractors, were they
30 covered, because what about denials? That would
31 mainly be contractors and not licensee employees. So
32 you're saying long term contractors are licensee
33 employees?

34 MR. ALBERT: No, I didn't imply that they
35 were licensee employees, but he was asking the
36 question if return-to-duty applied only to licensee
37 employees. I was telling him that long term
38 contractors would fall into that category as well,
39 because they are at the site all the time.

40 MODERATOR WEST: Thank you, Ron.

41 MS. HAYES: My question is -- This is Lori
42 Hayes from Progress Energy -- that if an individual --
43 If I read that slide right -- has a DUI arrest that we
44 are obligated as a licensee to give that person a for-
45 cause test when they come back.

46 MODERATOR WEST: Correct.

47 MS. HAYES: I guess my question is what is
48 the purpose of that?

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1 MR. ALBERT: What benefit do we gain by
2 doing that?

3 MS. HAYES: Yes. What benefit do you gain
4 by doing that, because the alcohol, obviously, would
5 not be in their system nor would the drug, if it was
6 perhaps a cocaine arrest. So what is the purpose of
7 that?

8 MS. THIEL: And a year later when they are
9 convicted, do we have to for-cause test them again?

10 MODERATOR WEST: I think those are
11 reasonable questions. I think the general answer is
12 that -- and I recognize the delta or the time between
13 when it occurred versus when you are going to
14 actually do the testing. I think the quick answer is
15 that the way the rule is currently written, it would
16 fit in.

17 Maybe at some level you would at least
18 rule out -- Although there's a delay in time, you
19 would rule out the possibility through the testing of
20 whether it was an issue or not.

21 MR. MIZUNO: Let me just throw in
22 something here, that I think there are two different
23 issues. I guess the first question I heard was a sort
24 of a rhetorical or a philosophical one about what is
25 the purpose of doing a test where there's a
26 substantial time period that may occur after, for
27 example, the arrest, which I personally don't think
28 should be a basis for testing. But anyway, assuming
29 that is the case, the point is that you have an
30 incident which the Commission has determined
31 represents evidence of that person's susceptibility,
32 if you want to call it, to use of an illegal drug or
33 misuse of a legal drug. Okay?

34 The question then becomes, which the
35 Commission determined falls -- puts that person in a
36 different category and says, based upon that indicia,
37 we believe that we need to have an additional measure
38 of assurance that when he comes on site that he is
39 going to be fit for duty.

40 So unlike a person who has no indicia of
41 any illegal drug use or misuse of a legal drug and is
42 simply subject to random testing and behavior
43 observation, here this person has crossed a threshold,
44 as it were, and now the Commission has determined that
45 special attention needs to be given to that person.

46 So the point is not that, obviously, you
47 are going to see whether he's still subject -- whether
48 he's fit for duty because of that particular incident.
49 No, it is the question of whether he is fit for duty,

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1 because he is susceptible to repeated -- I mean that
2 he is potentially subject to further use or misuse of
3 the drug such that when he comes on site he actually
4 has a higher chance of being unfit for duty. Okay?
5 T h a t ' s t h e f i r s t t h i n g .
6

7 MS. HAYES: But now as a licensee employee
8 I'm required to report arrests. I know now when I
9 reported arrest that (1) I'm going to be classified as
10 having a history of substance abuse; (2) I am going to
11 get a for-cause test. Do you think I'm going to
12 report that arrest?

13 MR. MIZUNO: You have to remember that --
14 I mean, you are asking me a question about whether --

15 MS. HAYES: I mean, this is real.

16 MR. MIZUNO: -- someone is or is not going
17 to do something. I guess you could ask that about
18 everything. I mean, when he fills out his employment
19 application, is he going to have an incentive to
20 report?

21 I think anytime when someone does
22 something that could subject him or her to potentially
23 adverse consequences, there is clearly a disincentive
24 to do that. But on the other hand, I think you have
25 to remember that fitness-for-duty was in part not only
26 to address the immediate "I am totally drunk and I
27 can't deal with it" but also the trustworthiness
28 aspect. Okay?

29 So, therefore, your inability to
30 truthfully set forth information with respect to your
31 background that would allow the licensee to be able to
32 perform its function in screening you, to me or to the
33 Commission, is something that is very important and
34 should result in a -- you know.

35 So I guess to answer your question, yes,
36 there is a disincentive. There is no incentive for an
37 individual to report adverse information, but the
38 Commission, I think, took that into account and
39 nonetheless required that there be that kind of
40 reporting, and there is no way around that unless we
41 said there shall be no self-reporting by the
42 individual or no requirement to provide information to
43 a licensee. Then the burden falls solely upon the
44 licensee or the contractor to ferret out that
45 information.

46 MODERATOR WEST: Thank you, Geary.

47 MR. DIPIETRO: Could I jump in that for-
48 cause test for one second?

49 MODERATOR WEST: Please.

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1 MR. DiPIETRO: If a guy reports a DUI and
2 he comes in, we are going to for-cause test him. What
3 would the appropriate for-cause test, an alcohol and
4 a drug test? And if that's the case, and it says
5 when you are doing for-cause testing, the individual's
6 unescorted access is to be suspended. So, therefore,
7 you've got an employee that's not going to be
8 available to work until you can get the results of the
9 test back, which --

10 MODERATOR WEST: And so you can have some
11 assurance that the person is fit for duty and can be
12 returned for shift, to a medical and management
13 determination?

14 MR. DiPIETRO: Right. I mean, the current
15 -- I'll just give some related experiences here.

16 MR. MIZUNO: I guess the first question I
17 heard was -- There's two. You're going to probably
18 have to repeat the second one, but I guess the first
19 one was if the person was DUI, arrested for DUI, are
20 you going to have to test him for drugs.

21 Looking at the definition of for-cause
22 testing, I don't think so. I think that -- Okay, well
23 -- In that case --

24 MODERATOR WEST: I'll take that one. I
25 think you would, in fact, have to test him both for
26 alcohol and drugs. The reason I think that would be
27 the case: Clearly, the alcohol is driving -- no pun
28 intended -- the DUI. However, it probably doesn't get
29 any better as an explanation. There's some level of
30 assurance.

31 MR. MIZUNO: I guess I have to disagree.
32 You know why? Because the language of the rule --
33 See, you are seeing this back and forth here, but if
34 you read the rule, the language of the rule, under
35 for-cause testing, it says the individual's unescorted
36 access must be suspended until the individual is
37 pronounced fit for duty, except for those instances
38 where an individual tests negative in a for-cause
39 test.

40 If the test is based on suspected use of
41 alcohol and breath analysis is negative, to me, there
42 are certainly two different ways you can interpret
43 that, but to me --

44 MODERATOR WEST: That's true.

45 MR. MIZUNO: -- the logical reason is that
46 the test must track the basis for having a for-cause
47 test. Now maybe the staff has a different perspective
48 on that, and I'd really have to defer to them.

49 MS. ROOKS: I have a comment with that.

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1 MR. EARNEST: Hold a second. Now in a lot
2 of states and a lot of jurisdictions, folks, DUI means
3 driving under the influence. It doesn't tell you
4 anything. The guy comes in there and tells you, hey,
5 I got busted for DUI. You better not assume it was
6 just for alcohol. It could be a mixture.

7 MODERATOR WEST: I think it's clear that
8 we have to as a staff --

9 MR. EARNEST: You're going to have to make
10 that determination whether it's appropriate.

11 MS. ROOKS: I have a comment of a
12 situation that we had that falls right into this
13 category. I'm Billie Rooks with Southern Nuclear,
14 Vogel Hatch & Farley.

15 We had a guy that reported a DUI, and it
16 was for alcohol, by the way. He reported what it was
17 for. We have a procedure already in place where we do
18 for-cause testing for any reported DUI on our
19 employees and subsequent clinical evaluation to see if
20 there's a problem.

21 This guy reported the DUI five days after
22 the DUI on his next reported shift to work. He was
23 positive in that for-cause test for cocaine, not
24 alcohol. Of course, it was five days later.

25 So I think that shows a clear indication
26 that the for-cause test is a good tool to use, not
27 just because he had a DUI, which could be other
28 substances other than alcohol in most states, but it
29 clearly --

30 MR. MIZUNO: Yes, but you could have the
31 other situation where the guy was busted for cocaine
32 and then he gets tested for alcohol as part of that.
33 I mean, again we have to discuss, but I would say that
34 there would be some Constitutional concern for the
35 fact that you are testing him on a for-cause testing
36 basis where again the for-cause basis differs from the
37 test that you are administering. Okay?

38 Remember, we have -- As an agency, we have
39 to defend the requirement for the invasive procedure
40 or for what we are intending to do in the testing, and
41 we have to have a reasonable basis for it. Okay?

42 I'm not sure that we are at the point, and
43 the statistics are at the point, where we can say, if
44 you are an alcohol substance abuser, then that means
45 you are also likely to abuse other drugs or just the
46 reverse. If you are a confirmed marijuana user, it is
47 also highly likely that you are going to be abusing
48 alcohol.

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1 I'm not aware of those kinds of
2 statistics, and that's why from my perspective I would
3 think that we would want to confine ourselves to
4 saying, if the for-cause test was caused by a specific
5 kind of incident, then the for-cause test has to
6 follow that.

7 Now the gentleman, Bruce, said that DUI
8 might not necessarily tell you whether it's drug or
9 alcohol. In that case, I would agree. You probably
10 do have to test him, because you don't know what is
11 the basis for the DUI arrest.

12 MODERATOR WEST: Thank you, Geary. Lori,
13 do you want to finish?

14 MS. HAYES: Yes. The second part of my
15 question was that, if we are using a HHS lab and you
16 receive your negatives, does the MRO have to review
17 those negatives prior to you allowing access to the
18 facility? Is that a provision or is that just an
19 afterwards that they need to sometime along the way
20 look at the negatives and make sure everything is in
21 line?

22 MODERATOR WEST: To be honest with you, we
23 probably haven't thought about it down to that level
24 of detail. I think the quick answer is that,
25 certainly, the MRO has to do it, and your point is a
26 good one. We'll have to sort out at what point that
27 has to be done.

28 More importantly, if I hear your question
29 correctly, what implications does that have for other
30 aspects of whether you are going to deny the person
31 access or returning to duty or so on?

32 MS. HAYES: Well, that would add a
33 significant delay; whereas, now negatives are looked
34 at by our staff and, of course, they come from an HHS
35 laboratory, which we audit and we trust. So at that
36 point --

37 MODERATOR WEST: Well, clearly -- and this
38 was, I believe, mentioned in passing -- you are asking
39 for a general answer, and we'll have to provide you
40 that. But, certainly, with respect to a for-cause
41 test, the current language of the rule wouldn't
42 require holding -- if it's negative, wouldn't require
43 precluding the individual from returning to shift, if
44 it's a negative. That's specific to the for-cause.

45 MS. HAYES: Okay, thank you.

46 MODERATOR WEST: But we owe you a general
47 answer.

48 MR. ALBERT: Garmon, just let me add this.
49 For your question, Lori, I don't know that our intent

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1 is never to look at the individual. I mean, they had
2 a negative test, but I think the intent is to make
3 sure that the laboratory has done things that it
4 should have done.

5 The MRO is in a position to look at that.
6 But we'll get back with you on another answer, but I
7 don't think it is going to impede --

8 MS. HAYES: More of a quality control
9 thing.

10 MR. ALBERT: Right.

11 MS. TECHAV: And I think the MRO Handbook
12 allows that.

13 I wanted to talk about fitness-for-duty
14 pools. With the mergers of all these utilities that
15 are happening, there's a concern or a need to merge
16 pools into -- Well, we currently were old COMED. We
17 have random testing at each site, and we have their
18 own pools. Then we also have what we call a seventh
19 site for corporate people. So we don't have people
20 that are not directly reporting to a site in all these
21 different pools when they have access at all those
22 different sites.

23 Now that we've merged with, you know,
24 Clinton Power, Limerick, Peach Bottom, TMI and Oyster
25 Creek, we want to go to one pool for all of our
26 licensees and one pool for all of our contractors.

27 Now in the rule it says that random
28 testing must be conducted at an annual rate equal to
29 at least 50 percent of the workforce. Now we would
30 consider all those people in that pool the workforce.
31 Then we would report it out separately in that either
32 six-month or annual report, but we want to know
33 whether or not we need to meet the 50 percent at each
34 of those individual sites or of the total pool
35 population.

36 MODERATOR WEST: I don't think I could
37 give you a quick answer on that.

38 MS. TECHAV: Of course not.

39 MODERATOR WEST: We would consider that.
40 Do you want to respond to it, Ron?

41 MR. ALBERT: All I want to say is we
42 certainly have to look at that, because when the rule
43 was written, we didn't expect all these
44 conglomerations to exist. So we certainly got to go
45 back and take a look at some things, just as a
46 question of practicality and how you do business.

