November 26, 2001

Mr. David A. Lochbaum
Union of Concerned Scientists
1707 H Street NW, Suite 600
Washington, DC 20006-3919

Dear Mr. Lochbaum:

This letter responds to the April 24, 2001, petition you submitted on behalf of the Union of Concerned Scientists to Dr. William Travers, Executive Director for Operations, under Section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR 2.206). The petition was supplemented on May 3, 2001.

You requested that the U.S. Nuclear Regulatory Commission (NRC) issue a Demand for Information (DFI) to the licensees listed in your petition, requiring them to provide a docketed response explaining how they comply with the requirement of 10 CFR 26.10 that licensees "provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part" and the requirement of 10 CFR 26.20 that "licensee policy should also address other factors that could affect fitness for duty [FFD] such as mental stress, fatigue and illness."

You also requested that the DFI require each licensee to generally describe its policy for the aforementioned factors and to explicitly describe its policy for these factors as applied to the security personnel supplied by the Wackenhut Corporation.

You addressed the Petition Review Board (PRB) on May 7, 2001, in a telephone conference call to clarify the bases for your petition. The transcript of this conference call is available in NRC's Agencywide Documents Access and Management System (ADAMS) (Accession No. ML012150128) and may be electronically viewed at the Commission's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland.

By letter dated May 29, 2001, NRC staff informed you that your petition met the criteria for review under 10 CFR 2.206 and would be acted upon within a reasonable time.

As a basis for the request described above, you stated that:

> An individual employed by Wackenhut Corporation and assigned duties as a security officer at Indian Nuclear 2 was fired on June 26, 2000 ... . The individual had worked five straight 12-hour shifts [(12 hours on shift followed by 12 hours off for 5 straight days)] and declined to report for a sixth straight 12-hour shift because he reported to his management—in writing—that it would be "physically and mentally exhausting." The individual reported to his management—in writing—that he was fully aware of his condition and "would not want to be negligent in performing [his] duties as a security officer."

> The security officer had unescorted access to Indian Point 2 and thus was covered by 10 CFR Part 26 as specified in Section 26.2 ... .

You also pointed out that Wackenhut employees are required by terms of their employment application, Collective Bargaining Agreement, and the Security Officer Handbook to report to work when directed.

You stated that the security officer you referred to reported to his management that he felt not fit for duty, declined to report for mandated overtime, and was terminated.

You also stated that "10 CFR 26.20 requires all licensees to have [a] formal policy and written procedures for factors that could render plant workers not fit for duty. Fatigue is specifically mentioned in 10 CFR 26.20." You contended that Wackenhut's contractual right conflicts with the Federal regulations in 10 CFR 26.10(a) and (b) and that in this case, the individual essentially provided "reasonable measures for early detection" of a condition rendering him not fit to perform activities within the scope of Part 26. You further stated that rather than respecting the individual's judgment or seeking another opinion by a Medical Review Officer or other health care professional, Wackenhut fired that individual.

The staff provided you a copy of the proposed Director's Decision for comment by letter dated September 28, 2001. You responded with comments by letter dated October 2, 2001. The comments and staff response to them are enclosures to the enclosed Director's Decision.

The staff has decided to grant your request to the extent that the NRC will address your concerns through the generic communication process. Specifically, the staff is developing a communication to all nuclear power plant licensees subject to the requirements of Part 26. The communication will highlight the concerns identified in your petition and articulate the NRC's requirements as they apply to matters involving a worker's self-declaration of FFD. The staff intends to issue the communication in the near future. Further, as the staff proceeds with proposals to revise Part 26 and address worker fatigue through rulemaking, it will consider the need to clarify the NRC's expectations concerning worker declarations of FFD and work scheduling.

A copy of this Decision will be filed with the Secretary of the Commission so that the Commission may review it in accordance with 10 CFR 2.206(c). As provided for by this regulation, the decision will constitute the final action of the Commission 25 days after the date of the decision unless the Commission, on its own motion, institutes a review of the decision within that time.

The documents cited in the enclosed decision are available in ADAMS for electronic viewing at the Commission's Public Document Room, at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and are accessible through the ADAMS Public Library on the NRC's Web site, http://www.nrc.gov/reading-rm.html (the Public Electronic Reading Room).

I have also enclosed a copy of the "Notice of Issuance of Director's Decision Under 10 CFR 2.206" that has been filed with the Office of the Federal Register for publication.

We appreciate your bringing this matter to the attention of the NRC. Please feel free to contact Mr. Chandu P. Patel, 301-415-3025, to discuss any questions related to this Petition.

