

September 6, 2006

MEMORANDUM TO: Chairman Klein  
Commissioner McGaffigan  
Commissioner Merrifield  
Commissioner Jaczko  
Commissioner Lyons

FROM: Luis A. Reyes */RA/*  
Executive Director for Operations

SUBJECT: NUCLEAR REGULATORY COMMISSION (NRC) DRUG-FREE  
WORKPLACE PLAN - RECOMMENDED CHANGES TO DRUG  
TESTING POOL

The purpose of this memorandum is to seek Commission approval of the staff's recommendation to include all NRC employees in its random drug testing pool.

BACKGROUND:

On September 15, 1986, President Reagan signed Executive Order 12564 (EO) to establish standards to achieve a Drug-Free Federal Workplace and require that the head of each Executive agency establish a program to test for the use of illegal drugs by employees in "sensitive" positions. The Department of Health and Human Services (HHS), as a member of the Interagency Coordinating Group (ICG) Executive Committee, was given the authority to review and approve Federal agencies' drug testing programs. HHS approved NRC's Drug Testing Plan that was implemented, in December 1988. In 1989, HHS issued the "Model Plan for a Comprehensive Drug Free Workplace Program" to all Federal agencies to guide their programs. NRC revised its Drug Testing Plan in March 1990 to comply with these new guidelines. In November 1997, NRC's Drug Testing Plan was superseded by the "NRC's Drug-Free Workplace Plan" (the Plan), NUREG/BR-0134, Revision 1, which is currently in effect.

Revision 1 of the Plan was developed based on NRC's understanding and interpretation of the EO requirements, along with guidance received from HHS and the Department of Justice (DOJ), at the time regarding which positions in an agency should be included in the random drug testing pool. A position included in the pool is termed a "testing designated position" (TDP). Guidance from HHS and DOJ defined criteria for presumptive, preferred, discretionary, and specifically disfavored TDPs. It required agencies to include all positions defined as presumptive in their random drug testing pools. In order to ensure reasonable uniformity among

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Federal agencies, it required agencies to provide explanation for not testing positions defined as preferred. Agencies needed to justify including preferred or discretionary positions and provide exceptional justifications to include specifically disfavored positions in their random drug testing pools.

On March 23, 1992, the staff recommended to the Commission in SECY-92-105 to modify NRC's criteria for identifying TDPs. Changes included the addition of "motor vehicle operators carrying passengers," a "presumptive" category, and modifying the criteria to include employees who have access to "truly sensitive information," a "preferable" category. DOJ informally advised NRC at the time that existing case law did not offer a high level of support for including positions which required access to classified information no more than once or twice a year.

By approving these changes for identifying TDPs, staff believed NRC's TDP criteria would be in line with the January 24, 1992, guidance. On April 15, 1992, the Commission approved the following four TDP categories:

1. Regional and Headquarters employees who have unescorted access to vital or protected areas of nuclear power plants, Category 1 fuel cycle facilities, or uranium enrichment facilities.
2. Employees who have assigned responsibilities or are on call for Regional or Headquarters incident response centers.
3. Employees with access to Sensitive Compartmented Information (SCI) and/or Foreign Intelligence Information (FII), or who require access more than once or twice a year to classified information (i.e., National Security Information or Restricted Data).
4. Employees who are operators of motor vehicles carrying passengers.

Subsequent to the issuance of Revision 1 of the Plan in 1997, the ICG Executive Committee, through HHS, issued "Guidance for Selection of Testing Designated Positions," dated August 2, 1999, (Enclosure 1). This guidance supplements and, to the extent there is a conflict, supersedes the previous guidance on TDPs.

As described in Enclosure 1, the well-developed law and clear public interest applicable to drug testing make it evident that TDPs meeting the preferred criteria represent strong government interests for drug testing. Agencies choosing to exclude functions defined as preferred by the ICG are required to explain the decision not to designate them as TDPs to the ICG Executive Committee (note that decisions to include them as TDPs are also to be submitted to members of the ICG for a consultative uniformity review).