47 MS. TECHAV: Yes, because otherwise it's
48 going to be administratively very difficult to have
49 people in all these different pools all over the place

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1 and multiple pools and when they change locations and
2 where their permanent work location reports to.

3 I mean, it's difficult right now to
4 administer that just within our old COMED, but with an
5 addition to all these other places. So if you can
6 take that consideration, it would be appreciated.

7 MODERATOR WEST: I might add, too, that we
8 are certainly, I would say over the last year -- Your
9 point is well taken, not only with the aspect of pools
10 but also in terms of responsibilities of personnel.
11 It's probably a set of questions that we've
12 accumulated in that area that we could also include in
13 this NUREG document.

14 MS. TECHAV: Okay, thanks.

15 MODERATOR WEST: Certainly.

16 MS. GULLIFORD: Maureen Gulliford with
17 First Energy Nuclear Operating. If I could just jump
18 back to for-cause testing for a minute for a
19 clarification.

20 MODERATOR WEST: Sure.

21 MS. GULLIFORD: Historically, whenever a
22 for-cause test is completed, both breath and urine are
23 collected. I thought I heard at the table that, if it
24 was an identification of an alcohol issue, only
25 alcohol would have to be conducted.

26 MODERATOR WEST: I think you did hear
27 that, but I think you also hear that we have somewhat
28 of a divergence of opinion.

29 MS. GULLIFORD: I just wanted really
30 wanted to direct you to Appendix A where it indicates
31 that we will do both, and that has not been changed.

32 MODERATOR WEST: I think this is probably
33 -- and I'm aware of the Appendix A, but I think the
34 long and the short of this is that we've given a
35 temporary answer, and I think the point that Geary was
36 making is that there are probably some legal
37 implications here that we need to also consider, in
38 addition to what we've just given you as a quick
39 answer, and we'll do that.

40 MS. GULLIFORD: Okay. So -- we will
41 suspend the access and wait for a negative both breath
42 and drug sample?

43 MODERATOR WEST: I think that's the quick
44 answer, yes, and we will give you further on that.

45 MS. LANOUILLE: Susan Lanouette from North
46 Atlantic Energy.

47 MODERATOR WEST: I'm sorry. That's a good
48 point. Yes.

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1 MR. MIZUNO: Garmon, can you make the
2 clarification?

3 MODERATOR WEST: Yes. It's the two hours
4 versus the eight hours. You would have two hours for
5 the alcohol and then eight hours for the drugs. So
6 that would be a factor as well. But beyond that, I
7 still think Geary's point on some legal implications
8 on the answer that we have given you is something we
9 have to give some attention to. Please? Oh, I'm
10 sorry, you have something?

11 MS. DURBIN: Well, I just heard something
12 that I wanted to clarify. The reason for the two
13 hours and the eight hours is not so the person can go
14 back to work for eight hours before they have their
15 drug test. It's to give you a chance to get them to
16 a drug testing facility.

17 You should have breath analysis devices
18 on-site. So that can be done very quickly, and you
19 want to do it quickly. The eight hours is flexibility
20 so that you can find a place to get them tested. It's
21 not -- There is no assumption that they would be going
22 back to work until that occurs.

23 MODERATOR WEST: Thank you for that
24 clarification. Please?

25 MS. LANOUILLE: Susan Lanouette from North
26 Atlantic Energy. I actually have about three
27 questions here.

28 Right now we have designees from the MRO
29 that verifies our results when they come in, and if
30 it's a positive, they send it on to the MRO. If it's
31 a negative, they send it on to us. Is that still
32 allowed?

33 MODERATOR WEST: I think this type of
34 question has come up before, and correct me if I'm
35 wrong, Geary. There is some discretion that we feel
36 that the licensee could have relative to how they
37 would tailor their plant-specific program.

38 I think the key thing would be that, if
39 it's going to deviate from some of the specifics of
40 what's called for in the rule or in cases more
41 generally when it usually comes up, it's more cleanly
42 in terms of going beyond the rule. Then we would
43 expect that they would be not just some sort of ad hoc
44 way of doing that, but rather it would be tied in and
45 be explicit in your policies and procedures on your
46 program.

47 MS. LANOUILLE: Okay. So as long as it's
48 in my procedure, then it's okay?

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1 MODERATOR WEST: I think the answer to the
2 question of could the negatives go -- Part of this,
3 too, also ties to how the MRO functions at a plant,
4 and there are some considerations in the new rule
5 where the licensees do have discretion in this area.
6 But ultimately, I would still maintain that the MRO is
7 going to have to be in the loop with respect to
8 looking at the negative results regarding -- in the
9 aggregate. But that's coming from the HHS lab. But
10 again, in terms of whether you could allow this to
11 happen, it would seem to me it would certainly have to
12 be something that you would have to call out in your
13 policies and procedures.

14 Do you have anything to add on that?

15 MR. ALBERT: Yes. Let me make sure I
16 understand what you are saying. What exactly are you
17 doing? What's happening with your test results?

18 MS. LANOUILLE: Our test results come into
19 an MRO office, which the medical office has access to,
20 to get those results.

21 MR. ALBERT: When you say medical office,
22 whose medical office?

23 MS. LANOUILLE: Our medical office next-
24 door. Our medical and fitness-for-duty is separate.

25 MR. ALBERT: So your MRO is a company
26 employee?

27 MS. LANOUILLE: No. He's a contractor.
28 He is the medical doctor, and he is the MRO. He is
29 contracted by both.

30 MR. ALBERT: Okay. I'm with you so far.
31 go on.

32 MS. LANOUILLE: So the MRO has designated
33 one of the top senior medical nurses to review those
34 results. If they are negative, they send them on to
35 us. If they are positive, they send them on to the
36 MRO. Is that still allowed?

37 MS. DURBIN: We responded to a question
38 similar to this in the comment response document. I
39 don't know that the answer will be the same, but it
40 does give a little bit more detail, if it would be
41 worth reading it.

42 The MRO has always had access to all
43 testing results. HHS guidelines specify that all
44 results be reviewed at a general level by the MRO.
45 Prior to sending the results to the licensee, it is
46 expected that the negative test results will be
47 reviewed as a group by the MRO who may note any
48 anomalies, false negatives based on blind performance

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1 tests, low specific gravity or creatinine results
2 which indicate a need for reanalysis, etcetera.

3 Positive test results, in contrast,
4 require careful individual review. Previously, the
5 rule and the NRC's response to questions regarding MRO
6 review of negative test results, such as the response
7 under 5.8 of NUREG 1385, have inappropriately implied
8 that the MRO makes no review of negative test results.

9 In fact, HHS guidelines and the NRC's FFD
10 rule require that all test results be sent to the MRO
11 for review -- now that's sent to the MRO for review.
12 The in-depth specific and individual review of
13 findings required for all positive results is not,
14 however, expected for all negative results.

15 That's the full answer as it was in the
16 comment response document. Now I don't know that that
17 will be the final full answer, but it does give you a
18 little bit more of why there's a confusion on this
19 issue, because you were given different information in
20 the past.

21 MODERATOR WEST: Does that help?

22 MS. LANOUILLE: Yes, but -- Yes and no.
23 Could I get a copy of that?

24 MODERATOR WEST: What she read from is in
25 the statements of considerations for the new rule.

26 MS. DURBIN: People can get a copy of it
27 soon.

28 MODERATOR WEST: Yes. Well, that's even
29 available now. The SECY 00-0159 is available on the
30 external web. By way of that, you will find the SECY
31 is comprised of the Commission paper followed by (a)
32 through (f) attachments, if you will.

33 MS. LANOUILLE: I have all that. I just
34 haven't gone through the whole thing.

35 MODERATOR WEST: But what you can do
36 there, the way I approach this is that if you have all
37 those pieces in one file, you can do a word search on
38 this. Then you won't have to go through each
39 attachment. It will just hit the particular key words
40 that you would specify, and it would get you to that
41 particular information.

42 MR. ALBERT: Just to give you -- Right on
43 the surface, I don't see a problem with what you are
44 doing thus far, just so you can walk away at ease, but
45 we will certainly take a look at it.

46 MS. LANOUILLE: Thank you.

47 MODERATOR WEST: But again I would add, we
48 have consistently -- more often in terms of going
49 beyond the requirements, we have emphasized that it

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1 would seem appropriate to have how you are operating
2 at a plant-specific level rather than some sort of ad
3 hoc fashion, if you will, but to have it tied into
4 your policies and procedures -- not really just to do
5 that, but then I guess the expectation would certainly
6 be that it would also carry over into your training,
7 your awareness training and so on.

8 MS. LANOUILLE: Okay. My other question
9 is: If you are doing a for-cause test on an DUI, am
10 I also sending that individual on to EAP?

11 MODERATOR WEST: I would think so, yes.

12 MS. LANOUILLE: I have one more question.
13 On your extrapolation of alcohol, why have you lowered
14 your limit from .015, which we have in the NUREG 1385,
15 I believe -- from .015 as a conservative to a .01,
16 which is -- you're giving that individual ample
17 opportunity?

18 MODERATOR WEST: Do you have any insights
19 on that, Nancy?

20 MS. DURBIN: I'm not sure.

21 MODERATOR WEST: I don't recall the
22 specific reference in 1385. We could take a look at
23 that, if you like.

24 MS. LANOUILLE: In the NUREG it does have
25 a conservative level of a .015. I don't have a copy
26 of it right here with me.

27 MODERATOR WEST: With respect to time that
28 the individual has been on shift?

29 MS. LANOUILLE: No. It's basically --
30 Right now what we do at North Atlantic is an
31 individual that shows up to be positive, what we call
32 a positive, at .025 we go back to the time they came
33 into work. If they were over a .04 when they came to
34 work, using the .015 they are positive.

35 MODERATOR WEST: You are saying it's more
36 conservative than the .02?

37 MS. LANOUILLE: Than a .01.

38 MODERATOR WEST: I don't have a good
39 answer to that except that the .02 and the .03 with
40 respect to the .04 -- that scheme, if you will,
41 relative to the time the individual has been on his
42 shift was felt to be the appropriate breaks with
43 respect to trying to -- without having to do an
44 extrapolation, with respect to trying to identify
45 someone that did, in fact, come on shift at something
46 that's going to be fairly close to the .04. But I
47 don't have a precise answer to that.

48 MS. DURBIN: I can also tell you that we
49 intentionally made it conservative. I mean, it is a

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1 more conservative approach than you are taking. We
2 wanted to get away from extrapolation, and we wanted
3 a rule that nobody could say, well, because of my
4 metabolism that's an unfair -- you know, this is a
5 very conservative.

6 Of course, you can have standards that are
7 more reverse.

8 MS. LANOUE: I will have to admit,
9 though, that we did go back and figure out how many
10 would have slipped through on your conservative, and
11 it would have been very minor.

12 MODERATOR WEST: Thank you for that. It's
13 good insight. Yes?

14 MS. THIEL: Yes. I'd like to go back to
15 for-cause and just bring up an area in the rule that
16 does say that, if the for-cause was based -- suspected
17 on use of alcohol and breath analysis is negative, the
18 person can return to duty after management
19 determination pending the results of the urinalysis.

20 MODERATOR WEST: That's right. I might
21 add, that wasn't always the case, the way it's
22 currently worded. But certainly, we moved in that
23 current direction in terms of the wording that you
24 just read, figuring that the thinking was that a
25 management determination was good enough so that the
26 individual could, in fact, continue to work until you
27 get the results from the urinalysis. Thank you.

28 MR. SEARS: Garmon, Russell Sears with
29 Energy Corporation. I had a question. I listened to
30 Loren's logic a little bit earlier about why an on-
31 site lab would not need an MRO review of results where
32 an off-site lab would, if you are using an HHS lab.

33 Having had both of those scenarios at the
34 four different sites that we have, I can tell you that
35 an off-site laboratory gets a much more extensive
36 review on that laboratory result through a lab
37 supervisor, QC review and a certifying scientist
38 before it comes to the licensee for review.

39 They are also under the HHS program where
40 they are inspected. They are probably under CAP.
41 They are under other programs where they are inspected
42 even more frequently than our licensee program is.

43 So applying the logic that a licensee's
44 program is being audited, therefore it's more reliable
45 than an off-site HHS laboratory doesn't seem to fit as
46 justification for adding an MRO review in there.

47 MODERATOR WEST: Thank you for your
48 comment.

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1 MR. SEARS: The other part: The rule now
2 allows that for negative test results that, once they
3 are put into a summary form for tracking purposes,
4 they can be immediately destroyed. As long as the MRO
5 review of any test result, whether it's on-site or
6 off-site, provided is in a QC mode, and that's going
7 to have very little impact. But I believe maybe it
8 was Kathy Burkett or somebody asked the question, how
9 are we to track that information? What would you
10 expect to see?

