

May 24, 2004

MEMORANDUM TO: William D. Travers
Executive Director for Operations

FROM: Stephen D. Dingbaum/**RA**
Assistant Inspector General for Audits

SUBJECT: MEMORANDUM REPORT: REVIEW OF NRC'S DRUG-FREE
WORKPLACE PLAN (OIG-04-A-15)

As part of the Office of the Inspector General's (OIG) audit of NRC's Drug-Testing Program, auditors identified an issue that warrants your immediate attention. The *NRC Drug-Free Workplace Plan* (Plan) is not in compliance with Federal guidance that requires the Plan to receive U.S. Department of Health and Human Services (HHS) approval. Furthermore, a required clause is missing from the Plan. These lapses occurred because NRC management officials implemented the Plan without obtaining confirmation from HHS that the Plan was acceptable. Consequently, without the required approval, the testing procedures contained in the *NRC Drug-Free Workplace Plan* are vulnerable to successful legal challenge. OIG brings this matter to your attention because the agency is close to completing and issuing a revised Plan without the needed clause. This report makes three recommendations to the Executive Director for Operations to bring the *NRC Drug-Free Workplace Plan* into compliance with Federal guidance.

OIG briefed NRC senior managers prior to issuance of this report. During this briefing, NRC senior managers informed OIG that they would request HHS approval of NRC's revised Plan.

BACKGROUND

Executive Order 12564, *Drug-Free Federal Workplace* (September 15, 1986), established the goal of a drug-free Federal workplace and made it a condition of employment for all Federal employees to refrain from using illegal drugs on or off duty.

Executive Order 12564 authorizes HHS to publish guidance for drug-testing programs, requires each agency head to develop a plan for achieving a drug-free workplace, and requires agencies to conduct their drug-testing programs in accordance with HHS guidelines. In 1987, Congress passed legislation designed to establish uniformity among Federal agency drug-testing plans and centralize oversight of the Federal drug-testing programs.

To implement this legislation, HHS convened the Interagency Coordinating Group Executive Committee to certify and oversee Federal agency drug-testing plans. The Executive Committee consists of representatives from HHS,¹ the U.S. Department of Justice, and the U.S. Office of Personnel Management.

In July 1988, NRC implemented its first drug-testing plan, which HHS approved. In November 1997, NRC's drug-testing plan was superseded by the *NRC Drug-Free Workplace Plan*, which the agency is currently using. Previously, the NRC Office of Human Resources had the responsibility for writing this document. Since FY 2004 the Office of Administration has had this responsibility and is close to completing a revision.

FINDING

The *NRC Drug-Free Workplace Plan* Is Not in Compliance With Requirement for Approval

HHS guidance concerning Federal drug-testing programs requires that agency drug-testing plans receive HHS approval and incorporate specific provisions concerning drug-testing procedures. NRC is not in compliance with this guidance in the following two ways:

- NRC's 1997 Plan has not been approved.
- NRC's 1997 Plan does not contain a required clause.

These lapses occurred because management officials did not obtain confirmation from HHS that the Plan was acceptable before implementing the agency's current Plan. Without this approval, the testing procedures contained in the *NRC Drug-Free Workplace Plan* are vulnerable to successful legal challenge.

U.S. Department of Health and Human Services Guidance Requires Approval of Changes to Agency Drug-Testing Plans

HHS provided agencies subject to Executive Order 12564 with the *Model Plan for a Comprehensive Drug-Free Workplace Program* to develop their drug-free workplace plans. The model plan, developed by the Interagency Coordinating Group Executive Committee, mandated the components and other key features of Federal agency plans.

Agencies with certified, or previously approved, drug-free workplace plans periodically determine that changes are needed. Substantive changes in an agency's plan and changes in the positions designated for random testing require advance consultation and approval by the Interagency Coordinating Group Executive Committee. Agencies must submit, for consultation and approval, a statement describing and justifying the proposed changes. According to an HHS representative, the Interagency Coordinating Group Executive Committee expects agencies to write their plans to be in conformance with the model.

¹ HHS' Substance Abuse and Mental Health Services Administration, Division of Workplace Programs, oversees the Federal drug-testing program.