At the time the 1999 revised ICG TDP guidance was issued, the staff did not provide HHS with the explanation for excluding preferred positions from NRC's random drug testing pool. These positions were those that required a security clearance, pursuant to Section 145 of the Atomic Energy Act of 1954, but in reality incumbents of these positions rarely, if ever, saw classified documents. The reason for not including such positions was simply their lack of actual access to classified information.

To validate Categories 1 and 3 of the TDP criteria, each Office Director and Regional Administrator was asked to review and confirm the level of access to classified information required by each of their employees and if their employees were expected to require unescorted access to vital or protected areas of nuclear power plants, Category 1 fuel cycle facilities, or uranium enrichment facilities. The staff reviewed responses, re-evaluated the ICG TDP criteria and determined that the NRC TDP criteria should be revised. Subsequently, the Office of Inspector General (OIG) conducted an audit of the drug testing program (OIG-05-A-05) and recommended that the NRC re-evaluate the TDP criteria.

#### DISCUSSION:

The environment and guidance applicable to NRC's Drug Testing Program have changed to emphasize the inclusion of individuals that require security clearances. The ICG guidance issued in 1999 instructs agencies to include personnel with security clearances in drug testing pools or provide an explanation why this is not warranted. Conversely, the guidance requires agencies to justify inclusion of these positions, to ensure government uniformity. While all NRC employees are required by Section 145 of the Energy Policy Act of 1954, as amended, to hold security clearances, in reality many of them have had little or no access to classified information. This could fairly be viewed as a legitimate basis for including in TDPs only those positions that would provide access to classified information with some reasonable degree of frequency. However, since September 11, 2001, many NRC employees who never had access to classified information now have access to it on a regular or intermittent basis (as in the case of cleared secretaries who are asked to receive, hold and/or deliver classified information). In addition, the terrorist attacks on September 11, 2001, and the subsequent increase in the threat of additional attacks against the United States, have placed the NRC into a more visible and critical national security role.

The EO states:

"The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law..."

The EO also states, “The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions” and defines the term “employees in sensitive positions,” in part, as employees who have been granted, or may be granted, access to classified information or employees who perform functions requiring a high degree of trust and confidence. While ICG guidance does not designate as presumptive, every position that requires a clearance, all cleared NRC employees in fact, are within the plain meaning of the EO’s definition of “employees in sensitive positions.” Since the EO was issued, TDP selection rationales at Federal agencies have been examined by the court system through litigation and judicial opinions, and the EO has been legally upheld, thereby further strengthening the basis for designating all NRC cleared employees as TDPs in accordance with the plain language of the EO.

Including all NRC employees in the random drug testing pool resolves HHS concerns regarding complexity of the current TDP criteria. Other Federal agencies which require security clearances for their employees include all cleared employees in random drug testing pools (i.e., National Nuclear Security Administration; Bureau of Alcohol, Tobacco, Firearms, and Explosives; Defense Security Service; and the Defense Nuclear Facilities Safety Board).

The current criteria results in approximately one-half of the current NRC employees being included in the random drug testing pool, or approximately 1,800 employees. The testing rate target is 50 percent, or approximately 900 random drug tests, to be performed on an annual basis.

#### OPTIONS:

The staff has examined three options for revising the NRC TDP criteria (pros and cons for each option are included in Enclosure 2). The options are:

1. Designate all NRC positions as sensitive TDPs, consistent with the plain language of the EO and put all NRC employees in the drug testing pool.
2. Revise the current TDP criteria to include NRC employees who carry firearms, those employees authorized to carry firearms, and employees who have drug rehabilitation program duties (i.e., Employee Assistance Program employees).
3. Revise the current TDP Category 3 to include employees who are in critical-sensitive positions requiring a “Q” or top secret security clearance, employees who are in positions of high public trust requiring an “L(H)” security clearance, and employees who are in other sensitive positions that may require access to classified information two or more times a year. Also revise the TDP criteria to include NRC employees who have drug rehabilitation program duties (i.e., Employee Assistance Program employees).

ANALYSIS:

Only Option 1 is certain to be viewed as consistent with the plain language of the EO that all sensitive positions be designated as TDPs. Since the ICG's guidance requires a justification to HHS for including all NRC positions, without regard to the extent of actual access to classified information, such justification will be provided and is virtually certain to be approved.