11 The logical thing to do would be to
12 annotate somehow on that negative test result that
13 that review had taken place. That negative test
14 result gets that review, and then we turn around the
15 next day and destroy that document. We are going to
16 be in a Catch 22 with inspectors and auditors in
17 trying to demonstrate that.

18 I can sit there all day long and put it in
19 a database with an MRO box checked that the review
20 took place. That's really not much added value to the
21 program.

22 MODERATOR WEST: Thank you.

23 MR. CASEY: Ron Casey, TVA. One more time
24 back to the DUI.

25 MODERATOR WEST: Sure.

26 MR. CASEY: DUIs and domestic violence
27 things are the only thing we get reported from our
28 company employees. An individual gets arrested for
29 DUI on a Friday. He reports it Monday morning. I
30 suspend his clearance. I for-cause drug and alcohol
31 test him. But can I take advantage of this section
32 that says, well, if the suspect of alcohol is
33 negative, then he can be returned to duty based on a
34 management determination solely, or must I kick in the
35 physician determination of fitness; because now I have
36 a credible allegation under your definition of
37 substance abuse?

38 So am I having to say it and suspend his
39 access, test him, wait for the results to come back,
40 and send him to the Medical Review Officer for final
41 clearance before -- assuming all of those are okay --
42 before he can come back to work?

43 MODERATOR WEST: I think the answer is
44 this. Certainly, there is a portion of the new rule
45 that would speak to if you do, in fact, have a
46 negative based on the alcohol results.

47 That, in and of itself, wouldn't preclude
48 you from sending the individual back to work.
49 However, I would also add further that there are other

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1 aspects of even the current rule, not the least of
2 which is (a) having some concerns about the
3 individual's fitness-for-duty or (b) going beyond
4 what the requirements are saying that would give you
5 the leeway if you have some question about the
6 individual's fitness to, in fact, go beyond just
7 simply sending him back to work, instead keeping the
8 individual off shift and making some medical and
9 management determination, if you chose to.

10 MR. CASEY: See, the way I was sort of
11 looking at this, if you smell alcohol but you have no
12 other indications, you for-cause. You know, it's
13 negative. Management can say seems fit. You move on.
14 But if you have the report of DUI -- I mean, that
15 could be it.

16 MODERATOR WEST: And that's my point. The
17 specific wording relative to the negative and allowing
18 the individual to go back to work was crafted simply
19 in terms of the issue of alcohol and resolving that.
20 However -- and the feeling was that the management
21 determination was good enough for that.

22 Then aside from that you may have other
23 concerns about the individual's fitness, and I think
24 that's what you have introduced in your question.
25 There aspects of the rule that would allow you to
26 address that.

27 We'll take one more question, and then
28 we'll take a break. One more opportunity. You may
29 have more than one question. I'm not trying to
30 restrict you to just one.

31 MR. SHULTS: Thanks, Garmon. As you know
32 me, I do have more than one. I actually don't have a
33 question. I have a comment, some observations.

34 MODERATOR WEST: Please.

35 MR. SHULTS: My name is Ted Shults. I'm
36 the Chairman of the American Association of Medical
37 Review Officers, and I've been reluctant to come in,
38 because I don't really have a dog in this fight. But
39 I do have a number of observations and concerns.

40 From looking at the rule and being
41 involved in auditing these programs over the last ten
42 years and training most of the MROs, I thought there
43 are a couple of comments I could make that you may
44 want to consider in your assessment of all of this.

45 One of the fundamental issues that I see
46 as very different between NRC programs and DOT
47 programs is the role of the MRO. A lot of that goes
48 back to when these programs began.

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1 Actually, the history in the utility
2 industry is much longer than it is with the DOT, and
3 many of your companies have been doing drug testing
4 before the rule was even put in place and before we
5 had a technical requirement for an MRO.

6 So if you look at the history, if you
7 visit a fitness-for-duty program and look at a DOT
8 program, those of you that have both programs, there's
9 a very different flavor. The question that was very
10 telling that was submitted ahead of time was the
11 question: Is the fitness-for-duty coordinator a
12 member of management -- a licensee management?

13 The significance of that, to me, was the
14 idea behind having all the results going to the MRO
15 was not to have the medical review officer act as
16 quality assurance department or supervisory
17 toxicologist or even medical oversight of the
18 laboratory results, but rather to mask those results
19 from management. That's essentially what the role
20 was, and to some degree it's ceremonial.

21 So I think a lot of the concerns that you
22 heard here were based upon the idea, since they are
23 not bringing anything to the table in terms of
24 technology, is there additional roles and
25 responsibilities?

26 Clearly, as the utilities and the fitness-
27 for-duty programs began to realize that the MRO was a
28 value added component, I have seen the trend to
29 bringing the MRO in-house and having all the results
30 go to the MRO to fulfill that type of requirement. It
31 will be challenging, through, for the on-site issues.

32 The other interesting observation from
33 DOT's program is that the area with this reporting
34 about DUI/DWI, I think, stems from the FAA's
35 experience. A number of years ago the FAA has had a
36 high profile case where pilots were flying into
37 Minnesota and were basically determined to be
38 intoxicated.

39 It was a dangerous situation. They
40 cheated death, to some degree, and the FAA then
41 responded in a number of ways, but one of the things
42 that they did was they said now, if you have a pilot
43 that is convicted, that you are going to do an
44 assessment.

45 The issue there is what is the most
46 appropriate assessment to do? We've had a question
47 should we just do the alcohol, should we just do the
48 drugs? I'd like to just contribute the idea that 50
49 percent of the individuals who are diagnosed with a

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1 substance abuse problem for illegal drug or
2 prescription drug also are diagnosed as having an
3 alcohol problem.

4 So I think that, if you look at it in the
5 broader context, both are justifiable. But the other
6 part of it, which I think is a legitimate concern, is
7 what is the value -- Since alcohol abuse and drug
8 abuse is sometimes episodic, what is the value of
9 having a scheduled, pre-appointed alcohol test, and
10 would it also not be worthwhile considering doing
11 really an assessment of substance abuse assessment,
12 because really the answer we have.

13 If we look at it that way, we're not even
14 doing a search. So we can sidestep all of the legal
15 issues about what's the probable cause for the type of
16 search that we are doing, although I would say that
17 it's probably justifiable to do the drug and alcohol
18 piece.

19 The challenge, I think, that we are going
20 to have here from the MRO's perspective, in addition
21 to how are we going to handle the data flow and all of
22 this, is also going to be the establishment of
23 standards and practices.

24 We've talked a lot this morning about the
25 issue of what is a history of substance abuse, and the
26 question that came up that was provocative to me is
27 what percentage of individuals have a substance abuse
28 history.

29 Well, from a theological perspective, we
30 all do. Just some of us have been caught. Again, I
31 don't want to be trite about that, but the truth of it
32 is that, you know, DUI/DWI is indicative of perhaps a
33 drinking problem, and the general rule is that two
34 certainly is, and half the addictionologists think
35 that one is.

36 The issue is that, to a large degree,
37 that's just been luck, bad luck. I mean, many of us
38 have driven a car that we shouldn't have driven or
39 have abused a substance, whether it's a drug. The
40 Chief Justice of the United States has got a history
41 of substance abuse. He developed a back injury and
42 was treated for it, and it was in the news.

43 So we have -- So the issue then is how do
44 we define that, and how do physicians who have a
45 variety of different perspectives on this establish
46 standards of practice? The challenge that I think the
47 MRO community has, not only with this program but also
48 the DOT and the DHHS program, is establishing those
49 clinical parameters or standards of practice so we

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1 don't have one seeing it one way and one seeing it
2 another.

3 Again, you have plenty of examples in the
4 existing program where utilities interpret these black
5 and white provisions with their relevant ambiguity in
6 dramatically different ways.

7 So again, I just wanted to just point out
8 that I think we have -- A lot of the difficulty will
9 be in the nuts and bolts of all of this.

10 Of course, the other observation I have --
11 although I'm involved very much in this industry, I'm
12 not part of the industry, but I will tell you what I
13 have seen over a ten-year period.

14 Ten years ago when Loren was having these
15 meetings, the issue was holding back the utilities in
16 terms of what the scope of testing was. Now because
17 of the fundamental change in the economic and
18 regulatory industry, all of the folks in here were
19 very much, I know, advocates of having a drug-free
20 workplace and a fitness-for-duty program are
21 constantly under pressure to minimize the time out for
22 individuals.

23 Again, I'm preaching to the choir here,
24 but again just from my observation, the fundamental
25 paradigm has changed where the pressure is do the
26 minimum. Do the minimum amount of work in this area,
27 and that is going to be the challenge, I think, for
28 both the staff as well as the industry.

29 Again, the MROs -- all I think they need
30 to have is pretty much a clearly defined role and
31 responsibility to sort of minimize the divergence,
32 because part of what we really want to do is keep them
33 out of trouble as well.

34 With that, I'll say thank you.

35 MODERATOR WEST: Well, thank you, Ted. We
36 appreciate those comments.

37 MR. ENKEBOLL: I'd like to make one
38 observation based on what you said.

39 MODERATOR WEST: Certainly.

40 MR. ENKEBOLL: Rich Enkeboll, NEI. I do
41 not believe that there is anybody slacking off,
42 thinking we want to do the minimum in fitness-for-
43 duty. Everybody here wants to do what's appropriate,
44 what's necessary.

45 The problem is they are telling you that
46 several things that you are asking for do not add any
47 value, and you shouldn't just do it because it seems
48 like a good idea. If it doesn't add value, if it's

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1 not safety significant, then we don't want to do it.
2 But doing it right is what everybody here wants to do.

3 MODERATOR WEST: Thank you for that
4 clarification.

5 At this point, we'll take a break, and
6 let's reconvene at a quarter to four.

7 (Whereupon, the foregoing matter went off
8 the record at 3:23 p.m. and went back on the record at
9 3:48 p.m.)

10 MODERATOR WEST: We just have a little bit
11 to cover in the section 26.25 in a moment, and from
12 looking over my slides we have a fair amount in the
13 section of 26.27. I'm not totally confident we will
14 get through all of that today, but we'll cover as much
15 as we can of 27.27 and then pick up with the remaining
16 portions on tomorrow, and I'll talk a little bit more
17 at the end of the day about tomorrow's schedule,
18 although it's fairly straightforward in terms of what
19 you see in the agenda.

20 (Slide change)

21 In 27.25 you will note the two bullets --
22 Even though it's saying that EAPs now must be designed
23 to achieve early intervention, it's not to -- It's a
24 little misleading in the sense that, certainly,
25 efforts are currently underway in that area for sure.

26 It also points out EAPs must also provide
27 for confidential assistance except in this instance
28 that's noted, conditions where there's some concern
29 about the hazard to the individual or others.

30 The only point here is that, with respect
31 to a change in the rule, concerns the fact that we
32 have gone from a "shall" in the current rule to a
33 "must," and I might note that some programs have -- in
34 terms of the early intervention aspects of what we
35 have there, some programs have made self-referrals as
36 somewhat of a first strike and, therefore, discouraged
37 early referrals and intervention.

38 The attempt here is just to perhaps
39 emphasize the obvious which has always been in the
40 rule, that the earlier the intervention or
41 identification of someone that has a problem with the
42 misuse of drugs and alcohol is certainly desirable.

43 We didn't get any advance questions in
44 this area, and I guess before -- just before shifting
45 into 27.27, if there are any additional thoughts in
46 this area, we could get into that now. Please?

47 MR. MORIARTY: John Moriarty, Vermont
48 Yankee. Just a quick question. Earlier some
49 discussion about employees, individuals, persons, long

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1 term/short term contractors. When you say employees
2 under EAP, the definition remains the same, all
3 persons subject to the program or are we--

4 MODERATOR WEST: Yes. I think that would
5 be the case, all persons that are subject to the
6 program.

7 MR. MORIARTY: Has access to an EAP
8 program.

9 MR. ALBERT: Let me understand your
10 question, John. Are you saying then at your site, if
11 a contractor tests positive, that you are required to
12 put that individual in an EAP? Is that your question?

13 MR. MORIARTY: No. In a broader sense.

14 MODERATOR WEST: I thought your question
15 concerned -- Earlier we were talking about how do we
16 define employee personnel. It seemed to me the
17 response at that time had included long term
18 contractors as well. So that's what I was trying to
19 refer back to. But do you have some other aspect with
20 respect to the EAP program that you're trying to get
21 at that maybe I've missed?

22 MR. MORIARTY: For purposes of the meaning
23 of employee under EAP, it is everybody that is subject
24 to the program?

25 MODERATOR WEST: Anyone that's subject to
26 the program, and that certainly would include employee
27 personnel, and then you would have individuals that --

28 MR. MORIARTY: Short term or long term
29 contractors, licensee employees all have equal access
30 to an EAP program, to self-refer or for mandatory
31 referral?

