Power Workers' Union

Cross-Examination Materials

EB-2016-0152

OPG Panel 3B

ONTARIO POWER GENERATION

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March 4, 2016

CD# N-CORR-00531-17988

MR. B. TORRIE
Director General
Regulatory Policy Directorate

Canadian Nuclear Safety Commission
280 Slater Street
Ottawa, Ontario
K1P 5S9

Dear Mr. Torrie:

OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty – Drug and Alcohol Testing

The purpose of this letter is to provide the CNSC with OPG's comments on REGDOC 2.2.4 Fitness for Duty – Drug and Alcohol Testing. These comments were developed in consultation with industry peers (Bruce Power, NB Power, and Canadian Nuclear Laboratory). In preparing these comments, OPG consulted broadly within our organization, including with Labour Relations, Human Resources, our Employee Wellness organization, Operations and Maintenance, Security, and our Legal Affairs division. We also held discussions with our two main labour unions, the Power Workers' Union and the Society of Energy Professionals.

Throughout these discussions, it was very apparent that the nuclear industry, which places safety above all else, supports the spirit and intent of this document. As active members of World Association of Nuclear Operators, OPG embraces international best practices and recognizes that testing of this nature is common in many jurisdictions. We appreciate the CNSC's efforts to ensure Canadian nuclear facilities are free from the influences of drugs and alcohol and that, workers in vital roles are physically and mentally ready to perform their duties.

OPG's concerns with the proposed document as currently written can be broadly summarized as follows:

1. The CNSC Impact Statement provides no actual evidence of improvement in nuclear safety or security that would result from the implementation of such an extensive program, or issues with the current fitness for duty programs. Industry acknowledges the potential deterrent effect of these programs, but has no evidence that there is an actual problem that requires resolution. OPG has a mature and successful program to ensure Fitness for Duty, which includes a robust Continuous Behaviour Observation Program (CBOP). In addition, OPG has multiple defence in depth measures in place to ensure the safety of the public, workers, the plant, and the environment. There is no evidence that our existing measures have been inadequate in this area nor indication that they will fail to be adequate in the future.

2. While OPG is generally supportive of the intent, we note there is no clear legislation in Canada supporting many of these requirements, particularly those related to random testing. A recent Supreme Court ruling in the Irving case found that the program of random alcohol testing introduced in that workplace infringed on privacy rights. Arbitrators and the courts have also identified the deficiencies of drug testing as an effective tool for determining fitness for duty, given the fact that drug testing through urinalysis cannot definitively confirm impairment. Many of the proposed requirements, particularly those related to random testing, are likely to generate privacy concerns and legal challenges by workers or the unions that represent them. A clearer legislative basis will ensure proper public debate can be seen to have occurred and reduce the probability of implementation delays brought about by legal challenges.

3. If the CNSC concludes that some degree of random and pre-placement testing is absolutely required, OPG would propose to narrow the application of such testing to only the most safety critical positions, i.e. certified staff and Nuclear Security Officers who are armed or who monitor access to the Protected Area.

4. As noted above, drug testing does not necessarily indicate impairment, or fitness for duty, although it can identify past drug use, second hand exposure, or potentially risky behaviours. The intent of the REGDOC is to ensure workers are fit for duty. Therefore, it is anticipated that the implementation of drug testing will fail to meet the fundamental intent of the REGDOC.

5. Likewise, pre-placement testing for drug and alcohol exposure is not a measure of fitness for duty in the workplace, and is not supported by OPG. We already have extensive measures in place to ensure that the selection of staff to the most safety critical positions (certified staff) is done in an extremely robust and thorough manner to ensure the candidates are fit for these jobs. OPG would support pre-employment testing in order to select external candidates for hire directly into safety critical positions.

6. OPG agrees to the appropriate use of "for cause" drug and alcohol testing upon identification of workplace behaviours indicative of a worker being under the influence of drugs or alcohol.

7. The requirement to psychologically assess all safety-sensitive positions is too sweeping. Regulation 18.2 of the *Nuclear Security Regulations* already provides that security staff are subject to a pre-appointment psychological test. By comparison, this REGDOC appears an inappropriate tool to expand those requirements. Our regular health screening already includes the opportunity for assessment from a mental health perspective if and as required. For certified staff, RD-204 already contains extensive prescriptive requirements for the selection, testing and evaluation of candidates. There is ample evidence that the actual certification and requalification processes required of certified staff would supplant any requirement for psychological testing. No evidence has been provided that such testing would improve selection processes or improve licensee fitness for duty programs.

8. There are a large number of implementation issues which would need to be addressed in order to implement the measures identified in this REGDOC. While some of these may be overcome eventually (acknowledging that there are US workplaces where similar measures have been implemented), OPG submits that this will take many years of union negotiation and litigation before any of these measures could be successfully implemented, given that the unique social, labour relations, and legal framework in

Canada differs significantly from that in the US. As an example, and by reference to point 4 above, we anticipate challenges due to the inability of drug testing to definitively identify impairment.

9. Effort and costs to implement such a wide-spread program (not fully recognized in the CNSC Impact Statement) will necessarily be diverted from other initiatives, and need to be balanced with actual benefits as licensees are constrained as to revenues

In summary, OPG recommends that CNSC consider recent legal and arbitration decisions in a refined version of this Regulatory Document.

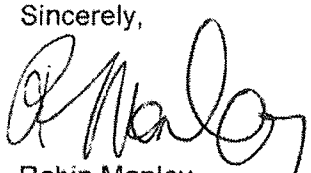
We recommend that CNSC refine the scope to better reflect the truly safety-critical population and the level of any ongoing random testing required. This document would be greatly improved if its requirements focused on a subset of security and certified control room staff whose true relation to nuclear safety can easily be confirmed by risk-informed analysis.