Sincerely,

/RA/

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Docket No. 50-247

Enclosures: *Director's Decision* DD-01-05
Federal Register Notice

cc w/encls: See next page

We appreciate your bringing this matter to the attention of the NRC. Please feel free to contact Mr. Chandu P. Patel, 301-415-3025, to discuss any questions related to this Petition.

Sincerely,

/RA/

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Docket No. 50-247

Enclosure: Director's Decision DD-01-05
Federal Register Notice

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DD-01-05

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of	)	Docket No. 50-247
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	License No. DPR-26
	)	
	)	
(Indian Point Nuclear Generating Station Unit No. 2)	)	
	)	

DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. Introduction

By letter dated April 24, 2001, as supplemented by letter dated May 3, 2001, Mr. David A. Lochbaum, on behalf of the Union of Concerned Scientists (petitioner), pursuant to Section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR 2.206), requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) issue a Demand for Information (DFI) to licensees that use security personnel supplied by Wackenhut Corporation (Wackenhut), requiring them to provide a docketed response explaining how they comply with the requirement of 10 CFR 26.10 that licensees "provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part" and the requirement of 10 CFR 26.20 that "licensee policy should also address other factors that could affect fitness for duty [FFD] such as mental stress, fatigue and illness."

The petitioner also requested that the DFI require each licensee to generally describe its policy for the aforementioned factors and to explicitly describe its policy for these factors as applied to the security personnel supplied by Wackenhut.

II. Background

As a basis for the request described above, the petitioner stated that:

> An individual employed by Wackenhut Corporation and assigned duties as a security officer at Indian Nuclear 2 was fired on June 26, 2000 ... . The individual had worked five straight 12-hour shifts [(12 hours on shift followed by 12 hours off for 5 straight days)] and declined to report for a sixth straight 12-hour shift because he reported to his management—in writing—that it would be "physically and mentally exhausting." The individual reported to his management—in writing—that he was fully aware of his condition and "would not want to be negligent in performing [his] duties as a security officer."
>
> The security officer had unescorted access to Indian Point 2 and thus was covered by 10 CFR Part 26 as specified in Section 26.2 ... .

The petitioner also pointed out that Wackenhut employees are required by terms of their employment application, their Collective Bargaining Agreement, and the Security Officer Handbook to report to work when directed.

The petitioner stated that the subject security officer reported to his management that he felt not fit for duty, declined to report for mandated overtime, and was terminated.

The petitioner also stated that "10 CFR 26.20 requires all licensees to have [a] formal policy and written procedures for factors that could render plant workers not fit for duty. Fatigue is specifically mentioned in 10 CFR 26.20."[1] The petitioner contended that

[1] The staff acknowledges that 10 CFR 26.20 specifically mentions fatigue. However, the language is nonmandatory. Paragraph 26.20(a) states that "licensee policy *should* [emphasis added] also address other factors that could affect fitness for duty such as mental stress, fatigue, and illness."

Wackenhut's contractual right conflicts with the Federal regulations in 10 CFR 26.10(a) and (b) and that in this case, the individual essentially provided "reasonable measures for early detection" of a condition rendering him not fit to perform activities within the scope of Part 26. The petitioner further stated that, rather than respecting the individual's judgment or seeking another opinion by a Medical Review Officer or other health care professional, Wackenhut fired that individual.

Subsequently, the petitioner provided additional information by letter dated May 3, 2001, and addressed the Petition Review Board (PRB) in a transcribed telephone conference on May 7, 2001. The transcript of this telephone conference is available in the Agencywide Documents Access and Management System (ADAMS) for inspection at the Commission's Public Document Room (ADAMS accession number ML012150128), at One White Flint North, 11555 Rockville Pike (first floor), Rockville Maryland, and from the ADAMS Public Library on the NRC's Web site at http://www.nrc.gov/reading-rm.html (the Public Electronic Reading Room). If you do not have access to ADAMS, or if you have problems in accessing the documents in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr@nrc.gov. Based on the information provided by the petitioner, the PRB determined that his request met the criteria for review under 10 CFR 2.206. In addition, by letter dated June 13, 2001, the NRC responded to the petitioner's letter dated April 23, 2001, in which he requested clarification of NRC policy concerning fatigue of security personnel.

By letter dated September 28, 2001, NRC staff sent the proposed Director's Decision to the petitioner. The petitioner's reply and the staff response to the petitioner's comments are attached as Enclosures 1 and 2, respectively.

