

ORIGINAL

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NUCLEAR REGULATORY COMMISSION**

**RETURN TO SECRETARIAT RECORDS**

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**Ann Riley & Associates**

*Court Reporters*

1625 I Street, N.W., Suite 921

Washington, D.C. 20006

(202) 293-3950

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14   informational purposes. As provided by 10 CFR 9.103, it is  
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16   matters discussed. Expressions of opinion in this transcript  
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19   any proceeding as the result of or addressed to any statement  
20   or argument contained herein, except as the Commission may  
21   authorize.

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1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

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4 BRIEFING ON STATUS OF NRC INTERNAL DRUG PROGRAM

5 \*\*\*

6 PUBLIC MEETING

7 \*\*\*

8 Nuclear Regulatory Commission  
9 Room 1130  
10 1717 H Street, Northwest  
11 Washington, D.C.  
12

13 Wednesday, January 6, 1988  
14

15 The Commission met in open session, pursuant to  
16 notice, at 10:00 a.m., the Honorable LANDO W. ZECH, Chairman of  
17 the Commission presiding.  
18

19 COMMISSIONERS PRESENT:

20 LANDO W. ZECH, JR., Chairman  
21 THOMAS M. ROBERTS, Commissioner  
22 FREDERICK M. BERNTHAL, Commissioner  
23 KENNETH M. CARR, Commissioner  
24 KENNETH C. ROGERS, Commissioner  
25

1 STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

2 SAMUEL J. CHILK, Secretary

3 WILLIAM C. PARLER, General Counsel

4 DENNIS DAMBLY, Counsel's Office

5 VICTOR STELLO, JR., Executive Director for

6 Operations

7 JIM TAYLOR

8 PAUL E. BIRD

9 DICK DOPP

10 GREG BENOIT

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

CHAIRMAN ZECH: Good morning, ladies and gentlemen.

Today we are going to hear from the staff on the progress of implementing the internal NRC drug testing program. Today's meeting is a counterpart to our discussion last month with industry representatives on the status of implementation of the Fitness for Duty Program for the nuclear industry.

As I noted at that meeting, the only people at the various plant sites that are not subject to some form of Fitness for Duty program are NRC employees. I believe it is important that we close that gap as soon as possible, and of course consistent with meeting the requirements established by Congress and by the Executive Branch.

It is better to define where we stand, in my judgment, regarding those requirements than to continue in this current position we are in of uncertainty. That is why we scheduled this meeting today, to see if we can't get the status report and to look at the schedule of accomplishing an NRC drug testing program and putting it into execution.

I would like to emphasize that this is a status briefing today, and that we don't expect to make any Commission decisions at this time; but that we do expect to be brought up to date on the status of the NRC drug testing program.

It is my understanding that vu-graphs are available at the back of the room that will be used in today's

1 presentation.

2 Do any of my colleagues have any opening remarks  
3 before we begin?

4 [No response.]

5 CHAIRMAN ZECH: If not, Mr. Stello, would you proceed  
6 please.

7 MR. STELLO: Thank you, Mr. Chairman.

8 I think it is important to emphasize that this is a  
9 meeting on what the NRC is going to do about drug testing  
10 within the NRC for NRC employees, and there is no direct  
11 connection or coupling to the industry's Fitness for Duty  
12 program.

13 We have followed the guidance as it evolved in the  
14 Federal Government. We believe we have met all of the  
15 requirements in the guidance that has evolved, and we are now  
16 in a position and, as we will explain to you shortly, prepared  
17 to move to a drug testing program as soon as the required  
18 approvals as set forth by law are obtained. Once they are  
19 obtained, we will describe to you the steps that are necessary  
20 that we will be taking that will lead to a drug testing program  
21 that could initiate as early as April of this year.

22 I will ask Mr. Taylor to give you a brief summary of  
23 where we are, and shortly Mr. Bird will take you through the  
24 details of the status of where we are with the program and lay  
25 out for you the series of steps that have yet to be taken, what

1 they are, and how we will finally get into a drug testing  
2 program.

3 CHAIRMAN ZECH: All right, thank you.

4 Mr. Taylor, you may begin, please.

5 MR. TAYLOR: Thank you, sir.

6 On the 9th of July of 1987 the NRC drug policy was  
7 issued, as approved by the Commission, to all employees setting  
8 the NRC as a zero-tolerance agency with regard to illegal  
9 drugs, and setting forth in the policy the major provisions  
10 that the Commission desired in the forthcoming drug testing  
11 program.

12 Two days later, on July 11th, legislation was passed  
13 which placed two major legal constraints on implementing drug  
14 testing programs throughout the Federal Government, including  
15 the program which the staff is beginning to develop here in the  
16 NRC.

17 Despite these constraints, the staff has worked and  
18 is considerably ahead of other Federal agencies in its category  
19 towards implementing a drug testing program, and that is what  
20 we will try to show you today.

21 For example, our staff response to the Department of  
22 Justice concerning the July 11th legislation has resulted in a  
23 special exception being granted the NRC in the planned Order  
24 for certification of our testing program. This means that the  
25 NRC, we estimate, is about a year ahead of other similar

1 Federal agencies in its category with regard to drug testing,  
2 and these agencies also are covered by the July 11th  
3 legislation.

4 In fact, we are pleased to report to the Commission  
5 today, and you will see in the details to follow, that we have  
6 submitted our drug testing plan to the Department of Health and  
7 Human Services, and to DOJ, for their approval. That happened  
8 over the holiday period, and we have followed the HHS  
9 guidelines and the law and the Executive Order as we understand  
10 them in developing our detailed plan. A copy of that plan was  
11 provided to the Commission.

12 We have worked hard to be sure we are ready to  
13 implement a program as soon as it is legally permissible for us  
14 to do so. We now project, by informal discussions with  
15 counterparts in HHS, DOJ, and OMB, that we could begin testing  
16 NRC nonbargaining-unit employees by April of 1988, this year,  
17 and you will see that developed in this presentation. The key  
18 to doing that is our projected approvals to be obtained from  
19 HHS and DOJ. OMB's report is reporting fiscal information to  
20 them, and we did issue a letter of projected costs to OMB. So  
21 we are working that channel, also.

22 I will now ask Paul Bird to provide the details of  
23 the presentation.

24 COMMISSIONER BERNTHAL: Just one question. When you  
25 say "nonbargaining unit employees," does that separate out

1       rather clearly along organizational lines? Or does that cut  
2       across organizational lines? In other words, of these major  
3       categories with unescorted access, for example, who would that  
4       affect and who would that not affect?

5               MR. TAYLOR: Yes, it does.

6               Paul, maybe you would care to answer, but as an  
7       example a senior resident is a nonbargaining unit position.  
8       The second resident is a bargaining-unit position, in the main.  
9       Have I said that right?

10              MR. BIRD: Yes. Essentially it cuts across a  
11       managerial/supervisory line versus nonmanagerial/supervisory.

12              COMMISSIONER BERNTHAL: I see.

13              MR. BIRD: That is the large portion.

14              COMMISSIONER BERNTHAL: Isn't that--well, the next  
15       obvious question is: You've got to resident inspectors. One  
16       is the senior, and one is the junior, and you are going to  
17       propose to go ahead with one and not the other?

18              MR. TAYLOR: That's correct, until we are able to  
19       negotiate this with the union people.

20              COMMISSIONER BERNTHAL: It sounds like trouble to me.

21              MR. STELLO: We don't want to do that, but we are  
22       obligated, when all the approvals are in, to go forward with  
23       negotiations with the union. It is conceivable that those will  
24       have been finished, so we will be able to do both reasonably  
25       close to the same time, but there is no guarantee.

1           COMMISSIONER BERNTHAL: Maybe, Paul, you would like  
2 to comment. You are the personnel expert here. Maybe you  
3 ought to comment on any morale and management difficulties you  
4 can foresee with that kind of a distinction being made between  
5 two people with essentially the same duties.

6           MR. TAYLOR: If it is acceptable to you, I will ask  
7 Paul to do that during his presentation, and then pick that up.