Option 1 will bring NRC's TDP criteria in-line with the plain language of the EO, the current ICG guidance, and HHS comments and recommendations. The cost to implement the program would remain essentially the same if a 25% testing rate were selected. The administrative burden and associated potential for errors when employees are moved in and out of the pool will be reduced. This option provides a greater deterrent to drug use for the agency since all employees would be in the pool. It is also consistent with NRC's zero tolerance policy, i.e., that the use of illegal drugs by NRC employees is unacceptable and will not be tolerated. The Office of Administration and the Office of Human Resources, who have responsibilities under the Plan, support Option 1 as it would result in more effective use of resources while providing a stronger drug testing program. As stated in the EO, placing all NRC employees in the random drug testing pool would provide a higher assurance of employee reliability, stability, and good judgement and reduce the possibility of coercion. Option 1 would resolve Recommendations 1 (include individuals with incident response duties and with annual access to classified information) and 4 (include computer system administrators and individuals engaged in law enforcement activities who are authorized to carry weapons) of OIG audit OIG-05-A-05.

Options 2 and 3 would resolve Recommendation 4 of OIG audit OIG-05-A-05, however neither of these options would bring the TDP criteria in line with the plain language of the EO. Further, Options 2 and 3 would require re-submission and HHS acceptance of NRC explanations to exclude preferred positions from the drug testing pool thereby increasing the risk that HHS would not approve NRC's Drug-Free Workplace Plan, Revision 2. Options 2 and 3 do not provide the same high level of assurance that NRC has a drug-free workplace as provided by Option 1.

RECOMMENDATION:

The staff recommends that the Commission approve Option 1, to put all NRC employees in the drug testing pool.

The staff will develop an implementation plan for Commission consideration within 45 days of receiving Commission approval.

The Commissioners

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COORDINATION:

The Office of General Counsel has reviewed this paper and has no legal objections.

SECY, please track.

Enclosures:  
As stated (2)

cc: SECY  
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August 2, 1999

### **MEMORANDUM**

**TO:** Federal Agencies

**FROM:** Interagency Coordinating Group (ICG) Executive Committee

**SUBJECT:** Guidelines For Selection of Testing Designated Positions (TDPs)

### **Guidance for Selection of Testing Designated Positions (TDP's)**

## **I. Purpose**

This memorandum is the primary reference for agencies selecting TDP's under the Federal Drug-Free Workplace Program established pursuant to Executive Order No. 12564, issued September 15, 1986. It supercedes, by combining and updating two previous ICG memoranda: "Guidance For Selection of Testing Designated Positions" issued by the ICG Executive Committee on January 24, 1992, and "Supplement to Guidance for Selection of Testing Designated Positions" issued by the ICG Executive Committee on June 10, 1993.

The purpose of this document is to consolidate changes resulting from court decisions into guidance for selection of TDP's, to provide agencies with a guide for their examination of TDP's, and to simplify the steps necessary to make changes to agency testing programs. Principally, the approval process is eased by establishing a core group of TDP's as presumptively to be included in all plans. Any agency desiring to exclude any of those TDP's must present justifications for doing so. This new guidance also eases review requirements when agencies include certain other positions in their drug plans. Where consultative review is required, it will be accomplished by members of the ICG Executive Committee under the authority of the Office of National Drug Control Policy (ONDCP). ONDCP assumed lead oversight and policy responsibility for Executive Order 12564 in March of 1991 by designation of the President. This guidance supplements and, to the extent there is a conflict, supersedes previous guidance on TDP's.

## **II. Background**

In the early stages of the implementation of Executive Order 12564, Federal agencies were provided a decision guide entitled *Drug Testing of Sensitive Positions, Optional Decision Guide for Selecting Testing Designated Positions*, to assist them in identifying the "pool" of personnel potentially subject to random testing and in selecting from that pool the TDP's. The analysis in that guide centered upon the criteria of section 7(d) of the Executive Order. By applying these criteria, agency identified the pool of sensitive positions which might be made subject to random drug testing. At the time the Executive

Enclosure 1

Order was issued, all positions satisfying these criteria appropriately could be designated for testing. Since that time, however, the Executive Order has been upheld and TDP selection rationales for random testing at federal agencies have been examined and narrowed by the courts through the years of litigation and numerous judicial opinions. Although they remain instructive in developing TDP's, the Decision Guide and Section IX of the Model Drug-Free Workplace Plan developed by the ICG should be used only consistent with the guidance.