III. Discussion

In response to the petition, the staff reviewed (1) the Wackenhut Security Officer Handbook and (2) the Agreement between Wackenhut Corporation and International Union, United Plant Guard Workers of America (UGPWA) and its Amalgamated Local 515 for Security Employees at ConEd Nuclear Power Station, Indian Point, NY, for the period of March 8, 1999, to March 3, 2002 (Agreement). The purpose of the review was to determine whether the terms or conditions of these documents, as they pertain to a worker's declaration of FFD, are contrary to requirements applicable to NRC licensees, their contractors or subcontractors, or their employees. The staff also reviewed concerns received by the NRC in the last 2 years that licensee procedures, policies, or practices discouraged individuals from reporting that they were not fit for duty because of excessive fatigue. Through these reviews, the staff sought to determine whether a DFI, as requested through the petition, was warranted. The NRC is independently addressing the adverse employment action taken against the subject security guard consistent with agency procedures. Further, the staff has reviewed the relationship between Consolidated Edison Company of New York, Inc. (ConEd) and Wackenhut. The staff determined that Wackenhut is required to implement the licensee's procedures regarding fitness for duty. Thus, the licensee maintains an awareness of Wackenhut personnel procedures and practices. Also, the NRC issued a "chilling effect letter" to ConEd on February 27, 2001. The NRC issued this letter following a February 8, 2001, letter from the Area Director of the Occupational Safety and Health Administration (OSHA). The letter stated that OSHA's investigation indicated that a contract security employee was engaged in a protected activity within the scope of the Energy Reorganization Act and that discrimination, as defined and prohibited by the statute, was a factor in the termination of the individual's

employment. Although there was a settlement in the OSHA case, the NRC is continuing to review this matter.

Staff's Findings

The preface to the Wackenhut Security Officer Handbook states: "The company retains the absolute right to terminate any employee, at any time, with or without good cause." In addition, Section 2.15, Discipline, of the Wackenhut Security Officer Handbook, itemizes "refusal to work" as grounds for immediate dismissal. The staff identified these statements as terms of employment which may be applicable to instances of workers who refuse to work because of FFD concerns. However, the staff finds no *necessary* inconsistency between these statements and Part 26. Although individuals may declare to their employer that they are not fit for duty because of excessive fatigue, and the NRC encourages individuals to inform their employer if they believe their FFD is suspect, Part 26 does not require the individual to refuse to work and thereby risk disciplinary action. Rather, Part 26.27(b)(1) states that "impaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this part, and may be returned only after determined to be fit to safely and competently perform activities within the scope of this part." As a consequence, when presented with information that a worker's fitness for duty is questionable, it is the licensee's responsibility to make a determination that the individual is fit for duty, prior to returning the individual to his or her duties.

In reviewing the Agreement between Wackenhut and UGPWA, the staff noted that Article 18 of the Agreement, Separability, states:

> Should any provisions of this Agreement at any time during its life be found in conflict with the federal or state law, or as such laws may be amended, then

such provisions shall continue in effect only to the fullest extent permissible under the applicable law . . .

Thus, the document makes it clear that compliance with NRC requirements is required, regardless of any terms or conditions in the Agreement that may be in conflict with Federal law.

Part 26 does not constitute the only regulatory constraint upon licensees and their contractors in matters concerning worker declarations of FFD. Part 50.7 prohibits discrimination by a licensee, or a licensee contractor or subcontractor, against an employee for engaging in protected activities.[2] As a consequence, it is a violation of Part 50.7 for a licensee, or its contractor or subcontractor, to take adverse personnel action against an individual when the basis of the action is, either in whole or in part, the individual's assertion that he or she is not fit for duty or the individual's refusal to work based upon reasonable belief that returning to work would be a violation of Part 26. However, pursuant to Part 50.7(d), an employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

In the event that an individual asserts that a licensee, or its contractor or subcontractor, took adverse employment action against an individual following a self-declaration that he or she is not fit for duty, the NRC reviews the circumstances of, and the bases for, the action in order to make a determination concerning the potential violation of any NRC requirements. In reviewing the licensee's basis for any employee sanction, with respect to the requirements of

[2] Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment.