32 MODERATOR WEST: I guess in some instances
33 with contractor personnel, you would have the case
34 where you are accepting another program. So I guess
35 part of accepting another program could include a
36 program that has its own EAP component. So that would
37 be one thought that I would have.

38 MR. MORIARTY: It was just a question of
39 availability, that everyone that comes onto the
40 umbrella of the program can refer themselves or
41 mandatorily referred to an EAP provider, either under
42 your own program or the --

43 MODERATOR WEST: Or some other program,
44 yes. I think the answer to that would be yes, and we
45 would certainly expect them to be in some program,
46 whether it's the licensee's program or their own
47 program that the licensee is accepting. Yes.

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1 MR. ALBERT: Okay, John. Come back up to
2 the mike. Don't leave yet. Let me understand. Let
3 me make sure that we're on the same page here.

4 So you're saying then that for your
5 particular site that you may accept a contractor's EAP
6 program for someone who may have tested positive by
7 your program? I just want to understand the practical
8 application of what you are asking.

9 MR. MORIARTY: So long as there is an EAP
10 program available, for whatever the situation, if it's
11 a tested positive or whatever, so long as it's
12 properly audited, if the site chooses to accept a
13 contractor's EAP program, that's fine. But I just
14 wanted to be sure there was no doubt that everybody
15 that has access that is subject to a program of
16 fitness-for-duty includes access to an EAP program.

17 MODERATOR WEST: I guess another aspect of
18 your question also is does it have to be the
19 licensee's program versus the contractor's program.

20 MR. MORIARTY: No. I would assume that it
21 could be either, so long as the licensee accepted the
22 contractor's program, appropriately audited program.

23 MODERATOR WEST: I think that's correct.

24 PARTICIPANT: You're saying a program for
25 employees and contractors, whether it's through our
26 own licensee program or whether it's accepted
27 contractor's?

28 MR. MORIARTY: That's my question.

29 MODERATOR WEST: I think the question is
30 would we expect in instances where there is a need for
31 an individual to be in an EAP program for the
32 individual to be in one or the other, a licensee's
33 program or a contractor's program.

34 I think the answer is, if there is a need
35 for an individual to be in an EAP program, we would
36 expect them to be in one or the other. We would
37 expect them to be in a program, and I think this
38 gentleman has -- if I understood his question
39 correctly, and his comment -- if the licensee has
40 accepted another program and it's properly audited and
41 so forth, it would be acceptable for the individual to
42 be in a program, and if it's an acceptable program to
43 the licensee, it's an acceptable program.

44 MR. MORIARTY: But in any event, there
45 needs to be an EAP program, one way or the other,
46 available to everyone.

47 MODERATOR WEST: I guess part of that has
48 to do with even for contractors. Clearly, for the

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1 licensees. Ron, do you have any insights on
2 contractors?

3 MR. ALBERT: Okay. I just want to make
4 sure I'm on the same page with you, John. I don't
5 think the rule is requiring you to ensure that even
6 your contractors have EAP programs or everybody has an
7 EAP program. That's your choice as a licensee.

8 Certainly, you've got to have one for your
9 people, but if you choose not to have one for your
10 contractors and they test positive and you take some
11 other measures, that's your prerogative to do that, if
12 that's the confusion or if there's any confusion. I
13 don't think there is any.

14 MODERATOR WEST: Thank you for that
15 clarification.

16 MR. MORIARTY: We interpreted the rule
17 that an EAP program has to be -- does offer assessment
18 and short term counseling, referral services,
19 etcetera, to everybody that came under the scope of
20 the rule.

21 MR. ALBERT: Okay.

22 MODERATOR WEST: And your point is that?

23 MR. MORIARTY: That's my question to you
24 guys, because if that's not the case, we'll go back
25 and --

26 MR. ALBERT: Well, my short answer to you
27 is this, that certainly you have to have it for
28 licensee employees, people who work directly for the
29 company. We are not telling you that it's required
30 for contractor people. That's the short answer.

31 MS. DURBIN: The longer answer would be
32 provided at another time.

33 MODERATOR WEST: And we'll look into it a
34 little bit further. We can go with the short answer,
35 and we'll look into it a little bit further. Thank
36 you.

37 MS. ROOKS: Billie Rooks, Souther Nuclear.
38 We have a concern, and maybe we are the only ones that
39 has this concern, about how you can effectively manage
40 and have an EAP program and still maintain
41 confidentiality for that employee for self-referrals
42 or problems that could affect their fitness-for-duty
43 when they are -- in effect, the vendor has to report
44 those or should report those to the licensee if they
45 have a problem that could affect their fitness-for-
46 duty .

47 For instance, if you have someone that is
48 admitted with bipolar disorder -- you all ever heard
49 that? -- to the EAP program, and this could definitely

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1 adversely affect their fitness-for-duty, and they
2 report it to us, the vendor or either the person.
3 Actually, it comes from the people themselves. The
4 employees will report it.

5 Then so we have a concern about the
6 confidentiality and how we can effectively manage a
7 program like that to meet the requirements of the
8 rule. Do you have an answer for that?

9 MODERATOR WEST: So your point is that --

10 MS. ROOKS: Confidentiality is crucial,
11 and we agree. We certainly want to follow that. We
12 inform our employees. I don't know how other
13 licensees do this, but we have an EAP program, and you
14 try to ensure them it's confidential. But on the
15 other hand, you have to give them this little caveat
16 that it's confidential except if your fitness-for-
17 duty is affected.

18 So in effect, it really isn't
19 confidential.

20 MODERATOR WEST: Would that
21 confidentiality be with respect to this second bullet
22 here where you have some concerns about the
23 individual's --

24 MS. ROOKS: Or fitness-for-duty
25 reliability, trustworthiness. You know, almost any
26 kind of mental health condition can affect their
27 reliability and trustworthiness.

28 MODERATOR WEST: Nancy, do you have any
29 thoughts on that?

30 MS. DURBIN: Only that the exception is
31 not if the person has a general fitness-for-duty
32 issue, but only if that fitness-for-duty issue
33 constitutes a hazard to himself or herself or others
34 that the EAP personnel are supposed to inform you. So
35 that's a fairly high standard, if there's an immediate
36 hazard. That's something your EAP people will need to
37 be trained in with regard to personnel who are working
38 in nuclear power plants, what kinds of issues would
39 create those kinds of problems.

40 One of the other issues, of course, is
41 whether or not that fitness-for-duty issue would be a
42 violation, and in that case it would not. So there
43 wouldn't be any sanctions involved either. I think
44 that's probably pretty clear to everyone. But it's
45 not simply that they might be unreliable or
46 untrustworthy or, you know, may not meet the highest
47 standards. It's that they constitute some kind of a
48 hazard to himself or herself or others.

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1 That would be in the context of working in
2 the protected area of a nuclear power plant. Does
3 that help?

4 MODERATOR WEST: And I think that's the
5 point that we are trying to make with the --

6 MS. ROOKS: Just where do you draw the
7 line, I think, is probably the main thing; because
8 that's a very gray area, to me.

9 MS. DURBIN: It's going to be.

10 MS. ROOKS: And to our group. Thank you.

11 MODERATOR WEST: Thank you.

12 MR. DiPIETRO: Just one comment on the
13 contractor of EAPs in 1385, Section 6 under
14 Contractor/Vendor Programs 6.4. Do
15 contractor/vendors, even small ones such as grass
16 cutter and building cleaners, have to have an employee
17 assistance program?

18 It says the contractor must have an EAP
19 only if the licensee has reviewed and accepted the
20 contractor's program under the provisions of 10 CFR
21 26.23, which is if you accept the whole fitness-for-
22 duty program. If the licensee does not accept the
23 contractor's program or the contractor does not have
24 a program, the contractor will come under the
25 licensee's FFD program.

26 If the contractor is being covered by the
27 licensee program, the licensee is not required to
28 provide the contractor with an EAP. So I think it's
29 answered.

30 MODERATOR WEST: Thank you. That's very
31 helpful. Appreciate that.

32 (Slide change)

33 MODERATOR WEST: Now we'll move on to
34 Section 26.27, and you will -- My colleagues are
35 conferring here a little bit, but we can go to the
36 next slide. Thank you.

37 You'll notice here that there are some
38 changes in this section that we alluded to earlier,
39 and I guess it's certainly no surprise to you that we
40 have some changes in this area.

41 So that we have changes to clarify and to
42 increase consistency. Clearly, the alcohol violations
43 now result in the same sanctions as drug violations,
44 which certainly wasn't the case with the current rule.

45 We have, throughout this rulemaking
46 effort, we have increased the focus on subversion, and
47 applicants now must have sanctions imposed with regard
48 to record violation.

49 (Slide change)

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1 MODERATOR WEST: On the next slide there
2 are requirements for a written statement by an
3 individual, and these statements are more specific,
4 and they are also broader, and we try to give you some
5 characterization of which statements are more
6 specific. Certainly, covering the last five years and
7 the broader aspects of the second bullet on the sale
8 or possession of illegal drugs, and certainly we've
9 given some attention to related areas here, or
10 employment action taken for alcohol or drug abuse.
11 That's certainly much broader.

12 On the third item, there hasn't been any
13 change in that area. Then lastly, there also hasn't
14 been any change with regard to removing an individual
15 with respect to an FFD violation.

16 (Slide change)

17 MODERATOR WEST: On the next slide there
18 is more specificity with regard to consequences of a
19 history of substance abuse, and we've clearly spent a
20 fair amount of time on that.

21 If a concern arises regarding the
22 individual's history, there must be a management or
23 medical determination of fitness. That's not new.
24 And an appropriate follow-up program -- that's not
25 new.

26 The new aspects would include meeting the
27 restrictions of 26.24(a) with regard to return-to-duty
28 testing, determination of fitness, and proof of
29 abstinence.

30 (Slide change)

31 MODERATOR WEST: Now as I mentioned, there
32 is more specificity in this particular area, and you
33 may notice a theme throughout the rule with regard to
34 granting of access. There are a number of places
35 where the requirements have been relaxed, accepting
36 other programs, to some degree, accepting any pre-
37 access test that was negative in the last 60 days,
38 allowing individuals to have access prior to the
39 results of their pre-access test under certain
40 conditions. This latter area is certainly accompanied
41 by more restrictions on access or more attention in
42 that area with regard to anyone with a history of
43 substance abuse.

44 (Slide change)

45 MODERATOR WEST: You note with the next
46 slide the highlighted section, the bolded language
47 with respect to failure of the individual to list
48 reasons for removal or revocation of unescorted access
49 or failure to authorize the release of information is

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1 sufficient to deny unescorted access. So that bolded
2 portion has been added.

3 (Slide change)

4 MODERATOR WEST: Next specifically under
5 Access authorization, we have completing the suitable
6 inquiry to check accuracy of a statement must cover a
7 period of five years and, if there is no previous
8 violation of a fitness-for-duty policy, temporary
9 access is okay with those considerations that are
10 noted there.

11 First, we would expect the completion of
12 the one-year verification of the accuracy of the
13 individual's statement and, second, the initiation of
14 the five-year suitable inquiry and the provision of a
15 test specimen. If there is, in fact, a history of a
16 violation of the FFD policy, temporary access cannot
17 be granted.

18 (Slide change)

19 MODERATOR WEST: And as we have certainly
20 discussed, individuals with a history of substance
21 abuse -- this would now include consideration of a
22 DUI. Yes?

23 MR. HARRIS: Would you like me to wait
24 until the end?

25 MODERATOR WEST: I think in this section,
26 since we have probably more than we can probably even
27 cover by the end of the day, it would be appropriate
28 for you to talk.

29 MR. HARRIS: Thank you. Neil Harris, TXU
30 Electric. In Item 3 it says the licensee shall
31 complete a suitable inquiry on the best efforts basis
32 to verify the accuracy of the individual's written
33 statement made under paragraphs (a)(1) through (a)(2)
34 of this section. This suitability inquiry should
35 cover at least the past five years, but in no case
36 less than the past three years.

37 Where do we come in with this caveat for
38 the past three years? Why do we speak throughout this
39 document of the five-year history on individuals, and
40 now we introduce a three-year caveat?

41 MODERATOR WEST: That's a good question.
42 I'm not sure I'm going to be able to give you a good
43 answer.

44 MS. DURBIN: I can say a couple of things.
45 One is that this has always been in the rule, this
46 kind of convoluted language, and in the first
47 implementation document I believe there is a
48 discussion.

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1 I finally found someone who explained it
2 clearly, and you are supposed to definitely do three
3 years, and a best efforts for five years. So it kind
4 of is supposed to say, you know, you're supposed to do
5 five years on a best efforts, but in no case can you
6 not finish the three-year thing.

7 That was how it was interpreted in the one
8 document I found that addressed it in a way that
9 seemed clear.

10 MR. HARRIS: Do we not feel that it's in
11 opposition 180 out from having individuals, though,
12 having to fill out historical information for five
13 years, as well as other things that apply on a five-
14 year basis in this document?