8           COMMISSIONER BERNTHAL: That's fine. Yes.

9           MR. TAYLOR: We do hit on that.

10          CHAIRMAN ZECH: Mr. Bird, you may proceed.

11          MR. BIRD: Fine. Thank you very much.

12                 I would like to introduce the people who you may not  
13 know at the table. To the left of Mr. Parler is Dennis Dambly  
14 from the Office of General Counsel. Dennis and his staff have  
15 worked with us arm-in-arm in the development of this plan.

16                 Next to Dennis is Dick Dopp of the Office of  
17 Security. Dennis is working essentially on the testing aspects  
18 of the plan.

19                 To my left is Greg Benoit of my staff, Policy and  
20 Labor Relations, who has worked hand in hand with this group in  
21 development of the plan to date.

22                 Now I would like to start with the slide  
23 presentation, if I could. I will direct your attention to the  
24 information before you.

25                 [Slide No. 1.]

1           MR. BIRD: The President issued the Executive Order  
2   12564 on September 15th of 1986 which required Federal agencies  
3   to develop plans for a drug-free work place.

4           The NRC issued a policy statement on July the 9th of  
5   1987 which conformed with the Executive Order. Basically it  
6   called for a number of things:

7           One, that the NRC would be a zero-tolerance agency  
8   and would not tolerate the use of drugs;

9           Secondly, that we would institute a random testing  
10   program for employees--

11          CHAIRMAN ZECH: When you're talking "drugs," I  
12   presume you're talking about illegal drugs?

13          MR. BIRD: Illegal drugs, that is correct.

14          CHAIRMAN ZECH: All right. Go ahead.

15          MR. BIRD: That we would institute--

16          COMMISSIONER CARR: And alcohol, right?

17          MR. BIRD: Well, alcohol is not part of this  
18   particular plan, but certainly we are doing a lot of activities  
19   and have been over a time related to alcohol use and  
20   rehabilitation.

21          Basically we developed a random testing process which  
22   would involve employees in certain sensitive positions,  
23   particularly those with unescorted access to nuclear  
24   facilities, to people that are involved in our incident  
25   response center, and to people that have access to classified

1 information.

2 We also have proposed five additional types of  
3 testing which we can discuss later on in the presentation, and  
4 we are ready to begin testing as soon as we feel it is legally  
5 permissible to proceed.

6 Can I have the next slide, please.

7 [Slide No. 2.]

8 MR. BIRD: Two days following the issuance of the NRC  
9 policy statement on testing for illegal drugs, Public Law 100-  
10 71 was passed by the Congress and signed by the President. It  
11 was a supplemental appropriations bill. However, it included  
12 certain requirements for Federal agencies to engage in drug  
13 testing programs.

14 The basic requirement was that the Department of  
15 Health and Human Services--referred to in the slide as "HHS"--  
16 was to publish mandatory guidelines prior to any testing  
17 programs in the Federal Government, with the exception of those  
18 agencies that are already engaged in testing.

19 The HHS guidelines which are now in draft form, if  
20 you would note the footnote at the bottom, call for certain  
21 requirements to be met prior to any agency implementation.  
22 Largely these are the technical requirements for testing, and  
23 the requirements for specifying that certain medical review  
24 officers and rehabilitation officers meet certain criteria, and  
25 we have passed that down to you in your background information.

1           It is rather specific guidance, and if you will look  
2 through it you will note that it is aimed at preventing any  
3 false findings in the testing.

4           We now have those draft guidelines, and we expect the  
5 final guidelines to be issued by HHS on January 30 of this  
6 year. Hopefully our plan, which has already been submitted to  
7 HHS, would meet those guidelines. We feel that we certainly  
8 meet the draft guidelines and don't anticipate a great deal of  
9 change between now and the final issuance.

10           Could I have the next slide, please.

11           [Slide No. 3.]

12           MR. BIRD: The Public Law also specified that no  
13 funds could be expended for drug testing in the Federal  
14 Government under the Executive Order until the Secretary of HHS  
15 had certified to Congress that drug testing plans, including  
16 the NRC, were in accordance with the Executive order, other  
17 laws and mandatory guidelines; that the Secretary of HHS would  
18 also submit to Congress the criteria for designating positions  
19 for testing; and identifying those positions, and the nature,  
20 and frequency, and type of drug testing.

21           We have covered these subjects in our plan that we  
22 have submitted to the Secretary of HHS. That plan was  
23 submitted in December, as Mr. Stello has said. It also calls  
24 for us to advise OMB on the cost of implementing this program,  
25 and we sent a letter forward to OMB estimating our costs for

1 this year, and also the costs in future years.

2 COMMISSIONER ROBERTS: What are those costs?

3 MR. BIRD: We estimate that in the current year, if  
4 we begin testing in April, the cost would be approximately  
5 \$85,000 for the current year. Those costs would then fluctuate  
6 in the following year. The cost is, I believe, \$134,000--or  
7 \$144,000--well, it is \$152,000. Then, because of the training  
8 planned, some of the training which is planned to be done every  
9 other year, that cost would fluctuate by \$10,000, but it would  
10 likely be in the \$150,000 range if the estimates of what each  
11 test would cost hold up. That includes travel costs, resource  
12 costs inside the agency, and so forth.

13 COMMISSIONER ROBERTS: Well, I don't know much about  
14 this area, but it is my understanding that there is a wide  
15 variation in the cost of this testing. Now are we getting--  
16 what are you using for your planning purposes?

17 MR. BIRD: Well, for planning, OMB is providing some  
18 guidance on what they believe would be the cost of a test.

19 COMMISSIONER ROBERTS: That's from OMB?

20 MR. BIRD: That's from OMB, giving an estimate of  
21 what they believe those costs would be. Then we supplement  
22 that with the cost that we think we would entail beyond those  
23 types of costs. We know what a test kit costs. We know what a  
24 laboratory test will cost us.

25 COMMISSIONER ROBERTS: That's where I understand

1       there is a lot of variation.

2               MR. BIRD: We are estimating, and I think this is  
3       again based on OMB guidance, that the laboratory testing would  
4       be roughly \$25 to \$30, given the volume. In contracting for  
5       that service--and it is going to be an HHS-driven contract--I  
6       think the Federal Government as a whole, given the number of  
7       tests that would be administered, will have a reasonable rate  
8       for that administration.

9               MR. TAYLOR: Mr. Roberts--

10              COMMISSIONER ROBERTS: I am more interested in the  
11       accuracy than the rate.

12              MR. TAYLOR: Right. Mr. Roberts, we expect the tests  
13       at HHS-certified laboratories.

14              COMMISSIONER ROBERTS: Okay.

15              MR. TAYLOR: And if the HHS certifications aren't in  
16       place by the time we're ready, we would be poised to go to  
17       laboratories that have current DOD-type programs. So we are  
18       being very careful about the selection. In fact, HHS expects  
19       to have the lab certified, and they will be certified for  
20       Federal sector use.

21              COMMISSIONER ROBERTS: Thank you.

22              MR. BIRD: We do believe we have a favorable rate,  
23       since it would be basically a government-wide rate.

24              Could I have the next slide, please.

25              [Slide No. 4.]

1           MR. BIRD: The staff has been working very hard to  
2 try to get our provisions for drug testing implementation into  
3 place. As you can see on this list, a number of activities  
4 have already been completed. Beyond assuring the availability  
5 of funds, we have identified the positions that we believe fall  
6 into the testing designated categories. This is approximately  
7 1200 NRC positions. About 600 of those positions, or about  
8 half of those, are nonbargaining unit positions and about half  
9 are bargaining unit positions that are in the random testing  
10 category.

11           We have developed a random selection process and  
12 procedures. We have established procedures for  
13 reviewing--

14           COMMISSIONER ROBERTS: Pardon me.

15           MR. BIRD: Yes.

16           COMMISSIONER ROBERTS: It is terribly important that  
17 this random selection be credible.

18           MR. BIRD: Yes.

19           COMMISSIONER ROBERTS: Can you give me a little bit  
20 about the procedure?

21           MR. BIRD: Yes, I can. I can tell you that Dan  
22 Lurie, who is here, can probably speak to the random selection  
23 process more specifically, but the process is based on the  
24 selection of Social Security numbers on a random basis. We  
25 would plan to select in a year's time frame on an annual basis

1 1200 names from a list of 1200 potential selectees.

2 What this will mean is that not everyone in the  
3 category for testing would be selected every year. However,  
4 the estimate is about 65 percent of those that are in the  
5 testing-designated pool would be selected on an annual basis.  
6 Over a longer period of time, there would be an expectation  
7 that everyone that was in the testing-designated category would  
8 be selected at some point.