The NRC Drug-Free Workplace Plan Lacks U.S. Department of Health and Human Services Approval

The *NRC Drug-Free Workplace Plan* is not in compliance with Federal guidance that requires review and approval from the oversight authority, HHS. The HHS Secretary certified NRC's 1988 plan in compliance with Executive Order 12564. However, NRC never received approval for its current plan, which has been in effect since 1997. Although NRC forwarded a copy of this revised Plan to HHS in February 1997, with a cover letter stating that changes had been incorporated, HHS never contacted NRC about the changes and did not approve the revised document. After approximately 6 months, NRC implemented the Plan without further communication with HHS.

A Required Clause Is Missing From the NRC Drug-Free Workplace Plan

According to an HHS representative, a required clause, titled "Deferral of Testing," is missing from NRC's Plan. Deferral of testing allows drug testing of employees who were absent on the day of the drug test for up to 60 days after the test date. This clause, which reinforces the random selection process, is contained in the *Model Plan for a Comprehensive Drug-Free Workplace Program* and was included in NRC's 1988 certified Plan. NRC's current process excuses randomly selected employees who are absent. As a result, other employees face an increased chance of selection. Using the deferral of testing clause equalizes absent employees' selection with other employees. The HHS representative said HHS would not have approved NRC's revision to the Plan without the deferral of testing clause.

NRC Management Officials Did Not Obtain Confirmation From the U.S. Department of Health and Human Services

These lapses occurred because NRC management officials implemented changes to the agency's previously approved plan without obtaining confirmation from HHS that the changes were acceptable. The Office of Human Resources manager serving as the point of contact with HHS for revisions was unaware that such confirmation was needed. In addition, the manager:

- Did not consider NRC's revisions to be substantive.
- Was unaware of the required deferral of testing clause.

The NRC Drug-Free Workplace Plan Is Legally Vulnerable

Without HHS approval, the drug-testing procedures contained in the *NRC Drug-Free Workplace Plan* are vulnerable to successful legal challenge. This vulnerability would surface when an employee legally challenges the validity of NRC's drug-testing process. For example, if NRC imposed disciplinary action on an employee who had a positive drug test result, the employee could appeal the action. The employee would be likely to prevail in an administrative appeal and the disciplinary action would not be sustained. Even if the agency prevailed, the employee could challenge the action in Federal court.

The U.S. Department of Justice, which has litigation discretion, would be likely to decline to defend the action because testing was based on an unapproved plan. Again, the disciplinary action would not be sustained.

CONCLUSION

The agency is completing revisions to NRC's Plan that are not in compliance with Federal guidance. The Interagency Coordinating Group Executive Committee responsible for oversight of Federal drug-testing programs has developed a standard format for agencies to follow when writing a plan that ensures consistent drug-testing program implementation. Despite this instruction, NRC has implemented a plan that deviates from the model and the revised Plan deviates from the model. To avoid a successful legal challenge, HHS must approve the *NRC Drug-Free Workplace Plan*.

RECOMMENDATIONS

OIG recommends that the Executive Director for Operations:

1. Revise the *NRC Drug-Free Workplace Plan* to include the deferral of testing clause from the U.S. Department of Health and Human Services *Model Plan for a Comprehensive Drug-Free Workplace Program*.
2. Include in the *NRC Drug-Free Workplace Plan* instruction that revisions must receive approval from U.S. Department of Health and Human Services prior to implementation.
3. Obtain U.S. Department of Health and Human Services approval of the 2004 *NRC Drug-Free Workplace Plan* prior to implementation.

AGENCY COMMENTS

At the exit meeting on May 19, 2004, OIG discussed the report's content with NRC officials. NRC officials agreed with the report's findings and recommendations.

SCOPE AND METHODOLOGY

To accomplish the audit's objectives, OIG reviewed NRC Management Directives, agency guidance, and Federal guidance pertaining to NRC's Drug-Testing Program. Auditors interviewed the Leader of Policy Oversight, Substance Abuse and Mental Health Services Administration, HHS and NRC staff members from the Office of Human Resources and the Office of Administration. This work was conducted from February 2004 through April 2004 in accordance with generally accepted Government auditing standards and included a review of management controls related to the objectives of the audit. The work was conducted by Beth Serepca, Team Leader, Vicki Foster, Senior Management Analyst and David Ditto, Management Analyst.

Please provide information on the actions taken in response to the recommendations directed to your office by June 25, 2004. Actions taken or planned are subject to OIG follow-up. See Attachment for instructions for responding to OIG report recommendations.

If you have any questions or concerns regarding this report, please contact Beth Serepca at 415-5911 or me at 415-5915.

Attachment: As stated

cc: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

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