15 You know, it seems like this would have
16 been a great opportunity to eliminate these caveats
17 and these "I've got this explained in another
18 document" type of thing.

19 MODERATOR WEST: Okay. Thank you for your
20 comment. Please, do you have a comment or a question
21 or whatever?

22 MR. BURRELL: Yes, Garmon. On Item 2 in
23 26.27(2) you use the word duration now. Statement
24 made under paragraph (a)(1) of the section must
25 include the individual's declaration as to the
26 specific type, duration and resolution of any such
27 matter.

28 What's the expectation for duration? What
29 does that mean?

30 MODERATOR WEST: I think we would probably
31 have to take that as a item to provide you further
32 clarification.

33 MR. BURRELL: What gives me some concern
34 is as it might relate to (A). Again, we have that
35 legal or employment action taken against him issue,
36 and what's the duration of that legal or employment
37 action. The connotation there is somewhat concerning.

38 MODERATOR WEST: But I hear your comment
39 under 26.27(A)(2).

40 MR. BURRELL: On down to Item number (4).
41 If we could go back to slide 59, please. We used some
42 new words there which raises a concern, and I notice
43 the first bullet under the bold language there says
44 "must have a management or medical determination of
45 fitness," not new. The words "raises a concern" are
46 new indeed. And what might that be? How can we
47 quantify that, because I can assure you from a QA
48 perspective, we're going to be expected to quantify
49 that?

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1 MODERATOR WEST: I don't think that's
2 necessarily different than other current language in
3 the rule that would speak to if you have some question
4 about an individual's fitness-for-duty that you are
5 obliged to clear up that question and to take the
6 individual off shift and to clear up that question
7 before you would return them to shift.

8 MS. DURBIN: I actually have my theory
9 about what the answer might be, if I can. Originally,
10 the language was referring to the record of a
11 violation of fitness-for-duty policy only, which is
12 what you would have given in your written statement.

13 Now you are giving not only that statement
14 but also if you have some kind of history of substance
15 abuse. So that it's broader. But putting this
16 language in, which raises a concern about the person's
17 history, it gives you flexibility to decide whether
18 the information about their history is of enough
19 concern that you should do a medical and management
20 determination of fitness.

21 This is my --

22 MR. BURRELL: That was, quite candidly, my
23 fear, because when that happens, we are driven back to
24 the legal or employment action taken against them, and
25 the descending, if you will, or escalating
26 determinations of the impact of the various
27 definitions that go to this issue.

28 MS. DURBIN: Right.

29 MR. BURRELL: So we end up with the
30 requirement, quite possibly, in many cases for a
31 medical determination if something raises a concern.
32 So if it raises a concern, it's now out of my hands as
33 an access manager, out of the hands that would be
34 applicable both between mine and the psychologist's,
35 and now driven directly to a medical determination
36 that didn't have to be done in the past.

37 I could work alone in this respect or I
38 could work in concert with a psychologist in this
39 respect. Now that option doesn't exist or might not
40 exist if there's something that raises a concern and
41 we cascade back through these various definitions.

42 MS. DURBIN: If the language about raising
43 a concern was not in there, you would have to do a
44 medical and management determination of fitness about
45 everything that was listed in Section (A). I mean
46 what this is doing is giving --

47 MR. BURRELL: Again, Section (A) has that
48 new language in it as well.

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1 MS. DURBIN: Right. Section (A) has new
2 language in it. This new language is intended to
3 allow some flexibility in determining whether that new
4 information is giving you a concern or not, and
5 licensees will need to make a decision about if -- If
6 I had a DUI four years ago, do I think that raises
7 enough of a concern that I'm going to do a medical and
8 management determination of fitness?

9 There can be a policy about whether that
10 -- As I said, I'm going out on a limb here, but that
11 language, I believe, was added in order to reduce the
12 impact of the additional information, to give you the
13 benefit of the additional information without creating
14 an immediate medical and management determination of
15 fitness in all cases.

16 MODERATOR WEST: I think your question --

17 MS. DURBIN: I am on a limb.

18 MODERATOR WEST: -- and concern in this
19 area -- it may well be that what this was intended to
20 do, you are not necessarily viewing it in terms of
21 being more flexibility but rather -- correct me if I'm
22 wrong -- but rather raising the standard with respect
23 to medical or management determination.

24 MR. BURRELL: Quite likely.

25 MODERATOR WEST: And I think, assuming
26 that we are accurate on how we are discussing this,
27 namely that it is introduced to give more flexibility,
28 I think this is something we can certainly address in
29 a clarification type statement.

30 MR. BURRELL: Okay, thank you.

31 MS. MATULA: On the same note of that in
32 the same paragraph, my concern also states "must be
33 based on the management and medical determination of
34 fitness-for-duty and the establishment of an
35 appropriate follow-up testing program."

36 I guess that wording "and" with no
37 flexibility -- If it raises a concern and you have it,
38 "and" you are going to have a follow-up. It kind of
39 gets you to the point that there is no -- you don't
40 have to have a follow-up.

41 MS. DURBIN: Well, an appropriate follow-
42 up program might be meeting with the AP one more time
43 next week. I mean, it's --

44 MS. MATULA: Not follow-up as in defined
45 as follow-up in --

46 MODERATOR WEST: Testing.

47 MS. MATULA: -- in testing

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1 MS. DURBIN: Right. The follow-up testing
2 is required specifically if it was a violation, but
3 those are not --

4 MS. MATULA: So the word follow-up here is
5 just following it up.

6 MS. DURBIN: Right.

7 MODERATOR WEST: Well, that's not true.

8 MR. BRAZIL: Lisa, to look at what you put
9 in in bold "and the establishment of an appropriate
10 follow-up testing program as specified in
11 26.24((A)(4)" which is specifically follow-up testing,
12 not less than once every 30 days for four months.

13 MODERATOR WEST: Is it clear, though, that
14 the language with respect to it -- and it clearly is
15 follow-up testing program. Is it clear that that
16 hasn't been added? I mean, that's in the current
17 rule. There's nothing new about that.

18 MS. MATULA: It is in it, that you have to
19 do that.

20 MODERATOR WEST: That's in bold.

21 MR. ALBERT: All right, let me ask you a
22 question. What you are saying then, if you did the
23 evaluation and there was nothing that you determined
24 that you needed to follow up on, your question to us:
25 Do you still need to do follow-up testing, that you
26 don't have any flexibility?

27 MS. MATULA: Correct. Yes. If I send him
28 to the medical review officer and he does all his
29 tests, clinical and exam, and he comes back and says
30 this person does not have a problem, why do I have to
31 have follow-up testing, which is what I think this is
32 telling me?

33 MR. ALBERT: Then appropriate follow-up
34 would be none.

35 MS. MATULA: Follow-up testing, none.

36 MR. ALBERT: Would be none.

37 MS. MATULA: Okay.

38 MODERATOR WEST: Thank you, Ron.

39 MS. MATULA: Accepted.

40 MR. BRAZIL: Scott Brazil again. I hate to
41 be redundant, but I want to -- Nancy said she was
42 going on a limb, and I think what you said, Garmon, in
43 response to that was the same.

44 My issue with paragraph (4) here was
45 whether or not, as a licensee, I would have the
46 flexibility to determine whether any of the
47 information that I gather in Alpha (1), (2) or (3)
48 raises a concern.

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1 If that's left to the licensee to
2 determine, if I have, say, a matrix and say is that
3 one DUI within the last five years, that's not a
4 concern. He's had two within the last five. That's
5 not a concern. He's had three within the last month.
6 That's a concern.

7 If I determine it's a concern, then I have
8 to do the remaining part of this, which is a
9 management/medical determination of fitness and -- not
10 or -- and establishment of an appropriate follow-up
11 testing program.

12 MODERATOR WEST: If you reach that
13 threshold, and if you are correct about the new
14 language at the beginning of Section 4, allowing more
15 flexibility rather than raising the standard.

16 MR. BRAZIL: But I just want to make sure
17 I understand. The licensee is going to have the
18 flexibility to determine whether or not that
19 information raises a concern?

20 MODERATOR WEST: I think that answer is
21 correct, and we'll have to corroborate that. But I
22 think the initial answer is yes.

23 MS. DURBIN: Yes. And I think -- and we
24 will have to look at this carefully, but I think if
25 you go to the language in follow-up testing, it's the
26 30-day -- you know, the once every 30 days for three
27 years and things -- is specified for people who have
28 violated the rule. Other kinds of appropriate follow-
29 up testing can be also included there, I believe.

30 So we need to go through this carefully
31 and go through the rule, but the idea is not that
32 someone had three DUIs and you're going to have to put
33 them in this very rigorous follow-up program. The
34 idea is you get them in an appropriate follow-up
35 program.

36 MR. BRAZIL: You are correct, because
37 under (4)(i) and (ii) there, there are the two where
38 you would definitely put them in the 30-days and 90
39 days for the three years. Thanks.

40 MODERATOR WEST: Thank you. Please.

41 MR. SEARS: Garmon, Russell Sears,
42 Entergy. A question about the provision that overlaps
43 into 73.56. If the individual has been previously
44 removed for violating the licensee fitness-for-duty
45 policy, temporary access provisions are not applicable
46 and cannot be utilized.

47 Under the scenario of bringing somebody
48 back in that situation, the background investigation,
49 the initial drug test, medical review and management

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1 determination will all be completed long before
2 fingerprints are available and, even if we get the new
3 rule and we have fast turnaround on that, if there's
4 military involved, MPRC response is going to be
5 lagging far behind that.

6 Is there any indication from the NRC's
7 perspective whether or not we are going to have relief
8 in those areas or we're going to have to wait for
9 those provisions to be fulfilled to grant temporary
10 access?

11 MODERATOR WEST: To be honest with you, we
12 haven't really addressed that specifically.

13 MR. SEARS: Not addressing those would
14 effectively ban those people from being considered for
15 access, and I don't know that that's the intent.

16 MODERATOR WEST: Thank you for raising
17 that. Brad, did you want to add anything?

18 MR. BAXTER: On the question of the, I
19 guess, relief for the electronic fingerprints and the
20 fast turnaround period, right now we are in a holding
21 pattern with the FBI and their Office of General
22 Counsel.

23 So the NRC's perspective, we are ready to
24 go, and the FBI's OGC and the NRC OGC - it's currently
25 fighting the battle of a third party entity. So right
26 now those who attended the FBI fingerprint, I guess,
27 meeting that PADS held down in Crystal City -- we're
28 still waiting for the 45-day response from FBI's
29 General counsel. So right now we're just in a holding
30 pattern to get that fast turnaround.

31 I think that would help alleviate some of
32 this discrepancy of derogatory information.

33 MODERATOR WEST: So that probably doesn't
34 nail the question, but at least it gives you some
35 sense of where we are at with respect to addressing
36 it, in some of these other areas at least.

37 MR. BURRELL: Garmon, I don't want to be
38 premature here. We did 26.27(C)(6) -- have we gotten
39 there yet?

40 MODERATOR WEST: Let me take a look. No.

41 MR. BURRELL: Then I'm premature.

42 MR. DiPIETRO: I have a comment on this
43 last comment that Russell made. If an individual is
44 holding unescorted access and then they violate a
45 fitness-for-duty policy, in the rules that we have
46 under the access we could bring them back under a
47 reinstatement or an update and not have to do a whole
48 temporary clearance process on them again, depending

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1 on the time frame and how long they don't hold
2 unescorted access.

3 So it's kind of contradictory to what some
4 of the provisions in the access rule, and maybe that
5 needs to be taken into consideration.

6 MODERATOR WEST: Okay, thank you.

7 MS. TECHAV: I had a question or maybe
8 just a clarification. In 26.27(C)(3) it says that the
9 licensee shall complete a suitable inquiry on a best
10 effort basis to verify the accuracy of the
11 individual's statement made under the paragraphs
12 included.

13 The definition before "suitable inquiry"
14 said that it had to go to the employer. There is no
15 definition for suitable inquiry anymore. I was
16 wondering what the intent of that is. Does it still
17 need to go to the employer or just to the licensees?

18 MODERATOR WEST: Do you have any thoughts
19 on that, Nancy?

20 MS. DURBIN: I think yo need to do the
21 suitable inquiry for all previous employers. Is that
22 what you are asking?

23 MS. TECHAV: No.

24 MODERATOR WEST: You're concerned with
25 where the report has to go?

26 MS. TECHAV: I'm wondering who we have to
27 do the suitable inquiry to, because the definition
28 before was in the fitness-for-duty rule, said that it
29 had to go to the employer. The definition is now
30 gone. It's not there anymore. It doesn't define what
31 a suitable inquiry is anymore.