9 However, someone may have more than one test in one  
10 year, since it is random.

11 COMMISSIONER ROBERTS: The random selection process  
12 has got to be a credible one. That's all I'm saying.

13 MR. BIRD: Yes. And we are working with experts to  
14 make sure that it is random. My belief at this time is that  
15 that will be the case.

16 The procedures for determining what happens if we  
17 have a positive drug test finding are also included in the plan  
18 that we sent to you. We have completed the OMB cost estimate,  
19 as was mentioned earlier, and we submitted our plan to both HHS  
20 and DOJ for certification.

21 COMMISSIONER ROBERTS: Now you have indicated when  
22 you hope or expect to hear from HHS. What about DOJ?

23 MR. BIRD: We would be expecting to hear from DOJ at  
24 the same time, because the Secretary of HHS and the Department  
25 of Justice are basically working hand in hand here. So

1       although they are separate departments and we sent this plan to  
2       them independently, we would expect the outcome to be  
3       simultaneous.

4               MR. PARLER:   Commissioner Roberts, as far as the  
5       Department of Justice is concerned, Mr. Dambly and I have  
6       talked with them from time to time.   I have no reason to  
7       believe that there will be a problem with them.   As a matter of  
8       fact, this plan that they are talking about is a part of an  
9       overall government effort.   We are no longer in the mode of  
10      operation that we were in July of 1986 where we were proceeding  
11      independently.   So I don't anticipate any problem there, at  
12      least from my standpoint.

13              COMMISSIONER ROBERTS:   Thank you.

14              MR. BIRD:   The last item on the slide is worthy of  
15      mention.   We have issued solicitations to certain contractors  
16      that we would expect to be working with in the process of  
17      implementation having to do with the collection and testing;  
18      the medical review officer, if you look at the acronym "MRO,"  
19      that's what that implies; and the employee assistance program,  
20      which is what EAP implies on the slide.   We do have those  
21      contracts out for bid.   Since this Public Law prevents us from  
22      expending funds at this time, we will not proceed with those  
23      contractual arrangements until such time as we feel we are in  
24      the legal position to do so, which should be shortly following  
25      the HHS approval.

1 My I have the next slide, please.

2 [Slide No. 5.]

3 MR. BIRD: The next milestone that is really critical  
4 is the final publication of the HHS guidelines. We believe  
5 that they will do this by the end of this month. Then the two  
6 approvals from DOJ and HHS would be expected to occur.

7 At that point when we have that approval, we are  
8 required to issue a 60-day notice to all employees regarding  
9 our drug testing plan, and a 30-day notice for those in the  
10 testing designated pool in the random sample. These issuances  
11 can occur simultaneously.

12 The final publication of a Privacy Act System of  
13 Records, which has to be in place before we can implement, is  
14 expected in February, along with the contracts awards. That  
15 would mean, if these approvals fall into place, that we could  
16 begin implementation for nonbargaining unit employees as early  
17 as April of this year, and that is what we are shooting for.

18 COMMISSIONER CARR: And that date is decided by the  
19 60-day notification?

20 MR. BIRD: Yes.

21 COMMISSIONER CARR: Okay.

22 MR. BIRD: We have already begun talking informally  
23 with the union. We expect to begin negotiations at the point  
24 that we have the final HHS guidelines. That doesn't  
25 necessarily fall after these other dates, but it would be

1 contingent on having the final guidelines to discuss with the  
2 bargaining unit.

3 Could I have the next slide? That is the last slide.  
4 We would be happy to answer any questions that you have related  
5 to this program.

6 CHAIRMAN ZECH: All right. Thank you, very much.

7 Questions, my fellow Commissioners?

8 COMMISSIONER ROBERTS: Yes.

9 CHAIRMAN ZECH: Commissioner Roberts.

10 COMMISSIONER ROBERTS: On your first slide, other  
11 than the random testing, we've got "voluntary," "reasonable  
12 suspicion," "specific condition," "pre-employment," and  
13 "rehabilitation." All those are self-evident except  
14 "voluntary." What do you mean by that?

15 MR. BIRD: That would be someone who would come  
16 forward voluntarily and ask to be tested.

17 COMMISSIONER ROBERTS: Why would anyone do that?

18 MR. STELLO: The example cited a moment ago: The  
19 senior resident would be covered under the bargaining unit as a  
20 nonbargaining unit employee. The other resident may choose at  
21 that point--may desire to enter into the program voluntarily,  
22 for a variety of reasons. As you are aware, we have at least  
23 one particular facility which is requiring drug testing of our  
24 employees, pursuant to their program. We clearly obviously  
25 would prefer ours, and they could volunteer to go into our

1 program at any point in time. Anyone could.

2 COMMISSIONER ROBERTS: All right.

3 CHAIRMAN ZECH: Commissioner Bernthal.

4 COMMISSIONER BERNTHAL: Well, I don't have any  
5 detailed questions at this point. I'm having a little trouble  
6 because I don't have in front of me the paper on which the  
7 Commission took official action. I am having a little trouble  
8 correlating that with the final form of the policy statement  
9 here.

10 I would note that there are elements in this  
11 Commission Policy Statement with which I have taken strong  
12 exception, and I note one in particular: the so-called  
13 "loyalty oath provision" here that all new employees be  
14 required to sign a statement acknowledging NRC as a zero-  
15 tolerance agency, et cetera, et cetera. It is reminiscent of  
16 the "I am not a communist" loyalty oath kind of thing that was  
17 required in California some years ago. I think that is  
18 repugnant, and I think it is legally unenforceable, and  
19 probably without any legal effect.

20 COMMISSIONER CARR: Could we have the General Counsel  
21 make a comment as to that?

22 MR. PARLER: I am quite aware of the Commissioner's  
23 position. It was reflected in his memorandum of July 6, 1987,  
24 on SECY 87-8. As far as I can tell, the plan that is being  
25 discussed here today does not provide for such a statement.

1 But as we explained earlier, that was one of the issues that we  
2 were asked to legally address, and we did it in some detail in  
3 attachment No. 3 of SECY 87-8A dated March 12, 1987; that it  
4 simply would have no teeth to it, at least from a legal  
5 standpoint.

6 It would simply put everybody on notice that this  
7 agency is a zero-tolerance agency, for whatever that means.

8 COMMISSIONER BERNTHAL: I think that reflects my  
9 comment, that it is legally unenforceable. I think that is  
10 what he has just told us.

11 COMMISSIONER CARR: But it does notify the hiree.

12 COMMISSIONER BERNTHAL: What's that? Sorry?

13 COMMISSIONER CARR: It does notify the applicant of  
14 what the agency's policy is.

15 MR. PARLER: That's what I tried to just say. As you  
16 know, that should be the agency's policy in any event from the  
17 Executive Order, because the Executive Order is entitled "A  
18 Drug Free Federal Work Place." The difference between a drug-  
19 free Federal work place and a zero-tolerance agency kind of  
20 like escapes me. So everybody who is coming to work for this  
21 agency, or works with this agency, knows that it is a zero-  
22 tolerance agency.

23 I would assume, whether they were asked to sign  
24 something or not--this is in your area, not mine--the people  
25 would certainly be told that early on at the very beginning of

1 their career, whether they signed the statement or not.

2 COMMISSIONER CARR: But it would be legally correct  
3 to say that they had been informed, because they had signed the  
4 statement.

5 MR. PARLER: Right.

6 COMMISSIONER CARR: Which I think is the only purpose  
7 of the statement.

8 MR. PARLER: That's what we concluded earlier.

9 COMMISSIONER BERNTHAL: Well, it is legally  
10 unenforceable to require the signing of the statement is the  
11 point.

12 COMMISSIONER CARR: But that is not what you are  
13 trying to enforce is the statement.

14 COMMISSIONER BERNTHAL: You are requiring--

15 COMMISSIONER CARR: You are trying to enforce  
16 something against illegal use of drugs.

17 COMMISSIONER BERNTHAL: You are requiring new  
18 employees to sign a statement which I think there is some  
19 question whether you can legally enforce the requirement to  
20 sign that statement. That is the point.