One of the primary goals in the President's designation of ONDCP as the lead agency in coordinating implementation of Executive Order 12564 is the identification of appropriate areas where consistency in agency plans is warranted. With the clarity resulting from this multitude of court decisions, it is possible to identify TDP's that no longer need to be submitted for consultative review to the ICG Executive Committee because the criteria for such designations are unambiguous.

### III. Current Legal Framework

Through litigation of agency programs, the courts have defined some limits on TDP justifications. As a result of these decisions, this guidance provides lists of presumptive, preferred, discretionary and disfavored TDP's. There is still a substantial gray area outside of the presumptive and preferred categories in which TDP's could be justified based upon the unique facts of a particular agency. Agency counsel should review the latest cases when proposing changes or additions to their TDP's. However, the most significant and instructive cases in this field continue to be the early pronouncements of the United States Supreme Court in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Additionally, the Supreme Court has upheld the constitutionality of drug testing programs in other contexts, such as interscholastic athletics. See *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

#### A. Presumptive Testing Designated Positions.

In Light of the well developed law and clear public interest applicable to the testing of certain categories of positions, these positions set forth below are approved for inclusion in agency testing plans without prior approval of the ICG Executive Committee. In order to improve consistency, it is essential that individual agencies include all positions in these categories in their plans unless very compelling reasons exist not to do so. Indeed, almost all agencies already test these positions. Since courts have consistently found that testing of these safety sensitive positions is justified, agencies need not submit for consultative review their plan to include these positions as TDP's. However, an information copy of implemented changes should be forwarded to the ICG Executive Committee. If an agency head is of the opinion that the unique circumstances of that agency warrant the exclusion of all or some of the positions in these categories, these circumstances should be presented to the ICG Executive Committee for consultative review. The positions that are to be included in every plan if such positions exist in the agency are the following:

##### 1. Employees who carry firearms.

*NTEU v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 1393-94 (1989). This category was narrowed from "employees authorized to carry firearms" in order to distinguish various investigators and guards who do not carry a firearm on a daily basis, but are merely authorized to carry firearms. Employees in the latter category should be placed in the



appropriate preferred TDP category. However, employees who actually carry firearms on a daily or regular basis are included in this presumptive category and should be in all TDP pools.

## **2. Motor vehicle operators carrying passengers.**

*NTEU v. Yeutter*, 918 F.2d 968, 972 (D.C. Cir. 1990). *AFGE v. Skinner*, 885 F.2d 884, 889 n.8 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). This category also includes operators of motor vehicles weighing more than 26,001 pounds and operators of motor vehicles transporting hazardous materials. *Intern. Broth. of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991). Note: Department of Transportation regulations implementing the Omnibus Transportation Employee Testing Act of 1991, require random testing for drugs and alcohol of federal employees who operate vehicles that require a commercial driver's license. A commercial license is required for vehicle operators who: (1) carry 16 or more passengers; (2) transport hazardous materials; or, (3) operate vehicles weighing 26,001 pounds or more.

## **3. Aviation flight crew members and air traffic controllers.**

*Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990). *AFGE v. Skinner*, 885 F.2d at 889 n.8.

## **4. Railroad operating crews.**

*Skinner v. RLEA*, 489 U.S. 602, 109 S. Ct. 1402 (1989). *RLEA v. Skinner*, 934 F.2d 1096 (9th Cir. 1991). *AFGE v. Skinner*, 885 F.2d at 889 n.8.

## **B. Preferred Testing Designated Positions.**

The well developed law and clear public interest applicable to drug testing make it evident that the categories set out under this section represents strong government interests for drug testing and will almost always need established judicial standards. However, inclusion of the following positions as TDP's is not presumptive. To ensure reasonable uniformity, agencies will still need to present for consultative review agency-specific justifications for testing of these positions. Agencies choosing to exclude positions of functions specified below from drug testing are required to explain the decision not to designate one or more of these positions as TDP's to the ICG Executive Committee.