32 MS. DURBIN: Okay.

33 MS. TECHAV: In the access rule or the
34 fitness-for-duty rule. So we're wondering, do we do
35 it on a best effort? Do we go to references? Can we
36 go to the licensees or do we have to go to the
37 employer still?

38 MS. DURBIN: Okay. This is one that we
39 will have to address. I think we took it out because
40 we thought it was an access authorization, and we
41 wanted to be consistent. It seemed like we'll let
42 them define it.

43 So this is one where we'll have to give
44 you an answer I would guess.

45 MS. TECHAV: Okay, thank you.

46 MS. DURBIN: I wouldn't guess it changed.

47 MODERATOR WEST: Thank you for raising
48 that. Appreciate it. Yes, sir?

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1 MR. CASEY: Ron Casey, TVA, again. To
2 follow up just a little bit on that, because you did
3 add this (A), in the past five years used, sold,
4 possessed any illegal drugs, had a legal action or
5 employment action. But these are a lot of -- Some of
6 these you're not going to get from employers, former
7 employers.

8 Under the current rule where you ask the
9 four questions, they can typically either answer you
10 or say they are not going to answer you, but here, you
11 know, a lot of employers are not going to know if
12 you've ever used drugs before or had a legal action
13 specifically, if you worked at McDonald's or someplace
14 like that.

15 So I think that's what -- following up a
16 little bit on, you know, was the intent to go to the
17 employer or to do something else and try to verify the
18 accuracy of the written statements from the
19 individuals.

20 MODERATOR WEST: I understand, and we'll
21 certainly clarify that. Thank you again.

22 MR. PIRTLE: Just one quick comment, if I
23 may. I think a lot of problems in the past have been,
24 when you were kind of driven to employers, too often
25 you got the response that it is our policy to only say
26 that Gary Pirtle worked here from this day to that
27 day, and he held the position of chief janitor when he
28 left, and wouldn't tell you anymore.

29 Our rules were not binding on those
30 employers to tell you more information. However, our
31 rules are binding on licensees or holders of NRC
32 license to respond to specific questions that are
33 addressed by the access authorization rule.

34 You will probably get a lot more
35 information that is useful to you in making your
36 access authorization and fitness-for-duty decisions.
37 Although the decision hasn't been final, I think we in
38 the regions would encourage in clarifying documents
39 that it either be both, the employers or licensees,
40 but that will have to be addressed at a later time.

41 Too often we've looked at access
42 authorization files and kind of seen disclaimers from
43 employers, and little more can be done except to
44 follow up with a FAX so they could tell you by FAX
45 what they told you by phone. But, hopefully, it will
46 be worked out.

47 (Slide change)

48 MODERATOR WEST: Okay. On the next slide,
49 62, we've certainly talked about some aspects of this

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1 previously. I'll try to just focus on the portions
2 that we haven't given a lot of attention to, and
3 that's principally the portion that has to do with the
4 72 hours.

5 Regarding that, when the person returns,
6 the licensee must now do a return-to-duty testing in
7 this context related to getting away from 60 days and
8 so on, but not necessarily wait for the results of
9 that test, and must initiate a suitable inquiry
10 regarding activities during the period of the absence
11 within 72 hours of granting access.

12 So I think that's essentially the portion
13 we haven't discussed. Next --

14 MR. BURRELL: Garmon, I guess I would like
15 to go back to (C)(6) now, as we've jumped to (C)(7).

16 MODERATOR WEST: Sure.

17 MR. BURRELL: (C)(6) deals with temporary
18 access or temporary unescorted access pursuant to
19 73.56 is to be granted, so forth and so on. Then (i)
20 now requires the initiation of suitable inquiry for
21 the balance of the past five years.

22 Your expectation would be what there
23 regarding the word initiate? I read this as though we
24 are going to be expected now to have in process all
25 the data from all the employers for suitable inquiry,
26 if we have to go to employers.

27 MODERATOR WEST: That's your
28 interpretation of initiated?

29 MR. BURRELL: That's what I believe this
30 says. If it's other than that, I would certainly like
31 to hear that.

32 MODERATOR WEST: I think we have a slide
33 that will address that. So if you would hold off on
34 that, we could deal with and, if I'm incorrect -- and
35 I don't think I am -- I'll revisit it.

36 MR. BURRELL: And I believe I heard the
37 word initiate under item (7) or the 72 hour window,
38 and the word in the rule is complete suitable inquiry
39 not later than 72 hours after unescorted access has
40 been restored. Doesn't say initiate; it says
41 complete.

42 MODERATOR WEST: Correct, with respect to
43 the 72 hours. Yes.

44 MR. BURRELL: And this is for people
45 returning to a licensee that they previously held
46 access?

47 MS. DURBIN: That they currently hold
48 access in.

49 MODERATOR WEST: I think the point here --

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1 MR. BURRELL: I'm sorry. Say that again.

2 MS. DURBIN: This particular requirement,
3 I believe, is the same as for return -- the category
4 of people that were in return-to-duty testing. They
5 are people that have been in your program. They are
6 your employees. They have been away for more than 60
7 days, not covered by the program, and so this is a
8 very quick check to see where they were and what they
9 were doing during the period of time that they were
10 still in your employe but out of your -- out from
11 under your program.

12 MODERATOR WEST: And I think the point --

13 MS. DURBIN: If they were on medical
14 leave, you might deal with the hospital. I don't
15 know. You know, you're not -- You're just going to
16 check.

17 MODERATOR WEST: And I think the point
18 here with the 72 hours is that you would -- As Nancy
19 has pointed out, the concern would be that portion of
20 the time that they were away, and the assumption would
21 be they are not covered by a fitness-for-duty program,
22 for whatever the reason, and now they are returning.
23 They are your employee, and you are going to be
24 expected to do the suitable inquiry, and you would
25 have a 72-hour time frame to do it. However, you have
26 to be careful with the 72 hours.

27 It's not just simply a safe haven, if you
28 will, with respect to 72 hours. As it is, you would
29 be expected to make some determination that you could
30 conduct this suitable inquiry within 72 hours. Go
31 right ahead.

32 MR. BURRELL: And this is a suitable
33 inquiry of the individual returning.

34 MODERATOR WEST: Correct.

35 MR. BURRELL: Okay. Not a suitable
36 inquiry to the employer. I mean --

37 MODERATOR WEST: No, this is the employee
38 that's returning. Yes.

39 MR. DiPIETRO: This has been an issue with
40 me for a long time. You got the individual's suitable
41 inquiry, which now we're calling a written statement.
42 Is that correct?

43 MODERATOR WEST: That's a fair statement,
44 yes.

45 MR. DiPIETRO: So why don't we just get
46 rid of the these terms suitable inquiry, when you are
47 doing it back to the employer to the individual. Why
48 don't we come up with a different name for this
49 written statement, like self-disclosure or something

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1 like that, and then leave the suitable inquiries
2 strictly the verifications that you are doing with
3 past employers or licensees or whatever else you are
4 doing, because this suitable inquiry language keeps
5 plopping back and forth, and it's nothing but
6 confusing. Do you understand?

7 MS. DURBIN: Yes, but I do think under
8 (7), if we are talking about (7) here, that the intent
9 was if the person was working at another site or
10 another -- say they were working at a fossil fuel
11 plant and they weren't under a fitness-for-duty
12 program but they are still your employee and still had
13 access, you might contact the site that they were
14 working at.

15 I mean, it was -- and see if they have had
16 a violation, a DUI, a arrest for drug use. It's a
17 check of that period.

18 MR. DiPIETRO: You would ask the employee
19 that or you would ask --

20 MS. DURBIN: You would ask the employee
21 that, and you would verify it, just as you would --

22 MR. DiPIETRO: And that's what I'm saying.
23 We ought to change that language of the suitable
24 inquiry. We should capture that under the written
25 statement or whatever you want to call it.

26 MODERATOR WEST: But I think the point
27 here in the discussion you were just having is that
28 it's twofold, though. You have the written statement,
29 and then there's some aspect of the verification of
30 that written statement.

31 MR. DiPIETRO: Right. But going back to
32 73.56, if an employee holds unescorted access and even
33 though he may have been absent of the possibility of
34 being tested, they still have the requirement to
35 report arrests and things that impact on their
36 trustworthiness and reliability.

37 So it's kind of redundant to go back and
38 verify with yourself whether that individual has self-
39 disclosed any arrests or anything while they were out
40 of the --

41 MODERATOR WEST: I guess your point is
42 that you would have done that already over on this
43 73.56?

44 MR. DiPIETRO: Yes.

45 MODERATOR WEST: That makes sense. Thank
46 you.

47 MR. CASEY: I'd like to have a little
48 clarification, because, obviously, I missed this one
49 in my interpretation, because I guess I thought that

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1 this was like a contractor that worked at your
2 facility that you granted access, let's say, in May,
3 and then they returned in less than a year as a
4 reinstatement, that you could initiate suitable
5 inquiries for up to 72 hours before granting.

6 So now I understand, no, that's not the
7 case, but I guess the reason I missed that is because
8 in your other commentary here you say employed by the
9 licensee in the language, and I don't -- Maybe I've
10 overlooked it, but I don't see that word "employed by
11 the licensee." So I assumed this was everybody.

12 So if this is not the case now, as I
13 understand, and this is just for a category of people
14 that's been out of -- your own employees out of the
15 possibility of being tested for more than 60 days that
16 you can do this, then what is the expectation for
17 suitable inquiries for reinstatement of contractors.

18 You know, you've done your initial five-
19 year background attempt and your five-year -- You
20 know, you grant them access. They work. They leave
21 in the spring, and then they come back in the fall. Do
22 you do suitable inquiries for those periods of time
23 and getting the results before you reinstate or is
24 there any provision in here to talk about that?

25 MODERATOR WEST: I think unless someone
26 has additional insight, I think it's fair to say that
27 we need to provide you some clarification under item
28 (7) as to whether it's speaking to all individuals
29 versus only the licensee's employees.

30 MR. CASEY: Because, I mean, we're not
31 only talking here just licensees, but I mean,
32 obviously, when you say back to that licensee's
33 program, but we've also got transfers in here. This
34 goes back to a statement that I had made earlier
35 about when you read this rule and you go back to the
36 access rule, you know, we've got categories of
37 transfers or reinstatements and updates. It's
38 difficult to go in here and try to determine exactly
39 what you need to do.

40 The new person coming in that's never been
41 granted access is pretty clear, but we've got that
42 same problem in this rule now where there's
43 interpretations of what do you do for reinstatements
44 on suitable inquiries. I guess I thought this was
45 your attempt to close that hole and say, well, you
46 know, you got to do suitable, but you can do them up
47 to 72 hours. But, obviously, that's not correct.

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1 So it seems like there's still something
2 missing here in suitable inquiries for reinstatements
3 and transfers.

4 MR. MORIARTY: This was also part of the
5 reason why I had asked my question on EAP about -- if
6 you go back to the scope, it says all persons granted
7 unescorted access. So all these requirements, and
8 we're talking about who is an employee, who is not an
9 employee, is a contractor.

10 MODERATOR WEST: Transfers and so on.

11 MR. MORIARTY: Yes. I suppose a basic
12 question would be under the meaning of this rule
13 throughout, what does employee mean? It's pretty
14 clear in the beginning that it's all persons granted
15 unescorted access. It doesn't differentiate any
16 standards from one to the other.

17 MODERATOR WEST: Okay. Thank you.

18 MR. NOEL: Just one more brief question.
19 We already have requirements for the DOE for every
20 employee to be on a continuous reporting process with
21 us for any change in status of marriage or divorce or
22 bankruptcy or any charge for any reason, any
23 conviction for any reason.

24 That's an ongoing program. They have to
25 continue it. am I correct in assuming now that, when
26 an employee comes back off of family leave or medical
27 leave, I actually have to sit them down and ask them
28 a series of questions relevant to fitness-for-duty,
29 have them fill out perhaps a standard form giving them
30 an opportunity to declare as a part of the return-to-
31 duty process?

32 MS. DURBIN: For someone who has been gone
33 for more than 60 days?

34 MR. NOEL: I'm sorry?

35 MS. DURBIN: This would be someone who has
36 been gone for more than 60 days?

37 MR. NOEL: Correct. As a part of their
38 return to duty process, even though they are required
39 to do this for us real time all the time without us
40 asking them, but for this particular instance we'll
41 have to sit them down face to face and ask them these
42 questions. Is that correct?

43 MODERATOR WEST: If the individual has not
44 been covered by an acceptable fitness-for-duty program
45 and has exceeded that 60 day threshold, I think the
46 answer would be yes.

47 MR. NOEL: Thank you.

48 (Slide change)

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1 MODERATOR WEST: Now with regard to the
2 next slide, 63, please, note that the sanctions
3 haven't changed substantially. Now also it applies to
4 applicants. I think that's an interesting point with
5 respect to the scope.