21 MR. PARLER: Well, if they don't want to sign a  
22 statement, they have no Divine Right that I know of to work  
23 here.

24 [Laughter.]

25 MR. PARLER: This agency's positions under the

1 Executive Order are all, as I understand it, sensitive  
2 positions. Therefore, the agency does have some flexibility  
3 under the law to decide what the qualifications are for its  
4 prospective employees.

5 COMMISSIONER BERNTHAL: Well, that is not the  
6 question. The qualifications are precisely not the question.  
7 The question is--

8 MR. PARLER: But what you're driving at, when you  
9 refer to McCarthy, is that whether you sign the loyalty oath or  
10 you refuse to sign it, that one of the organizations is on a  
11 list or something and that means that you have had it, you are  
12 terminated, et cetera, et cetera.

13 We have said in our earlier legal analysis that this  
14 statement does not go that far. At least it says what the  
15 policy is and puts the people on notice.

16 Now if this statement is used and somebody refuses to  
17 sign it, this agency will have to do whatever it does in  
18 similar circumstances. You will look at everything and decide  
19 what to do.

20 COMMISSIONER CARR: Well, I could call up whoever it  
21 is personally and sign a memo for the record, which would make  
22 it pertinent that he had been informed of the policy, which is  
23 all we want.

24 MR. PARLER: Is the statement a part of the current  
25 plan? I thought it was not in the plan.

1 MR. STELLO: Our intent is to do that.

2 MR. PARLER: It wasn't in the plan that I--

3 MR. STELLO: It doesn't need to be in the plan, but  
4 we will develop a form that people will be asked to sign that  
5 will make them understand this is the policy of the agency.

6 COMMISSIONER BERNTHAL: And is that going to be used  
7 to wash out people who might choose not to sign it?

8 MR. STELLO: If they don't choose to sign that form  
9 or any other form that we require, then they don't--as General  
10 Counsel said--have a right to be employed here.

11 COMMISSIONER BERNTHAL: If they refuse to sign an  
12 acknowledgement that they have been informed, can you legally  
13 wash them out of the hiring process then, Bill?

14 CHAIRMAN ZECH: Well, maybe --whether it's legally to  
15 wash them out or not, it seems to me that our agency has the  
16 authority to execute such a policy. Now if that policy were  
17 challenged and taken to court, certainly it could be decided in  
18 court. But as I understand, it was the majority of the  
19 Commission that viewed it was straightforward, open, honest,  
20 and important to inform employees, if they work for this  
21 agency, that they would be expected to work in a drug-free  
22 environment.

23 COMMISSIONER BERNTHAL: That is not the issue.

24 CHAIRMAN ZECH: That is the issue.

25 COMMISSIONER BERNTHAL: It is not. The issue is

1       whether to--

2               CHAIRMAN ZECH:  The issue is to inform employees that  
3       this is a drug-free agency.

4               COMMISSIONER BERNTHAL:  You're not informing them,  
5       you're requiring them to sign it.

6               COMMISSIONER ROBERTS:  We're not going to solve your  
7       issue right here.  That's going to be done in the courts.  So  
8       we're wasting time discussing it.

9               COMMISSIONER BERNTHAL:  Well, but the point is that  
10       in the first place that provision was placed in this policy  
11       while I was on leave, without my consultation, and I do not  
12       approve of it the way it stands.

13               The issue is not one of informing the employees.  We  
14       can do that, and we can require employees to read it, but to  
15       require them to sign a statement and then say, as apparently  
16       we're being told, that if you don't sign a statement saying  
17       that you realize this is a zero-tolerance agency that you're  
18       not eligible for employment in this agency, that is the  
19       question and that is the thing which I feel is legally  
20       unenforceable.

21               COMMISSIONER CARR:  Is it not true that we require  
22       them to sign an application and swear to all the things in  
23       their application for employment that are true?  We require  
24       them to sign that.

25               COMMISSIONER BERNTHAL:  I think that this goes beyond

1       that, Ken.

2               COMMISSIONER ROBERTS: But, Fred, your issue will be  
3       decided in the courts and not at this table.

4               COMMISSIONER BERNTHAL: Yes, it will be. It will be  
5       decided in the courts. There's no question about that.

6               MR. PARLER: I doubt that it will ever come to that  
7       point.

8               CHAIRMAN ZECH: Well in any case I think, Mr.  
9       Bernthal, your position has been made clear, and I think  
10      perhaps the rest of us differ with that position. That happens  
11      on this Commission from time to time, but I do think that if it  
12      does go to the courts, so be it. We all obey the law, and we  
13      will obey the law. But I think the intent is, at least with  
14      the majority of us as I understand, is to be forthright, open,  
15      and honest with employees of this agency, recognizing before  
16      they come aboard that this is a drug-free agency and if they  
17      wish to come aboard they may, if they do not wish to come  
18      aboard under those circumstances they may not; but again, I  
19      fully recognize that this court be tested in court.

20              It is my personal position that it is very important  
21      to put that position forward, and that is the intent of this  
22      statement. But I do think, since it is going to be tested in  
23      court, so be it; I think we should move along.

24              MR. PARLER: It may well--if the issue comes up, that  
25      is where it will be resolved. I don't know whether it will be

1 tested or not.

2 CHAIRMAN ZECH: No, I don't either, but as I say we  
3 recognize that that is certainly a distinct possibility. But  
4 my view is that it is important that we be up front in this  
5 kind of a statement.

6 COMMISSIONER BERNTHAL: Look, I don't disagree for a  
7 moment that we be up front, and all that requires is that we  
8 inform employees that are coming in that this is a zero-  
9 tolerance agency. That is not what we are talking about. We  
10 are talking about a requirement here that they sign a  
11 statement. I think that should be clear by now.

12 COMMISSIONER CARR: But having a lot of experience in  
13 trying to get people tagged who have used drugs, one of the  
14 requirements is that they knew that they weren't supposed to.

15 CHAIRMAN ZECH: Well, let's see--

16 COMMISSIONER CARR: How are you going to get around  
17 that?

18 COMMISSIONER BERNTHAL: Maybe we ought to have the  
19 General Counsel ask whether the entire Federal--or answer the  
20 question of whether the Federal program, and a statement, a  
21 policy statement by the Commission is sufficient to fulfill the  
22 requirement that employees have been informed of--Well, in any  
23 case, what about all of the many employees who aren't new  
24 hirees? Should we require everybody now an employee to sign a  
25 statement so they all know, as well?

1 COMMISSIONER CARR: Do you want my vote?

2 COMMISSIONER BERNTHAL: You'd like everybody to sign  
3 a statement now?

4 COMMISSIONER CARR: I would be happy to.

5 COMMISSIONER BERNTHAL: So would I.

6 CHAIRMAN ZECH: We've got two of them right now.

7 COMMISSIONER BERNTHAL: Could we require that, Mr.  
8 General Counsel?

9 MR. PARLER: I suppose that you could require the  
10 employees to sign a statement that they know that their  
11 offices, for the most part, in the new White Flint buildings  
12 are going to be open spaces and it's Commission policy that you  
13 ask them to sign a statement about it.

14 The difficult question is: What can you do about it  
15 if you don't sign it?

16 COMMISSIONER BERNTHAL: That's right.

17 MR. PARLER: And if that issue comes to pass and it  
18 cannot be resolved amicably, if you have the system tested, the  
19 part of our government that resolves those disputes are  
20 obviously the court, so I can't resolve that. This is not like  
21 the legal situation that was presented to me shortly after I  
22 took this office and I was asked to render an opinion on the  
23 constitutionality of random testing across the board, which I  
24 did, and that's in an attachment to the first paper, 86-223.

25 There were obviously some things that had to be

1 addressed there that clearly had the real potential for  
2 clashing with the Constitution. What you are asking me here is  
3 not that clear. Somebody else will have to decide that  
4 question if it comes up.

5 To me, legally, it does not affront my sense of  
6 fairness, or my understanding of the Constitution or any  
7 Federal law to require somebody to sign a statement that they  
8 understand something about an agency policy. As a matter of  
9 fact, if there were better understandings about various agency  
10 policies, perhaps some of us would have probably been happier  
11 over the years so we could find out even now what the heck is  
12 going on and not find out 15 or 20 years later.

13 [Laughter.]