### **1. Certain Health and Safety Positions.**

The first major category includes certain health and safety responsibilities that could cause immediate, substantial physical injury if carried out under the influence of drugs, usually involving a potentially dangerous instrument or machine. These positions are:

#### **a. Employees authorized to carry firearms.**

*NTEU v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 1393-94 (1989). This category was changed from "employees having access to firearms." In many cases, there are guards or security personnel who do not regularly carry a firearm, but are authorized to carry one in some circumstances, e.g. emergencies. The rationale for including these positions as TDP's is the same as employees with a security clearance who see classified documents only rarely--granting security clearances in advance proved flexibility and ensures employees can be given access to classified material as soon as the need arises. See

*Harmon v. Thornburgh*, 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

**b. Railroad employees engaged in safety sensitive tasks.**

This includes persons engaged in handling train movement orders, safety inspectors and those engaged in maintenance and repair of signal systems. *Skinner v. RLEA*, 489 U.S. 602, 109 S. Ct. 1402 (1989). *RLEA v. Skinner*, 934 F.2d 1096 (9th Cir. 1991). *AFGE v. Skinner*, 885 F.2d at 889 n.8.

**c. Aviation personnel.**

This includes flight attendants, flight instructors, ground instructors, flight testing personnel, aircraft dispatchers, maintenance personnel, aviation security and screening personnel, and aircraft safety inspectors. *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990). *AFGE v. Skinner*, 885 F.2d at 889 n.8. In 1992, two federal district courts in California considered challenges to Air Force and Navy TDP's respectively. In *AFGE v. Wilson*, 5-89-1274 (E.D. Cal. Aug. 17, 1992), the Air Force had included an employee who made tools used by aircraft mechanics to maintain and repair their aircraft. The court held that the danger of a defective tool causing a crash was too remote to support random testing. Only Air Force employees with direct aircraft maintenance responsibilities were approved for random testing. In *AFGE v. Cheney*, C-89-4443 (N.D. Cal. Aug. 14, 1992) a different court considered several categories of employees who performed maintenance on Navy ships, submarines and planes. Those approved as TDP's were able to show a nexus between the work performed and a "compelling government interest in safety," such that small errors or momentary lapses could have "catastrophic consequences for crew members." This case highlights the principle that agencies may randomly test employees with direct and critical responsibilities for maintenance, but not those in general support roles.

**2. Presidential Appointees Requiring Senate Confirmation (PAS).**

The second major preferred category involves presidential appointees requiring Senate confirmation (PAS). While including PAS positions as TDP's is strongly preferred, one category may qualify for an exclusion. A few agencies have part-time presidential appointees who sit on commissions or boards that meet only three or four times a year. An agency head may determine that random testing of these appointees is impractical.

**3. Front Line Law Enforcement Personnel.**

The third major preferred category is front line law enforcement personnel with proximity to criminals, drugs, or drug traffickers. These positions include guard and law enforcement personnel who have access to firearms (but do not carry weapons or otherwise meet the standards for a presumptive TDP) and those directly involved in drug interdiction duties. *Von Raab*, 109 S. Ct. at 1393-94; *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S. Ct. 404 (1989).

**4. Drug Rehabilitation Employees.**

The fourth major preferred category is drug rehabilitation or equivalent employee assistance duties so inimical to illegal drug use that such employees can expect inquiry into their fitness. These positions include direct service staff of alcohol and drug abuse treatment centers. *NFFE v. Cheney*, 884 F.2d 603, 614 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Although some agencies believed that all employees associated with the drug program should be included in the random testing pool, the courts have taken a narrower view. In *NFFE v. Cheney*, the court approved drug counselors with direct client contact as TDP's; however, it refused to approve either drug laboratory testing personnel or to those employees in the biochemical chain of custody. Regarding the latter two categories, the court found an insufficient nexus between a drug-related lapse and any irreparable harm. Based on the holdings of this case, only drug program employees who have direct client contact should be included as TDP's. Unless supervisors of drug counselors meet this test, they should not be included as TDP's. In addition, computer employees who help select personnel for random tests do not qualify as TDP's. The court was

not persuaded that the "credibility" or "integrity" of the drug testing program justified random testing for every employee associated with drug testing.