6 We don't in the rule call this out and
7 didn't address under the scope, but in this particular
8 section there has been a change in that respect in
9 that it does now clearly apply to applicants.

10 The same, as we mentioned before, with
11 respect to the sanctions for alcohol. They have come
12 up to the standard of the same sanctions for drug
13 violations. And subversion, including refusal to take
14 a test, must be a violation of the licensee's fitness-
15 for-duty program.

16 (Slide change)

17 MODERATOR WEST: You note on 64 that
18 personnel, including applicants, just to reiterate
19 that point, and you can see the other portions that
20 have been added to this particular requirement.

21 (Slide change)

22 MODERATOR WEST: You note, too, that
23 whenever there is a clear indication that someone is
24 not fit -- for example, erratic behavior -- there must
25 be a full evaluation before the person is returned to
26 duty, and potentially this could override the
27 provision -- and this is something we have to
28 admittedly discuss a little bit more, but I'll share
29 it with you, nevertheless.

30 This could potentially override the
31 provision that under a for-cause testing, which we
32 discussed previously, that a person who tests negative
33 in a for-cause test does not need a medical evaluation
34 of fitness. In that instance, a management
35 determination would be good enough.

36 This would mean that in a for-cause test
37 initiated because of a credible allegation or smelling
38 alcohol on someone's breath, there would not need to
39 be a medical evaluation of fitness. But if the for-
40 cause test was initiated due to clear impairment or an
41 indication of lack of fitness, then there would be a
42 need for a medical determination of fitness.

43 So I think with all these words what I'm
44 trying to say is that, generally speaking, we do have
45 a new provision in the rule that would speak to the
46 fact that, if you simply have a negative test from an
47 alcohol results, there wouldn't be any necessity as a
48 stand-alone consideration, if you will, to have a
49 medical determination as well.

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1 The only thing I'm trying to emphasize,
2 there may be some other considerations that would, in
3 fact, necessitate a medical determination, even with
4 that medical result. Yes?

5 MR. HARRIS: Neil Harris, TXU Electric.
6 I'd like clarification on two generic items within
7 this document.

8 MODERATOR WEST: Okay.

9 MR. HARRIS: One, are all return-to-duty
10 tests, regardless of where they occur within the
11 document -- are they always considered random tests?

12 MODERATOR WEST: No.

13 MR. HARRIS: All right. Second one then:
14 The use of the word "must" within your document rather
15 than the word "shall" where it's been stricken -- does
16 "must" equal "shall" or does "must" actually equal
17 "should"?

18 MODERATOR WEST: I think they are
19 essentially the same.

20 MS. DURBIN: "Must" actually replaced
21 "should." So "must" and "shall" are the same.

22 (Slide change)

23 MODERATOR WEST: And on slide 65 note that
24 lacking other evidence of use, sale or possession of
25 illegal drugs or use of alcohol on site, the following
26 would indicate a violation: A laboratory confirmed
27 positive test verified by the MRO as a policy of
28 violation -- certainly nothing new there; and then the
29 second area which we've given some attention to
30 already, we would have still the BAC at .04, but then
31 also the considerations with regard to .02 and .03,
32 depending on long the individual had actually been on
33 shift.

34 (Slide change)

35 MODERATOR WEST: After a first violation
36 involving a confirmed positive drug or alcohol
37 determination, the individual can be reinstated after
38 appropriate treatment, evaluation by the MRO and
39 manager, follow-up testing program established, and
40 return-to-duty testing.

41 Then lastly, if they are in a work status
42 prior to reinstatement of unescorted access, they must
43 still be covered by the program.

44 (Slide change)

45 MODERATOR WEST: Now shifting to a second
46 violation or determination of subversion must result
47 in revocation of authorization to perform activities
48 described in 26.2: (a) for a minimum of three years;
49 further, revocation of authorization for five years

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1 for determination of sale, use or possession of
2 illegal drugs or use of alcohol within the protected
3 area.

4 Note that now NRC contractors are now
5 covered, along with NRC employees in that they cannot
6 be contractors. In other words, they cannot be denied
7 access, but they can be escorted, and the appropriate
8 regional administrator must be immediately notified.

9 During off-normal working hours, the NRC
10 Operations Center must be notified. The addition here
11 is certainly with respect to NRC contractors, and this
12 addition was in response to an NEI comment.

13 (Slide change)

14 MODERATOR WEST: Now we have certainly
15 some questions that we received in this particular
16 area for 26.27, and we'll see how many of these we can
17 address in the next remaining 15 minutes or so.

18 First of all, what is the difference
19 between 26.27(A)(1)(a) and (b), and then secondly,
20 what is the difference between 26.27(A)(1)(i)(b) and
21 26.27(A)(1)(i)(c)?

22 I'll read you out response to this, and
23 then we can probably add a few caveats with respect to
24 essentially the (a)-(b) and the (c). Much of what I'm
25 going to say is largely coming from the rule, for
26 sure.

27 A refers to the use, sale or possession of
28 illegal drugs or legal or employment action taken
29 against the individual for alcohol or drug use in the
30 past five years. Just in passing, I think the
31 emphasis there and the distinction is the fact that
32 it's somewhat general, certainly covering the five-
33 year period. And (B) refers to having been determined
34 to have violated a fitness-for-duty policy or as a
35 result of an action taken in accordance with the
36 fitness for duty policy being denied initial
37 assignment to activities within the scope of Part 26
38 in the past five years.

39 I think there the distinction we were
40 trying -- in response to this question, trying to make
41 is that, unlike (A), this one is not general, but it's
42 specific to a fitness-for-duty violation, and the
43 commonality, for sure, is still within the scope of
44 the five years.

45 Then lastly regarding (C), it refers to
46 removal from activities within the scope of Part 26 as
47 a result of an action taken in accordance with a
48 fitness-for-duty policy at anytime. I think that's
49 the key distinction; whereas, similar to (B), it also

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1 involves a fitness-for-duty violation, but the
2 distinguishing aspect of (C) is that it covers all
3 time rather than just simply five years.

4 MR. CASEY: Can I ask a question?

5 MODERATOR WEST: Please.

6 MR. CASEY: Maybe I didn't understand
7 exactly what you said. But if (C) -- (B) is ever
8 violated in five years, and if (C) is you ever violate
9 it, why do you need (B)? That's where I'm confused on
10 this, because what I'm trying to do is write up a
11 questionnaire that I can ask the pipefitter,
12 boilermaker, whoever to fill out this written
13 questionnaire, because I'm going to use that to do a
14 background and potentially deny them for
15 falsification.

16 So I've got to be clear in what I'm asking
17 them to declare when I do this check to see if there's
18 any -- and I'm still not clear about the difference
19 between (B) and (C). I understand (A) and (B). It's
20 (B) and (C).

21 MODERATOR WEST: I don't know if there are
22 any additional insights that anyone at the table might
23 provide, but it seems to me it's just the one of the
24 time frame that you are considering or asking
25 information about.

26 MR. CASEY: I mean again, why would I --

27 MODERATOR WEST: I hear what you're
28 saying. If you ask the more general one, it's going
29 to be overlapping with the other one.

30 MS. DURBIN: I can think of a reason you
31 might want to know whether it was within the past five
32 years, because you are only going to be doing the
33 background check for five years. But I can't answer
34 your general question, which is why have both.

35 MR. CASEY: And I would counter with that
36 by saying again, why would you need (B) if you're
37 going to say forever, because if you said yes for
38 "ever," you then go down and say they got to give the
39 duration, the time, etcetera, etcetera, and the person
40 then would say, well, that was in 1989.

41 MS. DURBIN: Right. So you would have the
42 information.

43 MR. CASEY: And there was a difference
44 between the two.

45 MODERATOR WEST: Thank you for your
46 question. Yes?

47 MR. SEARS: When I looked at that, the
48 only thing that I thought there might be some
49 application for is because the sanctions are going to

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1 be different for a second positive. You need to know
2 if that person has ever tested positive before,
3 because the second strike would be different than how
4 you would treat the first strike.

5 MODERATOR WEST: I see.

6 MR. SEARS: And I just -- I had just made
7 that, and I don't know if that's what it was intended
8 for, but that's what I was going to use it for.

9 MODERATOR WEST: That's certainly an
10 insight. Thank you for that.

11 (Slide change)

12 MODERATOR WEST: With the next question we
13 received concerning 26.27(A)(4): How does the
14 licensee determine what is sufficient evidence for
15 proof of abstinence?

16 (Slide change)

17 MODERATOR WEST: Here our response would
18 be as follows: Negative results from a regimen of
19 follow-up testing by the licensee is identified by the
20 rule as the method by which proof of abstinence is
21 provided.

22 In cases where there is a break in
23 employment and/or changes in employers during the
24 period when follow-up testing would have been
25 administered by the licensee, the licensee may but is
26 not obligated to consider other evidence; for example,
27 verified testing by another employer or an independent
28 testing agency as proof of abstinence.

29 We need to -- admittedly, to identify all
30 of the places that proof of abstinence is mentioned in
31 the rule and look for perhaps some further
32 clarification in this area, but hopefully, that's
33 getting at some aspects of the question, however.

34 (Slide change)

35 MODERATOR WEST: Another question: What
36 constitutes a three-year follow-up program for
37 transient workers? Is the three years consecutive or
38 cumulative? Do we credit time spent in another
39 licensee's programs?

40 I've certainly personally received a fair
41 number of calls, different variations of this same
42 question.

43 Our answer is as follows: The licensee
44 must assure that there has been at least a consecutive
45 three-year period during which the individual has been
46 subject to a testing program that assures abstinence.
47 The licensee may, but is not obligated to, verify and
48 then credit testing at another licensee's program or
49 an independent testing program if that testing

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1 represents a consecutive period; that is, no more than
2 30 days without the possibility of being tested, and
3 is verified as continuing a testing program as
4 described in 26.24(A)(4).

5 (Slide change)

6 MODERATOR WEST: What flexibility does the
7 MRO have with regard to recommending follow-up testing
8 for individuals who have some history of substance
9 abuse, for example, a DUI, but have not violated an
10 NRC licensee's fitness-for-duty program?

11 Our answer is as follows: The MRO has
12 flexibility in determining whether an individual with
13 a history of substance abuse requires any program of
14 response, such as counseling or follow-up testing.

15 I think that is perhaps related to some
16 previous discussions we were having in that area.

17 MR. CASEY: It must be getting late in the
18 day. Nobody has questions. Could we go back to the
19 previous slide for one second?

20 MODERATOR WEST: That's 72?

21 MR. CASEY: Yes. I need clarification.
22 My understanding now of the new rule, if you test
23 positive the first time now you've got to go and you
24 go through your rehab or whatever. You come back, you
25 got to go through three years of consecutive -- a
26 three-year follow-up program.

27 MODERATOR WEST: Correct.

28 MR. CASEY: And I think I heard you say
29 basically that, if a person -- you know, if they were
30 in a year at our program and then left and came back,
31 I would have to put them back into Day One again, and
32 I have to do three years consecutive before I could
33 take them out of the follow-up.

34 MODERATOR WEST: That's not precisely what
35 I was trying to say. What I was trying to say is that,
36 generally speaking, you're correct. We would consider
37 the answer to this question of whether -- essentially,
38 whether it has to be consecutive or cumulative, the
39 answer would clearly be consecutive. But the attempt
40 here was also to acknowledge that the consecutive --
41 there would be some leeway with respect to perhaps
42 taking credit under certain conditions for the fact
43 that the person, even though they have left your
44 particular program -- let's say Licensee A's program
45 -- but if certain conditions were met with respect to,
46 let's say, going to Licensee B, you could, in fact,
47 take credit for that.

48 MR. CASEY: Okay. Because I didn't --

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1 MODERATOR WEST: You wouldn't necessarily
2 have to reset the clock, if the conditions were met,
3 and the most obvious one would be with respect to
4 whether the individual actually continued on in a
5 consecutive fashion with Licensee B.

6 MR. CASEY: Right. I guess I wouldn't try
7 to apply it if the guy would be, say, at our place,
8 and you put him in a year and, if some reason or
9 other, take him out but he's still working here, and
10 then put him back in again. He would be consecutive
11 with us, but he could leave, you know, and then come
12 back. Do we have to reset it again or could I take
13 another licensee person and add back or do I start one
14 day again?

15 MODERATOR WEST: I think the concern there
16 would be during that period that the individual left,
17 what was happening? Was there some continuation of
18 the testing regimen that the individual was under
19 before he left?

20 My general answer is that, if indeed you
21 can answer that to the level that we are looking for,
22 you could take credit for that. If you can't, then
23 you would, in fact, have to do what you're saying.
24 You would have to reset the clock when the individual
25 came back.

26 MR. CASEY: Okay. My second question
27 follow-up to that is: For the current rule my
28 understanding, your first positive you don't go into
29 a follow-up. It's only into your second. Now it's
30 your first.