14 CHAIRMAN ZECH: Can we move along, Commissioner  
15 Bernthal?

16 MR. STELLO: I would suggest, Mr. Chairman, that it  
17 may not completely answer this question, but on page 15 of the  
18 plan that you have in front of you: "Each employee in a testing  
19 designated position shall be asked to acknowledge in writing  
20 that the employee has received a written notice which states  
21 that the employee's position has been designated for random  
22 drug testing, and that refusal to submit to testing will result  
23 in initiation of disciplinary action up to and including  
24 removal."

25 In other words, every employee who is to be part of

1 this testing program will have to submit in writing that they  
2 understand what the rules are, and I think that is reasonably  
3 clear notice.

4 COMMISSIONER BERNTHAL: That is a different question.

5 MR. PARLER: That is is a designated position. That  
6 is different from what we have been talking about, in my  
7 judgment.

8 COMMISSIONER BERNTHAL: Yes, that's right. I think  
9 there is no problem with that.

10 CHAIRMAN ZECH: Well, look, to make very clear here--

11

12 COMMISSIONER CARR: Your point, Fred, is not an  
13 overcomeable obstacle. If the man doesn't want to sign it, or  
14 the woman, whoever, if they want I'll read them the policy and  
15 then I'll witness it in front of somebody else that they have  
16 been--that the policy has been read to them. That is all I  
17 want them to know, so they can't come in then with a defense  
18 that says I didn't know what the policy was.

19 CHAIRMAN ZECH: That's how I feel, too. The intent  
20 is that they be informed of the policy. That's the important  
21 thing. The mechanics of how they're informed is not important  
22 to me, either; but the important thing to me is that they be  
23 informed so that they actually know what the policy is. That  
24 is important, I believe.

25 COMMISSIONER BERNTHAL: There is no disagreement

1     about that. The idea of informing them is one thing. The idea  
2     of seeking to enforce as a legal matter the requirement to sign  
3     that sort of thing is a separate question which, as Tom says,  
4     will be decided in the courts. So I think there is enough  
5     said.

6             I want to make very clear that, as I think I have  
7     many times, for the record that I, like the rest of my  
8     colleagues, have reached a determination that, at least in my  
9     case, that limited random testing, not agency-wide random  
10    testing, of individuals with unescorted access to vital areas,  
11    and those people with special positions of responsibility  
12    analogous to train engineers, perhaps, for Amtrak, that it is  
13    essential for our regulatory mission that those people be  
14    subjected to random drug testing, and I fully concur with the  
15    agency's policy in these areas and the Commission's stated  
16    policy.

17            I have had some difficulty with certain--with the  
18    path we have taken to this objective. We are not now going to  
19    do random testing throughout this agency. I had some  
20    difficulty with that when that proposal was made. I am still  
21    having some difficulty, as you can tell, with the seemingly  
22    implied requirement as a condition of employment that somebody  
23    sign a statement which I suspect is not legally enforceable,  
24    but we will find out in the courts if someone chooses to  
25    challenge it.

1           Those are the comments I wanted to make.

2           CHAIRMAN ZECH: Commissioner Carr?

3           COMMISSIONER CARR: Yes. On the nonbargaining-unit  
4 versus bargaining-unit, doesn't the 60-day requirement apply to  
5 everybody?

6           MR. BIRD: Yes, it would. The 60-day requirement--

7           COMMISSIONER CARR: So what you're saying is it may  
8 be longer than 60 days before the nonbargaining unit people--

9           MR. BIRD: That's correct.

10          COMMISSIONER CARR: And how are we doing on those  
11 negotiations? Aren't we negotiating now?

12          MR. BIRD: We have been talking informally. We are  
13 not formally negotiating, pending getting the final HHS  
14 guidance.

15          COMMISSIONER CARR: Well, couldn't we start?

16          MR. BIRD: In essence, we have begun a dialogue.  
17 However, we want to have the final guidelines because that  
18 would be the point of departure. Those guidelines, basically  
19 coming from HHS, will be the bargainable subject.

20          MR. PARLER: Could I comment briefly on that? Since  
21 this is a part of a government-wide program, there is some  
22 concern in certain quarters, at least from the legal  
23 standpoint, that there not be premature negotiations which  
24 could raise certain types of legal issues unnecessarily. You  
25 wait until you get all your ducks lined up and then proceed.

1                   COMMISSIONER CARR: Are you telling me that we have  
2 to wait for somebody else to negotiate before we can?

3                   MR. PARLER: No. Wait until the plan passes muster  
4 with Justice and HHS before we do anything prematurely.

5                   COMMISSIONER CARR: Okay.

6                   MR. PARLER: I was asked, personally, to try to do  
7 that by somebody from the office over there.

8                   COMMISSIONER CARR: All right. I have looked this  
9 over closely, since I am interested in it. It looks to me like  
10 there are sufficient safeguards that we won't get the wrong  
11 person with a false reading. There is a tremendous amount of  
12 quality control checks in the program. My only concern is that  
13 we can't get it in place faster.

14                  CHAIRMAN ZECH: Commissioner Rogers.

15                  COMMISSIONER ROGERS: Just a couple--one comment on  
16 that voluntary question that Mr. Stello cited as an example.  
17 It just seems to me that that would be a good place not to  
18 encourage the voluntary step because of these other questions  
19 that might come up with respect to negotiations with the  
20 bargaining unit. I think it would be a mistake for us to  
21 encourage bargaining-unit people to participate in this program  
22 until that question of the whole unit's involvement is settled  
23 with the bargaining unit.

24                  MR. PARLER: I have a comment on that. I would think  
25 that the official encouragement of any kind would cast, at

1 least in my judgment, a cloud over whether or not the effort on  
2 the part of the employee was voluntary. So to make sure that  
3 something is indeed voluntary, we have to be particularly  
4 careful, which I am sure that Mr. Bird and his colleagues will  
5 be.

6 COMMISSIONER CARR: Well, I would agree with that,  
7 but we don't want to eliminate that option for somebody who is  
8 tired of being followed around by some plant employee who--

9 MR. PARLER: A person who is tired of being followed  
10 around that wants to opt for the NRC approach rather than being  
11 followed around can, of his or her own free will, can do so,  
12 but without agency encouragement.

13 COMMISSIONER ROGERS: Well, I'm not familiar with how  
14 this particular bargaining unit functions, but in other  
15 contexts it is very unwise to do anything on an individual  
16 basis within a bargaining unit with respect to anything, any  
17 individual. So it is just a cautionary note there to look at  
18 that very carefully, because you may be negotiating something  
19 and the whole thing is upset because somebody from the  
20 bargaining unit is already participating in the program and  
21 fouls up your negotiations. It's just a general comment, but  
22 it is something I think you should look at very carefully with  
23 respect to the applications of the voluntary thing--

24 MR. BIRD: We understand that clearly.

25 COMMISSIONER ROGERS: --to people in the bargaining

1 unit until the whole unit has come in.

2 The other question is the definition of the  
3 categories that led to the 1200 number. It just occurred to me  
4 in looking at some of those people that they--and it's my  
5 impression that some of them are not aware that in fact they  
6 would fall under the requirements that led to this--that their  
7 responsibilities are such that they would fall under that; not  
8 that they necessarily object to being in the testing thing, but  
9 is it clear to all of the job categories that are listed here  
10 that would then be subject to testing that those people's  
11 responsibilities are consistent with, and their understanding  
12 of their responsibilities, is consistent with the basis on  
13 which that group was defined?

14 I don't have it here in front of me, but you define  
15 some requirements there for the sensitive positions, and I  
16 wonder if all those people in those job categories understand  
17 that they are in fact in those kinds of sensitive positions?

18 My reading is that that is not universally the case.

19 MR. BIRD: That is not the case at this point, but  
20 the intention of the notice period, and particularly the 30-day  
21 notice, is to tell everyone who is in a testing designated  
22 position that this criteria has been applied to those specific  
23 jobs, to your job, and it also allows the employee then to have  
24 an appeal to that, if they feel that the criteria have been  
25 misapplied.