#### 5. Personnel Having Access to "Truly Sensitive Information."

The fifth major preferred category is personnel having access to "truly sensitive information," for example, national security material that it is reasonable to assume may damage national interests if compromised. *Von Raab*, 109 S. Ct. at 1396. Specifically, these positions include:

##### a. Top secret and higher clearances>

*Harmon v. Thornburgh*, 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). *AFGE Local 1533 v. Cheney*, No. 90-15834 (9th Cir. Sept. 11, 1991)

##### b. Secret Clearances.

*Hartness v. Bush*, 919 F.2d 170, 173 (D.C. Cir. 1990), *cert. denied*, 59 USLW 3865 (U.S. 1991).

#### C. Discretionary Designations

In addition to the categories of positions identified for presumptive and preferred inclusion in agency plans, there are other agency specific sensitive positions which may warrant designation for testing. The presumptive and preferred testing categories are not exhaustive of TDP's supported by case law. For example, courts have supported testing for: confidential security clearances holders, *NTEU V. Hallet*, No. 86-3522 (E.D. LA. Feb 7, 1991); health care professionals responsible for direct patient care, and firefighters, *afge v. Derwinski*, 777 F. Supp. 1493 (N.D. Cal. 1991). Other federal district courts also have upheld random testing for medical doctors (except for doctors performing research or administrative duties), nurses, nursing assistants, pharmacists, and medical technicians because they were involved in direct patient care. Moreover, many TDP's that have not been court tested are also appropriate as required by agency needs. To the extent agencies identify these kinds of positions for TDP's, the agency must submit Appendix A of its plan with supporting documentation to the ICG Executive Committee for consultative review. The agency's plan must contain a statement indicating the necessary causal connection between the employee's duties and the feared harm for each TDP.

#### D. Specifically Disfavored Testing Designated Positions

It is possible to identify positions which uniformly have been found by the courts not to warrant *random* testing. If an agency has TDP's based solely on the criteria below, exceptional justifications will be required to be submitted to the ICG Executive Committee for consultative review. These positions are:

1. Positions designated based upon the need to foster public trust or generalized requirements for integrity, honesty, or responsibility. *NTEU v. Yeutter*, 918 F.2d 968, 972 (D.C. Cir. 1990)
2. Positions designated based upon access to sensitive information not meeting the "truly sensitive" criteria, e.g. personnel files, budget and financial information, and grand jury information also is inadequate. *Harmon v. Thornburgh*, 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). Many questions were raised about including inspector general employees because of their access to sensitive information and budget or financial employees because of their influence on large sums of money. Under present case law, neither group qualifies as a TDP. The rationale for excluding inspector general employees is contained in the *Harmon case*. In *Harmon*, the court approved employees with top secret clearances as TDP's because of their access to "truly sensitive" information, but it refused to approve as TDP's federal prosecutors or employees with access to secret grand jury proceedings. The court stated that "truly sensitive" does not include all information which is confidential or closed to public view. The rationale for excluding budget and financial employees is found in

*AFGE v. Carazoes*, 721 F. Supp. 1361 (D.D.C. 1989), where the court refused to approve as TDP's a group of computer employees involved with billions of dollars of government resources who might be subjected to bribery, fraud, waste or mismanagement. The court concluded that program information which affects large sums of money does not necessarily mean the information is "truly sensitive". The clearest examples of "truly sensitive" remain information requiring a top secret clearance, where by definition, national security would be seriously damaged by an unauthorized disclosure.

## DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS

### Option 1:

Designate all NRC positions as “sensitive” and put all NRC employees in the drug testing pool. NRC would not have to provide an explanation to HHS for not including preferred TDPs in the random drug testing pool, but would have to provide this information to members of the ICG in the form of a justification, for a consultative uniformity review.