10 CFR 50.7, the NRC would consider whether the licensee had a legitimate, non-discriminatory basis for the sanction.

Separate from its inquiry into potential violations of 10 CFR 50.7, the NRC may, under certain circumstances, also consider whether a licensee's FFD program meets the general performance objective of Part 26 that licensee FFD programs provide reasonable assurance that nuclear power plant personnel are not "mentally or physically impaired from any cause, which in any way affects their ability to safely and competently perform their duties". Specifically, the NRC may assess whether a licensee's work schedule and practices for assessing fitness for duty are resulting in personnel performance consistent with reasonable assurance that personnel are fit for duty.

Although employees who report FFD concerns may be subject to employer sanctions for other, nonprohibited, considerations (e.g., personal negligence with respect to maintaining one's FFD), the staff notes that such sanctions, depending upon how they are implemented and or communicated, can potentially discourage future self-declarations. Pursuant to 10 CFR 26.10(b), FFD programs must provide reasonable measures for the early detection of persons who are not fit to perform their activities. The NRC considers self-declaration to be an important adjunct to behavioral observation in providing early detection of persons who are not fit for duty because of fatigue. As a result, the NRC may, under certain circumstances, find it appropriate to assess whether a licensee's actions, in conjunction with the prescribed work schedules, has created an environment that is not conducive to the reporting of FFD concerns. The NRC may also find it appropriate to assess such circumstances relative to the NRC's policy statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation."

IV. Conclusion

As clarified in petitioner's October 2, 2001 letter, the petitioner has raised the concern that Wackenhut security personnel at NRC-licensed facilities who feel their performance may be impaired and report it to their supervisors will have their fatigue concerns dismissed and be forced to work. The petitioner contends that security officers are required by the terms of their employment application, the Collective Bargaining Agreement, and the Wackenhut Security Officer Handbook to report to work when directed and that this "contractual right" is in conflict with specific requirements of Part 26. The staff's review indicates that these written conditions and agreements among Wackenhut, its employees at the ConEd Nuclear Power Station, and UGPWA are not, by themselves, violations of NRC requirements. However, when informed that a worker's fitness for duty is questionable, licensees are required, pursuant to 10 CFR 26.27(b)(1), to make a determination that the worker is fit for duty, prior to returning the worker to his or her duties.

The staff notes that the petition has raised generic policy questions concerning how NRC requirements apply to circumstances involving individuals who declare themselves not fit for duty because of fatigue and to the actions taken by licensees in response to such declarations. Specifically, the manner in which a licensee or its contractor implements certain conditions of employment or policies for preventing the abuse of leave can potentially discourage employees from reporting that they are not fit for duty or contribute to inadequacies in the assessment of employee FFD. Either outcome would undermine the effectiveness of a licensee's FFD program. These concerns may not be limited to licensees that use Wackenhut security personnel. As a result, the staff does not believe that a regulatory action limited to licensees that use Wackenhut security personnel is an appropriate means to address this concern. In addition, the staff believes that in matters concerning self-declaration of FFD, the

potential for conflicts with NRC requirements is largely in the implementation of licensee policies, procedures, and conditions of employment, rather than the written terms of these documents. Accordingly, a DFI requesting such documents is not expected to provide significant new information to the staff and therefore does not appear warranted. However, the staff has decided to grant the petitioner's request to the extent that the NRC will address the petitioner's concerns through the generic communication process. Specifically, the staff is developing a communication to all nuclear power plant licensees subject to the requirements of Part 26. The communication will highlight the concerns identified in the Petition and articulate the NRC's requirements as they apply to matters involving a worker's self-declaration of FFD. The staff intends to issue the communication in the near future. Further, as the staff proceeds with proposals to revise Part 26 and address worker fatigue through rulemaking, it will consider the need to clarify the NRC's expectations concerning worker declarations of FFD and work scheduling.

A copy of this Decision will be filed with the Secretary of the Commission so that the Commission may review it in accordance with 10 CFR 2.206(c). As provided for by this regulation, the decision will constitute the final action of the Commission 25 days after the date of the decision unless the Commission, on its own motion, institutes a review of the decision within that time.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 26th day of November 2001.

Enclosures: Comments on Proposed Director's Decision
NRC staff response to Petitioner's Comments

7590-01-P

U.S. NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-247

LICENSE NO. DPR-26

ENTERGY NUCLEAR IP2

ENTERGY NUCLEAR OPERATIONS, INC.