1           What we have now is largely a grouping of positions  
2 identified by our senior managers for which we have, in the  
3 broad sense, tried to apply that criteria. There has been a  
4 lot of participation here, and many of the people whose  
5 positions are identified on this list are aware of that, but  
6 there are some who might not be aware or might take exception,  
7 in which case we do have an appeal process which is outside of  
8 the grievance process for those employees who come forward and  
9 state--

10           COMMISSIONER ROGERS: I was less concerned about  
11 their being selected for random testing than that they  
12 understood that their jobs were of such a nature that they had  
13 this kind of sensitive position. I get a little feedback that  
14 tells me that some people are not aware that their jobs in fact  
15 were that sensitive.

16           So there is room for clarification here in terms of  
17 what people's responsibilities are. I think I am less  
18 concerned about their being part of the testing program because  
19 I happen to be in favor of testing, but I am concerned that  
20 this seems to be surfacing a lack of understanding of the full  
21 nature of one's position in the organization, and that there is  
22 some clarification I think that needs to be made.

23           MR. BIRD: I think some clarification on the  
24 sensitive nature of the positions is warranted, and certainly  
25 the notice period will provide a mechanism for us to do that.

1                   COMMISSIONER ROGERS: And that might give you an  
2 opportunity for a little clarification through the system of  
3 people's responsibilities.

4                   MR. BIRD: I agree.

5                   COMMISSIONER ROGERS: There seems to be a little  
6 looseness there on that.

7                   The other point that doesn't come in to this, though,  
8 but I think concerns us, and certainly concerns me, is the  
9 question of alcohol abuse. It is not illegal, but it certainly  
10 is troublesome. It is not an illegal drug, but it is a  
11 troublesome problem, and I just urge that we not lose sight of  
12 the significance of that as we proceed with the "illegal drug"  
13 policy, because that can be even more serious in some ways  
14 because of the likelihood of a larger number of people being  
15 involved, since it is the use of a "legal" rather than an  
16 "illegal" substance.

17                   I just encourage us to keep working on an alcohol  
18 policy, or something, because I am not sure where that stands,  
19 but nationally that is a very serious problem.

20                   MR. BIRD: We have an ongoing program dealing with  
21 that subject matter, and certainly our intention is to enhance  
22 that along with the inclusion of further education on drugs and  
23 the drug program; but the alcohol problem is widespread, and we  
24 are dealing with that I think very successfully in this agency,  
25 from my standpoint

1           We are doing a lot of training. The training will  
2 continue and be enhanced. There's a very large focus in the  
3 employee assistance program which is mentioned here on alcohol  
4 as well as drugs.

5           COMMISSIONER ROGERS: Let me ask--I would like to  
6 hear more about that sometime, because my concern is with  
7 impaired performance, and that can extend to something that is  
8 not all that obvious.

9           MR. BIRD: We would be happy to brief you on our  
10 current program and talk to you about what we intend to do in  
11 the future in that regard.

12           CHAIRMAN ZECH: We have an ongoing training program  
13 in that regard, too, that I think it might be useful,  
14 Commissioner Rogers, for you to look into when you are looking  
15 into the general subject. I think the training program we have  
16 does make a very excellent presentation in this regard, and I  
17 think is something that we can point to as a very specific area  
18 of action that we are taking.

19           But your point is well taken. I think that training  
20 program, though, might be of great interest to you.

21           COMMISSIONER ROGERS: Well, just to stress, I am less  
22 concerned with alcoholism, although that is a problem, but I am  
23 very concerned with alcohol impairment on the job.

24           MR. BIRD: The use of alcohol as it would relate to  
25 these positions.

1 COMMISSIONER ROGERS: Yes.

2 COMMISSIONER BERNTHAL: I wanted to ask a question  
3 related to the one which Commissioner Rogers has raised,  
4 because it is a question that, as I go back and look here at  
5 what was done last July, I have wondered about myself. Let me  
6 ask two questions, one for the EDO, I guess, and perhaps one  
7 for you, Paul.

8 First, broadly speaking it was unclear to me at the  
9 time what elements of the Commission's June 16th directive were  
10 retained and remain now in what you have finally come up with  
11 here, and remained in effect as compared with the policy  
12 statement that went out in July. I was curious as to how you  
13 have resolved--I don't know whether you are prepared to speak  
14 to that now, but they were rather different. There were two  
15 modifications, and it wasn't clear after it was all said and  
16 done exactly what we were doing and what we weren't doing. If  
17 that has been resolved consciously, I would like to know how it  
18 was resolved.

19 MR. STELLO: I don't know what directive he's  
20 referring to.

21 MR. BIRD: I think I can speak to that.

22 COMMISSIONER BERNTHAL: There was a June 16th  
23 Commission directive, which was the last thing that I had a  
24 part in, and then the Commission policy statement went out  
25 while I was out of town and I had a number of difficulties with

1       that, with the details of that policy statement as it went out,  
2       and there were differences between the two, the Commission's  
3       June 16th directive and the final policy statement.

4               MR. BIRD: We don't have that June 16th directive  
5       here, but certainly we can look at the differences.

6               MR. STELLO: I don't know if there are any, and  
7       without looking at them, maybe you can enlighten me, but what  
8       we did is faithfully, as best we knew how, take the  
9       instructions from the Commission, developed the policy  
10      statement, sent it back down to the Commission for the  
11      Commission to in fact approve it. And this represents my  
12      understanding of the Commission's desire that faithfully  
13      implements the guidance of the Commission.

14              COMMISSIONER BERNTHAL: Of the June SRM, are you  
15      saying?

16              MR. STELLO: Yes.

17              MR. BIRD: Yes, sir. We tried to do that.

18              CHAIRMAN ZECH: This was the effort that took place,  
19      and that was my understanding, too.

20              MR. STELLO: That is what we were trying to do to the  
21      best of our ability.

22              COMMISSIONER BERNTHAL: So that was your guiding  
23      document and not particularly the policy statement?

24              CHAIRMAN ZECH: The policy statement, as I understand  
25      it, was developed from that SRM.

1 MR. STELLO: Yes.

2 MR. TAYLOR: Yes, sir. We attempted to do that. We  
3 may have missed--

4 COMMISSIONER BERNTHAL: Well, there were differences,  
5 I think, but that is okay.

6 MR. TAYLOR: That was our object.

7 COMMISSIONER BERNTHAL: Let me get to the question of  
8 alcohol, then, because one of the problems that I saw in the  
9 policy statement is that it was unclear as to which elements of  
10 the policy statement--and one of those was the specific  
11 condition of testing element--would apply to alcohol as well as  
12 to drugs. Are we clear in our minds, now? Is the staff clear  
13 in its more detailed considerations which of these elements  
14 will apply to alcohol as well as to illegal drugs?

15 MR. BIRD: Yes, I think we're fairly clear with that.  
16 In dealing with the alcohol problem, as we have historically,  
17 we will continue to make referrals to medical officers and work  
18 with rehabilitation counselors, professionals in that field to  
19 deal with the problem.

20 The testing aspect of that is not going to be a  
21 forced issue, at this point. We're not testing in the random  
22 testing for alcohol. However, when we have an identified  
23 problem we would certainly do everything that we could to deal  
24 with that problem.

25 COMMISSIONER BERNTHAL: So for example, then, in

1 specific condition testing, although the policy statement  
2 singles out illegal drug use, will it also apply to alcohol?  
3 Or, for that matter, to being under the influence of legal  
4 drugs?

5 MR. BIRD: It could apply. It's not necessarily a  
6 requirement that we test to verify alcohol use at this point.  
7 We would use that if we felt there was a need to test. I think  
8 our experience has been that those people who were involved  
9 with alcohol generally when they're confronted and deal with  
10 the medical officers and the rehabilitation counselors will  
11 submit to the rehabilitation without having been found through  
12 a positive test to have an alcohol problem. But the intention  
13 is not to force that with this policy.

14 In other words, we would not require a test. But  
15 certainly we would continue in our efforts to counsel employees  
16 and families of employees, and anyone who we identify, however  
17 we identify them, with the use of alcohol abuse.

18 COMMISSIONER BERNTHAL: Well, let's see. The  
19 Commission's policy does have a kind of management enforcement  
20 in the agency so that if somebody is using drugs, I would read  
21 this policy--and I think the Commission intended that this  
22 policy means that if his supervisor or a co-worker sees a  
23 condition where he suspects that there is something wrong that  
24 might involve drug use, that employee may be required to  
25 undergo testing. But you are saying that that requirement, as

1 a management matter, will not extend to suspicions of alcohol--  
2 being under the influence of alcohol in the same circumstance?