### Pros

1. Consistent with the plain language of the EO, to include NRC cleared individuals in the drug testing pool. In accordance with Section 145 of the Atomic Energy Act of 1954 (as amended) all NRC employees shall obtain at least a Secret, or L, security clearance. Therefore, any NRC employee, if they have a need-to-know, can have access to classified information. This satisfies the HHS preferred criteria of Personnel Having Access to “Truly Sensitive Information.”
2. Resolves Recommendations 1 and 4 in OIG Audit OIG-05-A-05.
3. Is consistent with the intent of NRC’s drug testing policy statement as reflected in Agency Announcement number 94, dated July 9, 1987. Given the nature of NRC’s responsibilities, and the importance of public trust and confidence in NRC’s ability to carry out its mission effectively, the Commission emphasizes that the use of illegal drugs by NRC employees is unacceptable and will not be tolerated by the agency.
4. Places greater emphasis on maintaining a drug-free workplace in a post-September 11, 2001, environment. Putting all NRC employees in the random drug testing pool will assist in ensuring that NRC is indeed a drug-free workplace, especially in light of recent positive drug test results for four NRC employees. If employees who are in the pool have been found to use illegal drugs, the probability is high that some individuals who are not in the pool are also using illegal drugs. This can place the agency at additional risk.
5. Establishes and maintains an effective deterrent factor for a larger pool of individuals as compared to the current practice. The cost of almost doubling the number of individuals in the pool now could be offset by reducing the testing rate to 25 percent. The ICG states that cost alone is not a sufficient criterion to decide whether or not a position is a TDP. In-line with this position, staff may consider testing rate options.
6. Satisfies HHS concerns regarding complexity of Category 3 criteria (i.e., "Category 3 remains unnecessarily complex...This section could be edited and summarized: Consistent with guidance, the NRC TDP pool is:...(3) Employees with Secret and above clearances...").

## **DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS**

7. Eliminates potential errors that are introduced when individuals are moved in and out of TDPs since all employees would be in the pool. Allows staff to focus efforts on managing the testing process and not employee movement in and out of TDPs. The Office of Human Resources (HR) estimates spending 312 hours a year on this effort and the Office of Administration (ADM) estimates spending 416 hours. This savings in staff time offsets the increased program costs to test all applicants for NRC employment. In spite of the effort expended by both offices, it has not been possible to maintain a 100 percent accurate pool. NRC's random drug testing pool is dynamic by nature.
8. Aligns NRC's program with other Federal agencies that require employees to hold a security clearance, although some link TDP criteria to position sensitivity and/or agency mission rather than to the actual security clearance. The following agencies are at or very near 100 percent TDPs: National Nuclear Security Administration; Bureau of Alcohol, Tobacco, Firearms, and Explosives; Defense Security Service; National Geospatial-Intelligence Agency; Department of Defense-Office of the Inspector General; Federal Bureau of Investigation; United States Secret Service; U.S. Agency for International Development; Drug Enforcement Administration; and Defense Nuclear Facilities Safety Board. The Department of Energy randomly tests all employees with a top secret security clearance and some other positions, i.e., couriers handling special nuclear materials and trainers who are part of the Human Reliability Program (they have access to weapons).
9. Reduces risk of hiring current drug users since 100 percent of all applicants would be tested.
10. Eliminates risk that HHS would not approve NRC's Drug-Free Workplace Program, Revision 2.

### **Cons**

1. Reduces the number of times the agency actually tests individuals in higher risk positions if the testing rate is the same for all TDPs.
2. The drug testing program tracking system would need to be modified if the testing rate were modified. Although this would expend staff and financial resources, staff does not consider this a significant negative since this would be covered in the cost of annual software application maintenance. The existing tracking system is out of date and has not been modified since 1999. Staff is looking into replacing the existing system.
3. Increases the burden on drug testing program staff by requiring testing of all applicants.

## **DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS**

### **Option 2:**

Revise the current TDP criteria to include NRC employees who carry firearms, those authorized to carry firearms, and those NRC employees who have drug rehabilitation program duties (i.e., Employee Assistance Program (EAP) employees), which is a preferred testing category. As stated by the ICG, individuals with EAP duties are so inimical to illegal drug use that such employees can expect inquiry regarding their fitness. This option would meet the ICG presumptive criteria pertinent to NRC. NRC would be required to provide an explanation for not including all pertinent preferred positions in the random drug testing pool (i.e., Personnel Having Access to "Truly Sensitive Information").