NOTICE OF ISSUANCE OF DIRECTOR'S DECISION UNDER 10 CFR 2.206

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has taken action on the April 24, 2001, petition under Section 2.206 Title 10 of the *Code of Federal Regulations* (10 CFR 2.206) submitted by Mr. David A. Lochbaum (petitioner) on behalf of the Union of Concerned Scientists. The petition was supplemented by letter dated May 3, 2001. The petitioner requested that the Nuclear Regulatory Commission (NRC) issue a Demand for Information (DFI) to licensees that use security personnel supplied by Wackenhut Corporation (Wackenhut), requiring them to provide a docketed response explaining how they comply with the requirement of 10 CFR 26.10 that licensees "provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part" and the requirement of 10 CFR 26.20 that "licensee policy should also address other factors that could affect fitness for duty [FFD] such as mental stress, fatigue and illness."

The petitioner also requested that the DFI require each licensee to generally describe its policy for the aforementioned factors and to explicitly describe its policy for these factors as applied to the security personnel supplied by Wackenhut.

As a basis for this request, the petitioner stated that:

> An individual employed by Wackenhut Corporation and assigned duties as a security officer at Indian Nuclear 2 was fired on June 26, 2000 ... . The individual had worked five straight 12-hour shifts [(12 hours on shift followed by 12 hours off for 5 straight days)] and declined to report for a sixth straight 12-hour shift because he reported to his management—in writing—that it would be "physically and mentally exhausting." The individual reported to his management—in writing—that he was fully aware of his condition and "would not want to be negligent in performing [his] duties as a security officer."
>
> The security officer had unescorted access to Indian Point 2 and thus was covered by 10 CFR Part 26 as specified in Section 26.2 ... .

The petitioner also pointed out that Wackenhut employees are required by terms of their employment application, Collective Bargaining Agreement, and the Security Officer Handbook to report to work when directed.

Thus, the petitioner contends that a worker employed by Wackenhut at an NRC-licensed facility reported to his management that he felt not fit for duty, declined to report for mandated overtime, and was terminated.

The petitioner also stated that "10 CFR 26.20 requires all licensees to have formal policy and written procedures for factors that could render plant workers not fit for duty. Fatigue is specifically mentioned in 10 CFR 26.20." The petitioner contends that the Wackenhut's contractual right conflicts with the Federal regulations in 10 CFR 26.10(a) and (b) and that in this case, the individual essentially provided "reasonable measures for early detection" of a condition rendering him not fit to perform activities within the scope of Part 26. The petitioner further stated that rather than respecting the individual's judgment or seeking another opinion by a Medical Review Officer or other health care professional, Wackenhut fired that individual.

The petitioner addressed the Petition Review Board (PRB) on May 7, 2001, in a telephone conference call to clarify the bases for his Petition. The transcript of this conference call is available in NRC's Agencywide Documents Access and Management System (ADAMS) (Accession No. ML012150128) and may be electronically viewed at the Commission's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland.

The NRC sent a copy of the proposed Director's Decision to the petitioner by letter dated September 28, 2001. The petitioner responded with comments by letter dated October 2, 2001. The comments and the staff response to them are enclosures to the Director's Decision.

The Director of the Office of Nuclear Reactor Regulation has decided to grant the petitioner's request to the extent that the NRC will address the petitioner's concerns through the generic communication process. Specifically, the staff is developing a communication to all nuclear power plant licensees subject to the requirements of Part 26. The communication will highlight the concerns identified in the petition and articulate the NRC's requirements as they apply to matters involving a worker's self-declaration of FFD. The staff intends to issue the communication in the near future. Further, as the staff proceeds with proposals to revise Part 26 and address worker fatigue through rulemaking, it will consider the need to clarify the NRC's expectations concerning worker declarations of FFD and work scheduling. The reasons for this decision are explained in the Director's Decision pursuant to 10 CFR 2.206 (DD-01-05), the complete text of which is available in ADAMS for electronic viewing at the Commission's Public Document Room (PDR), at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. The text is also accessible through the ADAMS Public Library on the NRC's Web site, http://www.nrc.gov/reading-rm.html (the Public Electronic Reading Room) at Accession No. ML013230169. If you do not have access to ADAMS or have problems in

accessing the documents in ADAMS, contact the NRC Public Document Room reference staff at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr@nrc.gov.

A copy of the Director's Decision will be filed with the Secretary of the Commission so that the Commission may review it in accordance with 10 CFR 2.206(c) of the Commission's regulations. As provided for by this regulation, the Director's Decision will constitute the final action of the Commission 25 days after the date of the decision unless the Commission, on its own motion, institutes a review of the decision within that time.

Dated at Rockville, Maryland, this 23rd day of November, 2001.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

R. William Borchardt, Acting Director
Office of Nuclear Reactor Regulation

Indian Point Nuclear Generating Station
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