3 MR. BIRD: It's different in that it's not included  
4 in this policy.

5 COMMISSIONER BERNTHAL: That is just what I was  
6 concerned about.

7 MR. BIRD: And it's not a requirement that we test  
8 for that.

9 MR. TAYLOR: Our plan, in our specific plan, and the  
10 thing we were asked to present today is for illegal drug use.

11 COMMISSIONER BERNTHAL: I understand that.

12 MR. TAYLOR: There are numbers of parallels to  
13 current alcohol programs within the agency, including  
14 supervisory observation. So a supervisor may note aberrant  
15 behavior that may be due to alcohol, or he may not aberrant  
16 behavior that may be due to drugs, but the training--this  
17 policy, this statement is for drugs and discusses supervisory  
18 observation--right, Paul?

19 MR. BIRD: Yes.

20 MR. TAYLOR: --and training to have supervisors be  
21 aware of potential behavior which may indicate either drugs.  
22 But currently supervisors are trained to observe employees for  
23 alcohol abuse. That is part of our current program.

24 MR. BIRD: If they observe aberrant behavior, at the  
25 time they observe it they may not know whether it is drug-

1 induced or alcohol-induced, however in both cases we would work  
2 with--

3 COMMISSIONER BERNTHAL: Let me see if I can cut  
4 through this. We are not applying the same management standard  
5 for required testing, for example, to alcohol and, implicitly,  
6 to legal drugs--although I don't know how you distinguish it as  
7 a practical matter--as we are to illegal drugs?

8 MR. BIRD: As far as testing goes, I think that is  
9 correct.

10 MR. TAYLOR: That is correct.

11 COMMISSIONER BERNTHAL: Okay, that was my concern,  
12 and it remains, then.

13 COMMISSIONER CARR: Well, that's not really true.  
14 Legal drugs are addressed in this drug policy because you're  
15 supposed to notify the tester that you are under prescription  
16 drugs, and provide the data that proves that.

17 COMMISSIONER BERNTHAL: The specific condition-  
18 testing requirement is the question, and I don't think that--

19 MR. STELLO: It does not address the issue of  
20 specific condition-testing for alcohol.

21 CHAIRMAN ZECH: That's right.

22 COMMISSIONER BERNTHAL: Right.

23 MR. STELLO: That is done through the current program  
24 that we have, and perhaps we need to do more there, too.

25 COMMISSIONER BERNTHAL: Well, it only mentions

1 "illegal drugs," though.

2 MR. STELLO: That's what I said. So perhaps we need  
3 to do more about alcohol.

4 COMMISSIONER BERNTHAL: That's what I was asking.

5 MR. TAYLOR: The whole Executive Order and the HHS  
6 guidance and everything else is based on illegal drugs. It  
7 does not cover alcohol.

8 MR. PARLER: So is the public law. But  
9 unfortunately, the alcohol has always come up in this  
10 discussion, and it was alluded to in various places in the  
11 Commission's policy statement of July 9th, 1987. That's the  
12 reason for these questions, I guess.

13 CHAIRMAN ZECH: Yes. Are there other questions?

14 COMMISSIONER CARR: Yes. I would like to ask one  
15 other question. How sure are we that HHS is going to meet  
16 their deadlines? Who is our HHS prodder?

17 [Laughter.]

18 MR. BIRD: Well, Greg and I prod every place we think  
19 there may be some potential hold up or delay in implementing  
20 the program. We feel confident that HHS will issue their final  
21 guidelines by the end of the month, and that HHS is proceeding  
22 to authorize agencies to proceed with their planning.

23 Our plan is on their doorstep. Other agencies  
24 certainly are pursuing the same issue, and the sequence in  
25 which HHS approves will be based on how well we lobby to get up

1 in the top group for approval. We feel that we have done  
2 everything they have asked us to do, and certainly anticipate  
3 that we would be approved by HHS and DOJ early on, and I hope  
4 that turns out to be the case.

5 COMMISSIONER CARR: Well, maybe I suggest that if you  
6 see potential problems in this area, you let the Chairman know  
7 so he can prod?

8 MR. TAYLOR: I am certain the Chairman and I will be  
9 in close touch on this issue.

10 CHAIRMAN ZECH: That is correct. We will be.  
11 Are there other questions, my fellow Commissioners?  
12 [No response.]

13 CHAIRMAN ZECH: Well, let me just make a couple of  
14 comments, then.

15 First of all, I would like to compliment the staff on  
16 their efforts in this very important program. I think you have  
17 very diligently attempted to carry out the will of the majority  
18 of the Commission, if not all the Commissioners, in their  
19 various viewpoints.

20 I think you do recognize that the Commission does  
21 believe that we should be a drug-free agency.

22 I also believe, from what you have told us today and  
23 my understanding of looking into this program very carefully  
24 and the status of our efforts, that we are considerably further  
25 along than most other government agencies in our country, and I

1 appreciate your efforts to try to keep out in front on that  
2 regard. I agree, too, that if you have problems, if you think  
3 it is appropriate that I contact HHS or DOJ, that you inform me  
4 promptly and I assure you I will do so.

5 I think basically the American people expect that  
6 this agency will indeed be a drug-free agency. I don't think  
7 the American people really want NRC employees involved with  
8 illegal drugs. I think that is clear. Certainly it is to me.

9 We have a responsibility to the public health and  
10 safety, and that is why I feel very strongly that we should  
11 have as tough a drug policy for our employees as is legally  
12 permissible. And I do feel, as Commissioner Carr has pointed  
13 out, too, that we should put such a program in place as soon as  
14 possible. To me, this is a responsibility we have of, frankly,  
15 one of the highest priorities.

16 We know the industry does have a program in place in  
17 our utilities, for example. All of the utilities have a drug  
18 program in place. This Commission does not. This agency does  
19 not. I think we should move again as promptly as we can to  
20 rectify that situation. I think again the American people  
21 expect and demand of us, and they should, that we who are  
22 responsible for their safety have a drug-free agency to the  
23 absolute extent legally possible.

24 So I would just like to commend you for what you are  
25 doing, and ask you to again move as promptly as you legally can

1 in cooperation with the other governmental agencies of our  
2 country, and I would hope that perhaps we might be the first  
3 government agency, or certainly maybe one of the first, to put  
4 this program in effect.

5 Are there any other comments, my fellow  
6 Commissioners, before we adjourn?

7 COMMISSIONER BERNTHAL: I don't think I got the  
8 answer to the question of--maybe I did and missed it--of the  
9 resident inspectors, where we are having two groups, in effect.  
10 We talked about it, but did you speak specifically to any  
11 management or other difficulties that you might foresee in  
12 doing that?

13 I guess I really wanted to inquire as to why we  
14 can't, notwithstanding the legitimate concerns that  
15 Commissioner Rogers raises, what I would like to do--and I  
16 agree with Lando--is move quickly in these areas where we know  
17 we are on firm legal ground, and I would wonder why we can't  
18 reach an early agreement with the union perhaps so that we  
19 don't have these two classes of citizens in our resident  
20 inspectors.

21 MR. STELLO: We are going to do everything we can to  
22 avoid it. We hope to be able to get the issue resolved so that  
23 the testing for bargaining and nonbargaining unit employees  
24 will be reasonably close, but there is no way to guarantee it.  
25 It is a process of negotiation. If it goes well, we will

1 achieve that. If it doesn't, we won't.

2 But that is one of the reasons we have built in, and  
3 think it is very very important to maintain the option of  
4 voluntary testing, so that if the resident chooses and elects  
5 and wants to, they can. We are not going to push, persuade,  
6 urge; it's up to them. They will have that option, and that is  
7 the most that I see that we can do with the reality of the  
8 process that we must follow, which is that we must negotiate  
9 with the union, and there is no predicting how long that  
10 process will take with any degree of certainty. We cannot  
11 estimate it. It may go well. It may not.

12 As you are aware, there is a challenge by the union  
13 that represents the employees here to the Executive Order, as I  
14 recall, itself, that is now pending in the courts.

15 COMMISSIONER ROBERTS: Is it Customs?

16 MR. STELLO: No, NTEU is challenging the Executive  
17 Order in I've forgotten what court.

18 MR. PARLER: Yes, that is who is challenging the  
19 Executive Order. But it might be some time before that will be  
20 resolved. I don't know what position the union will take, but  
21 I do know that we shouldn't discuss negotiating tactics and  
22 issues here. That is for sure.