### **Pros**

1. Resolves Recommendation 4 in OIG Audit OIG-05-A-05, and would not result in a significant increase to the number of individuals in the random drug testing pool since most of these individuals have been identified as being in TDPs for other reasons (i.e., they satisfy current Category 1, 2, or 3 criteria).
2. Meets current ICG guidance since employees who carry firearms are included in the ICG's presumptive TDP category and employees who are authorized to carry firearms are included in the preferred TDP category.
3. Meets the ICG preferred TDP criteria since employees who have employee assistance duties would be included in the pool.
4. Poses no impact to most employees who are currently in non-TDP positions.

### **Cons**

1. May not be viewed by HHS as compliant with the plain language of the EO to include all NRC cleared individuals in the drug testing pool, and therefore may not be approved by HHS.
2. Requires explanation for preferred positions not included in the random drug testing pool (i.e., "Personnel Having Access to "Truly Sensitive Information"), which results in increased risk of HHS not approving NRC's Plan.
3. Does not satisfy HHS concerns regarding complexity of Category 3 criteria (i.e., "Category 3 remains unnecessarily complex...This section could be edited and summarized: Consistent with guidance, the NRC TDP pool is:...(3) Employees with Secret and above clearances...").
4. Potential for errors is introduced when individuals move in and out of TDPs, as they do each pay period.

## **DRUG TESTING PROGRAM OPTIONS AND PROS AND CONS**

5. Does not allow staff to focus efforts on managing the testing process. Expends staff resources (estimated at approximately 728 hours per year) to track movement of employees in and out of the testing pool at the expense of managing the agency's Drug-Free Workplace Program. This effort does not effectively utilize NRC resources.
6. Expends staff effort in collecting information from Office Directors and Regional Administrators regarding individuals in their organizations who meet the Plan criteria does not effectively utilize NRC resources.
7. Treats employees inconsistently, which could lead to disparate treatment claims.

### **Option 3:**

Revise the current TDP Category 3 to include employees who are in critical-sensitive positions requiring a "Q" or Top Secret security clearance, employees who are in positions of high public trust requiring an "L(H)" security clearance, employees who are in other sensitive positions that may require access to classified information two or more times a year, and those NRC employees who have drug rehabilitation program duties (i.e., Employee Assistance Program employees), which is a preferred testing category. As stated by the ICG, individuals with EAP duties are so inimical to illegal drug use that such employees can expect inquiry regarding their fitness. This option would also resolve Recommendation 4 of OIG audit OIG-05-A-05.

### **Pros**

1. Resolves Recommendation 4 in OIG Audit OIG-05-A-05.
2. Brings NRC's TDP criteria closer in-line with the ICG's revised TDP guidance.
3. Poses no impact to most employees who are currently in non-TDP positions.

### **Cons**

1. May not be viewed by HHS as compliant with the plain language of the EO to include all NRC cleared individuals in the drug testing pool, and therefore may not be approved by HHS.
2. Requires explanation for preferred positions not included in the random drug testing pool (i.e., "Personnel Having Access to "Truly Sensitive Information"), which results in increased risk of HHS not approving NRC's Plan.
3. Does not satisfy HHS concerns regarding complexity of Category 3 criteria (i.e., "Category 3 remains unnecessarily complex...This section could be edited and summarized: Consistent with guidance, the NRC TDP pool is:...(3) Employees with Secret and above clearances...").



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4. Potential for errors is introduced when individuals move in and out of TDPs, as they do each pay period.
5. Does not allow staff to focus efforts on managing the testing process. Expends staff resources (estimated at approximately 728 hours per year) to track movement of employees in and out of the testing pool at the expense of managing the agency's Drug-Free Workplace Program. This effort does not effectively utilize NRC resources.
6. Expends staff effort in collecting information from Office Directors and Regional Administrators regarding individuals in their organizations who meet the Plan criteria does not effectively utilize NRC resources.
7. Treats employees inconsistently, which could lead to disparate treatment claims.