31 MODERATOR WEST: We've had a fair amount
32 of discussion on this. I think, clearly, we would
33 agree to this point. If there was any confusion about
34 a distinction being attendant with respect to first
35 positive versus second positive, it was our intent --
36 and, hopefully, we've cleared that up in the new rule,
37 where in the new, certainly, there is no distinction.

38 MR. CASEY: Right. So I understand now
39 that that is intended first positive, three years.
40 But one scenario: So if an individual -- This new
41 rule has passed. We're not talking here about
42 grandfathering or whatever.

43 Now I have a contractor coming to me who
44 in 1992 tested positive, was terminated by that
45 utility, and never went into any type of follow-up
46 program because we terminate contractors on a first
47 positive, because we don't offer them EAP, and we
48 don't put them in follow-up.

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1 Now this person is coming to me eight,
2 nine, name any time, never served any type of follow-
3 up. Does that mean -- I mean, I understand, number
4 one, I can't grant him a temporary clearance. I
5 believe that's clear. It says you've had a prior
6 violation, you can't do EAP.

7 Now do I have to then turn around and put
8 him or her into a three-year follow-up program?

9 MODERATOR WEST: Would anyone at the tale
10 care to comment on that?

11 MR. ALBERT: Go first. I'll let you go
12 first.

13 MS. DURBIN: I think the answer is yes.
14 I mean, basically, you have somebody who has violated
15 the policy and has never demonstrated that they have
16 been abstinent from the use of whatever they abused,
17 even if they have been -- if it's been eight or nine
18 years. There's no evidence that they have had a
19 significant period without using. That's my level of
20 reaction.

21 MR. CASEY: So what I think I'm hearing:
22 Anytime you've had a positive, even if it was prior to
23 this rule being established, we're then going to say
24 we can't grant you a temp, and we're going to have to
25 put you in a follow-up for three years. However,
26 knowing the nature of the transient workers, they are
27 not going to be at your location anytime to get a
28 three-year period, even if you could do it
29 cumulatively, and particularly you're, you know,
30 having to look at what conditions.

31 You would possibly have to go back and
32 reset the clock. So, basically, you know, even if you
33 didn't have to reset the clock and he's there for 14
34 days or whatever, you're talking about people who the
35 last ten years tested positive, but you can't prove in
36 some form or fashion went through a three-year follow-
37 up program, but you've got to put them in your follow-
38 up, track that, make sure they are in there when they
39 come in, when they leave or if they come back in.

40 In essence, you know, they may be in there
41 for 105 years to be able to get their --

42 MODERATOR WEST: I hear your concern.
43 There is one example I'll throw out for you. It
44 actually comes up on a later slide, but I think it's
45 relevant to what you are asking. This is the only
46 good example in my own mind that I can think of, and
47 I think it's relevant to this -- you know, way back
48 when, when something occurred.

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1 We do have an example that goes something
2 like this, that if you have an instance where an
3 individual, let's say, had tested positive for alcohol
4 some years back and didn't, for the reasons, let's
5 say, you described, whatever the reasons, didn't go
6 through a program. But yet -- and I think this is in
7 the spirit of what I was trying to describe relative
8 to not so much in the past but an individual goes away
9 from you but is still covered by something. You have
10 some assurance that they are coming back, and you
11 could take credit for that.

12 The one example I would note would be
13 something along the lines of, let's say, for alcohol.
14 The individual didn't go into a particular program,
15 but you have historical evidence to show that (a) this
16 was somewhat of a -- just not a pattern of substance
17 abuse but rather just isolated incidents; and (b) you
18 have historical evidence to show that the individual,
19 let's say, has gone through a Alcoholics Anonymous
20 program.

21 I think that would be an example where
22 there would be some consideration, even from a
23 historical perspective. I can't think of another one,
24 but that would be a potential one, and maybe there
25 would be other examples of that, because in that
26 instance the -- again, it's isolated. It's not a
27 frequent occurrence, and you have some assurance that
28 the issue has been addressed, even though it is
29 historical and even though the individual didn't, in
30 fact, for whatever the reasons, go through the program
31 with the particular licensee.

32 MR. ALBERT: Okay, Garmon, could I jump
33 in, please? All right, let's back up a second. The
34 first thing you said, that after the first positive
35 test the existing rule doesn't require you to be in a
36 follow-up program for X amount of time. That's not
37 correct. It does require you to be in a follow-up
38 testing program for the first positive.

39 PARTICIPANTS: Not for alcohol.

40 MR. ALBERT: Okay. But we were talking
41 about drugs, so to speak.

42 MR. CASEY: And we do that, okay? But I
43 was under the impression it was not required, and
44 maybe I'm thinking of the alcohol.

45 MR. ALBERT: Okay. And one thing about
46 the rule as it exists now: It was misplaced as for
47 the duration, but this iteration of the rule put it
48 where it was supposed to be, to begin with. I just
49 wanted to clear that up.

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1 Now let's go back to the other individual
2 who comes to your site. Now I got to ask you another
3 question. What have you done to assure that the
4 individual had ever been rehabilitated from being
5 kicked out of a fitness-for-duty program the first
6 time?

7 MR. CASEY: Okay. What we do currently
8 now, we put a three-year restriction on you that you
9 can't come to work for us. So after three years when
10 you process back in and you declare your positive
11 whenever, we'll put you --

12 MR. ALBERT: But still, you have not
13 established that the individual has been
14 rehabilitated.

15 MR. CASEY: I'm not finished yet. What
16 I'm saying is, when they come back -- We put three
17 years out. Then when they come back, then what we do,
18 we do an evaluation. We send them over to the
19 psychologist. They do a substance abuse profile on
20 them. They determine -- and that is when we get
21 notified by our psychologist who we use and who, I
22 might say, is a much better assessor and like a SAP
23 program as far as substance abuse professional to
24 determine substance abuse problems and rehab than a
25 licensed physician who basically is going to be
26 sitting there determining whether or not -- what the
27 effect of alcohol is on you for that day or maybe
28 medical causes. But all of our physicians, when they
29 evaluate a person and they detect there could possibly
30 be a problem of alcohol of substance abuse, they call
31 me and say we need to get this person further
32 evaluated by professionals in the substance abuse
33 arena, which we have a psychologist who is certified
34 in that.

35 Then we go into our EAP, and we -- you
36 know, we go into that program. So the question is
37 nobody just walks in, you know, and says, well, it's
38 been five years ago. We put them through this
39 substance abuse evaluation and profile, and I have a
40 licensed psychologist come back and tell me this
41 person is rehabilitated.

42 It could be in many forms. He could have
43 gone through a treatment program in the community
44 somewhere or whatever, but that, along with a negative
45 drug test, is my satisfaction that a guy that tested
46 positive ten years ago, you know, and has no history
47 since that time would be evidence of rehabilitation
48 from, you know, periods of times of cessation of the

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1 behavior that we know of and through a professional
2 substance abuse evaluation.

3 MODERATOR WEST: I think we could provide
4 some further clarification in this area.

5 MR. ALBERT: Wait a minute. At first
6 glance, I'm not sure that I agree totally with what
7 you are doing, but we can address that later.

8 I guess, going back to the individual
9 coming back --

10 MR. CASEY: Could I ask you one -- Excuse
11 me.

12 MR. ALBERT: Yes.

13 MR. CASEY: If you're not comfortable or
14 understanding exactly what I just said we did, what
15 would the expectation be that we would do for a person
16 that's coming back that had a positive test nine years
17 ago?

18 MR. ALBERT: I'd have to visit you to tell
19 you. I'm only kidding.

20 MR. CASEY: I got a feeling I'm going to
21 get a visit next week.

22 MR. ALBERT: I would have to get some more
23 specific information on how you are applying this. On
24 the surface, I can see some problems with it, but
25 let's get back to the individual when he shows up.

26 In essence, what you are doing then, you
27 are putting that individual into your EAP program.

28 MR. CASEY: No. No.

29 MR. ALBERT: Why are you not, because now
30 you're going to put him in a follow-up testing
31 program, and that's what you would have done if you
32 had put him into your EAP program, had he tested
33 positive at your site the first time?

34 MR. CASEY: No, and let me try to explain.
35 If a person comes to me and tested positive nine years
36 ago as a contractor somewhere else --

37 MR. ALBERT: Let's not make it nine. That
38 was in the first example. Let's make it two years
39 ago.

40 MR. CASEY: Well, we put three years.

41 MR. ALBERT: Oh, disqualified by three
42 years.

43 MR. CASEY: Three years, you know, and we
44 look at that as just kind of an evidence of
45 rehabilitation for potential of cessation of any type
46 of activities, at least that we know of, because
47 you're not testing positive somewhere else or being
48 arrested for some other type of substance abuse.

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1 So we have the three years. They come in.
2 They fill out the questionnaires. They declare they
3 had a positive three and a half years ago, four years
4 or whatever. That information goes to our
5 psychologist. Our psychologist, along with doing the
6 MMPI, also does a substance abuse evaluation. I can't
7 remember the -- It's a different type of -- like it's
8 not the MMPI. It's in addition to the an MMPI.
9 There's a test. Okay?

10 There's a substance abuse test going
11 along with the MMPI. Then they do a clinical
12 interview. After that clinical interview, the
13 psychologist there will say, you know, I feel this
14 person no longer has a substance abuse problem, and
15 they are rehabilitated.

16 They could have had other outside
17 treatment that they've brought in for them to look at.
18 Maybe not, depending on the time, but I rely on the
19 qualified, licensed psychologist to administer the
20 MMPI, this additional substance abuse test, do the
21 clinical interview, and come back and give me
22 assurances that this person has rehabilitated and is
23 not a substance abuser at that time.

24 Then, of course, along with that, we would
25 certainly do a pre-access test, you know. If he's
26 clean or she's clean on that one, then we grant
27 access.

28 MR. ALBERT: And then you put him in a
29 follow-up testing? Was that where you ended up?

30 MR. CASEY: No. No. We do not put --

31 MR. ALBERT: Okay. That's where I want to
32 get to.

33 MR. CASEY: We do not -- they do not go
34 into the follow-up as far as --

35 MODERATOR WEST: Because of the historical
36 nature of the incidence, you don't have any --
37 whatever the time frame is, three years or greater,
38 and you don't have any evidence, and you examine this
39 to indicate otherwise?

40 MR. CASEY: Right. There is no history of
41 DUI or any other type of legal history. When we do
42 the background, the psychologist does all of these
43 steps that I just described, and then he certifies
44 back to me that this person meets access requirements
45 under the rule and has rehabilitated and is not a
46 substance abuser or needs any type of further
47 counseling or follow-up counseling, as far as EAP,
48 etcetera. And we will grant access.

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1 MODERATOR WEST: We are going to stop on
2 this particular question that we're dealing with. But
3 I would add this. I think what you have described is
4 perhaps, in my opinion, an approximate example of the
5 example that I gave you. We'll get into that specific
6 example on tomorrow.

7 I would say the long and the short of it
8 is that we acknowledge, even given the fact that I
9 gave you an example, that we need to provide you some
10 considerations in this area, and we'll certainly do
11 that.

12 Ted, did you have any final thoughts?

13 MR. SHULTS: Just before we lose the
14 thought on this, what I think you also would like to
15 do, I think, is take a look at this from the
16 perspective of the Americans With Disabilities Act,
17 because the scenario that I was presented with a week
18 or two ago was the utility that had somebody who even
19 -- they had already interpreted this under the
20 existing rule that it would be a cumulative three
21 years, but it was a transient worker that only worked
22 during outages.

23 So it would be 32 years or so by the time
24 that individual finished. My concern is, if those
25 tests are negative, and the operators don't want to
26 use this individual. Why? Because of the additional
27 time it takes to do those additional tests.

28 So at some point or other, the allegation
29 is going to be that there has been disparate impact
30 based upon a history of substance abuse here that
31 really has been attenuated or can be disproved.

32 So if you look at private employers, what
33 they will do is they will put in a follow-up program
34 but will usually say at some point, three years, five
35 years, cap it so you don't have that scenario where we
36 are looking at 30 years or 40 years of testing, just
37 because of one violation.

38 So I think that this approach of looking
39 at it from a substantive -- Do I have a substance
40 abuse problem now is a substantive approach than just
41 more of a formalistic approach and saying, well, we're
42 just going to run out the three years, one way or the
43 other.

44 So I think the ADA is a significant issue
45 in all of this.

46 MODERATOR WEST: I appreciate the insight.

47
48 Before we close, tomorrow is essentially
49 a continuation of today in that we will try to get

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1 through the last section of the rule, and we certainly
2 should be able to do that. If we, in fact, finish up
3 a little bit earlier, then that will be a pleasant
4 surprise for everyone.

5 Thank you for your patience today, and
6 I'll look forward to seeing you tomorrow.

7 (Whereupon, the foregoing matter went off
8 the record at 5:12 p.m.)
9
10
11

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