23 MR. STELLO: Absolutely.

24 CHAIRMAN ZECH: Are there any other final comments,  
25 my fellow Commissioners?

1 [No response.]

2 CHAIRMAN ZECH: If not, Mr. Stello, I would like to  
3 congratulate you and your colleagues for an excellent  
4 presentation. Thank you very much.

5 MR. STELLO: Thank you.

6 CHAIRMAN ZECH: We stand adjourned.

7 [Whereupon, at 11:10 a.m., the Commission meeting was  
8 adjourned.]

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1  
2 REPORTER'S CERTIFICATE  
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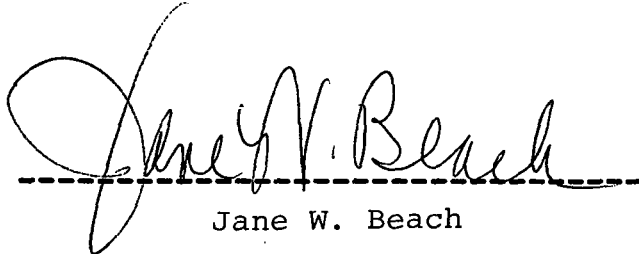
4 This is to certify that the attached events of a  
5 meeting of the U.S. Nuclear Regulatory Commission entitled:  
6

7 TITLE OF MEETING: Briefing on Status of NRC Internal Drug Program

8 PLACE OF MEETING: Washington, D.C.

9 DATE OF MEETING: Wednesday, January 6, 1988  
10

11 were held as herein appears, and that this is the original  
12 transcript thereof for the file of the Commission taken  
13 stenographically by me, thereafter reduced to typewriting by  
14 me or under the direction of the court reporting company, and  
15 that the transcript is a true and accurate record of the  
16 foregoing events.

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22 Jane W. Beach  
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22 Ann Riley & Associates, Ltd.  
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COMMISSION BRIEFING ON THE STATUS OF THE NRC DRUG TESTING PROGRAM

## BACKGROUND

E.O. 12564 (SEPTEMBER 15, 1986) REQUIRES AGENCY PLANS FOR ACHIEVING DRUG FREE WORKPLACE

NRC DRUG TESTING POLICY STATEMENT OF JULY 9, 1987, IN CONFORMANCE WITH THE E.O. PROVIDED THAT:

- USE OF DRUGS BY NRC EMPLOYEES WILL NOT BE TOLERATED
- RANDOM TESTING WILL BE REQUIRED FOR EMPLOYEES IN SENSITIVE POSITIONS (UNESCORTED ACCESS, INCIDENT RESPONSE, CLASSIFIED INFORMATION)
- VOLUNTARY, REASONABLE SUSPICION, SPECIFIC CONDITION, PRE-EMPLOYMENT AND REHABILITATION FOLLOW-UP TESTING WILL ALSO BE ESTABLISHED
- TESTING WILL BEGIN AS SOON AS LEGALLY PERMISSIBLE. NONBARGAINING UNIT EMPLOYEES WILL BE TESTED FIRST, WITHOUT WAITING FOR UNION NEGOTIATIONS TO BE COMPLETED

PUBLIC LAW 100-71, JULY 11, 1987

- A. REQUIRES DEPARTMENT OF HHS TO PUBLISH MANDATORY  
GUIDELINES PRIOR TO NRC DRUG TESTING

HHS GUIDELINES PROVIDE:

SCIENTIFIC AND TECHNICAL REQUIREMENTS

SPECIMEN COLLECTION PROCEDURES

LABORATORY ANALYSIS PROCEDURES

REPORTING AND REVIEW REQUIREMENTS

STANDARDS FOR CERTIFICATION OF TESTING LABORATORIES

PROFICIENCY TEST PROGRAM SPECIFICATIONS

(NOTE: DRAFT GUIDELINES PUBLISHED AUGUST 14, 1987.  
- FINAL GUIDELINES ANTICIPATED JANUARY 30, 1988.)

PUBLIC LAW 100-71

B. NO FUNDS FOR DRUG TESTING UNDER E. O. 12564 UNTIL:

1. SECRETARY, HHS:

- (A) CERTIFIES TO CONGRESS THAT NRC HAS A DRUG TESTING PLAN IN ACCORDANCE WITH E.O. 12564, OTHER LAWS, AND THE MANDATORY HHS GUIDELINES
- (B) SUBMITS ANALYSIS TO CONGRESS CONCERNING NRC'S CRITERIA FOR DESIGNATING POSITIONS FOR TESTING AND WHICH IDENTIFIES ALL TESTING DESIGNATED POSITIONS, AND THE NATURE, FREQUENCY AND TYPE OF DRUG TESTING.

(NOTE: NRC SUBMITTED PLAN 12/87. HHS ACTION ANTICIPATED 2/88)

2. DIRECTOR, OMB, SUBMITS ANALYSIS TO CONGRESS OF NRC'S ANTICIPATED ANNUAL COSTS FOR E.O. 12564 AND OTHER P.L. 100-71 REQUIREMENTS FOR FIRST 5 YEARS

(NOTE: NRC SUBMITTED COST ESTIMATE 12/87. OMB ACTION ANTICIPATED 2/88)

## SCHEDULE SUMMARY

<u>MILESTONE</u>	<u>LEAD RESPONSIBILITY</u>	<u>END</u>
ASSURE AVAILABILITY OF FUNDS	ARM	COMPLETED
IDENTIFY POSITIONS AND INDIVIDUALS IN THE "TESTING DESIGNATED" CATEGORIES (APPROXIMATELY 1200 POSITIONS)	OP	COMPLETED
DOCUMENT RANDOM SELECTION PROCESS AND PROCEDURES FOR COLLECTION AND RECEIPT OF TEST RESULTS	ARM	COMPLETED
ESTABLISH PROCEDURES FOR REVIEW OF POSITIVE DRUG TEST RESULTS BY MEDICAL REVIEW OFFICER	ARM	COMPLETED
COMPLETE AND SUBMIT TO OMB ESTIMATED COSTS ASSOCIATED WITH CARRYING OUT E.O. 12564	ARM	COMPLETED
SUBMIT NRC PLAN TO HHS FOR CERTIFICATION, INCLUDING POSITION TITLES AND JUSTIFICATIONS	OP	COMPLETED
SOLICITATIONS ISSUED TO POTENTIAL CONTRACTORS (COLLECTION, TESTING, MRO, AND EAP)-	ARM/OP	COMPLETED

## PROJECTED SCHEDULE SUMMARY

<u>MILESTONE</u>	<u>LEAD RESPONSIBILITY</u>	<u>END</u>
HHS PUBLICATION OF FINAL GUIDELINES	HHS	1/30/88*
DOJ APPROVAL OF NRC PLAN	DOJ	2/88*
HHS CERTIFICATION OF NRC PLAN	HHS	2/88*
ISSUE REQUIRED 60 DAY ADVANCE GENERAL NOTICE TO ALL EMPLOYEES REGARDING DRUG TESTING PLAN (CAN NOT BE ISSUED UNTIL AFTER PLAN IS CERTIFIED BY HHS AND DOJ)	OP	2/88
ISSUE REQUIRED 30 - DAY ADVANCE SPECIFIC NOTICE TO EMPLOYEES SUBJECT TO DRUG TESTING	OP	2/88
FINAL PUBLICATION OF NEW PRIVACY ACT SYSTEM OF RECORDS	ARM	2/88
ALL CONTRACTS AWARDED UPON CERTIFICATION OF NRC PLAN BY HHS	ARM	2/88
INITIATE DRUG TESTING FOR NON-BARGAINING UNIT EMPLOYEES	ARM	4/88
COMPLETE IMPACT AND IMPLEMENTATION NEGOTIATIONS WITH NTEU	OP	**
INITIATE DRUG TESTING FOR BARGAINING UNIT EMPLOYEES	ARM	**

\*PROJECTED DATE, BUT NOT UNDER NRC CONTROL.

\*\*DATES TO BE ESTABLISHED BASED ON INITIATION OF AND PROGRESS IN NEGOTIATIONS.