In addition, we suggest CNSC gather additional feedback from workers as well as licensees, unions and other interested parties through facilitated workshops in order to ensure a consistent industry approach and realistic implementation timeframe.

OPG supports the efforts to improve our fitness for duty programs. We would like to thank the CNSC in advance for an engaged consideration of our comments and concerns. Details of OPG's concerns and suggestions for improvement to this REGDOC are provided in Attachment 1. Concerns and comments related to the Impact Statement are provided in Attachment 2.

If you have any questions or concerns please contact Ms. Leslie Mitchell, Manager Regulatory Programs Strategy and Support, at (905) 839-6746, extension 5198, or by e-mail at leslie.j.mitchell@opg.com.

Sincerely,



Robin Manley
Vice President
Nuclear Regulatory Affairs and Stakeholder Relations
Ontario Power Generation

cc: M. Santini -CNSC (Ottawa)
F. Rinfret -CNSC (Ottawa)

ATTACHMENT 1

OPG's Concerns and Suggestions for Improvement to REGDOC 2.2.4

Fitness for Duty – Drug

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
1.	Overall	**Support overall intent**: Industry, which places safety above all else, supports the spirit and intent of this document. As active members of WANO, we embrace international best practices and recognize that testing of this nature is common in many jurisdictions. As such, we appreciate the CNSC's efforts to ensure Canadian nuclear facilities are free from the influences of drugs and alcohol and workers in vital roles are physically and mentally ready to perform their duties. **Legislation**: While generally supportive, we believe the high-level requirements in this document, industry notes there is no clear legislation in Canada supporting many of these requirements, particularly those related to random testing. A recent Supreme Court ruling in the Irving case found that the random alcohol and drug testing infringed on privacy rights. Additionally, arbitrators and the courts have identified the deficiencies of drug testing as an effective tool for determining fitness for duty, given the fact that drug testing through urinalysis cannot definitively confirm impairment. Many of these requirements, particularly those related to random testing, are likely to generate privacy concerns and legal challenges by workers or the unions that represent them. A clearer legislative basis will ensure proper public debate can be seen to have occurred and reduce the probability of implementation delays brought about by legal challenges. **Scope too broad**: Industry also believes the requirements to test personnel in safety-sensitive positions as identified in this document are unduly expansive and would require hundreds of workers to be undergo costly drug, alcohol, medical or psychological	Consider recent legal and arbitration decisions in a refined version of this Regulatory Document. Refine the scope to better reflect the truly safety-sensitive population and the level of ongoing random testing. This document would be greatly improved if its requirements focused on a subset of security and certified control room staff whose true relation to nuclear safety can easily be confirmed by risk-informed analysis. Suggest CNSC gather additional feedback from workers as well as licensees, unions and other interested parties through facilitated workshops to ensure a consistent industry approach and realistic implementation time.	**MAJOR**	While the purpose of this document is understood and supported, the creation of an expanded drug, alcohol & psychological testing system will profoundly impact the industry and its workers. As currently written, we anticipate it will: • Prompt our union partners to defend their members' privacy concerns by mounting legal challenges, which may delay implementation. • Generate conflict between regulatory requirements and arbitration rulings. As the CNSC is aware, Industry and its union partners use an arbitration process to help resolve differences over the interpretation of collective agreements. In the absence of legal clarity, the potential for conflicting requirements exist which would lead to significant issues for operators, who may be required to follow an arbitration decision rather than the Regulatory Document. • Impose a financial burden on licensees required to create and maintain a round-the-clock organization for the level of random and post-incident testing required in this draft. To be clear, licensees will always fund and vocally support programs that address genuine nuclear safety issues. As active members of WANO, we embrace international best practices to close identified gaps to excellence. We just want to ensure investments and efforts are proportionate to an identified problem and feel this draft document does not yet strike an appropriate balance. • Create an inadvertent chilling effect on the number of applicants to safety-sensitive positions and exacerbate minimum complement & employee accommodation challenges. The cumulative effect of additional medical, psychological, drug and alcohol tests on top of the host of existing written and practical exams may be seen my applicants as too significant a burden. Similarly, we may see long-time certified personnel chafe under the growing suite of tests required to keep jobs for which they are already qualified & leverage their union seniority to take roles not deemed safety-sensitive.

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	**Impact on Industry,** if major comment
		testing with no corresponding impact on nuclear safety. While every employee at our facilities is vital to our success, many work in roles with no direct effect on reactor safety and should not fall under the broad requirements of this document as currently written.			
2.	General	The language "safety sensitive" may be defined differently for different purposes, in different regulatory documents or in different licensee documents. See also comments related to Section 4.1.	Replace "safety sensitive" with different phrase such as "safety critical".	**MAJOR**	Similar language for slightly different purposes will result in confusion in implementation and in compliance monitoring.
3.	General	The requirement to psychologically assess all safety-sensitive positions is too sweeping. Our regular health screening already includes the opportunity for assessment from a mental health perspective. Psychological issues are often not identified at one particular point in time and can be the result of external environmental triggers.	Include psychological assessments as part of regular Fitness for Duty assessment requirements, which already include consideration of psychological well-being.	**MAJOR**	As currently written, the scope of safety-sensitive positions identified for psychological assessments is too broad & could be applied to all minimum shift complement roles with no corresponding safety benefit. If not skilfully and discreetly managed, this requirement poses the risk of increased stigma with regard to mental health and increases the potential for discrimination.
4.	Preface	7th paragraph, final sentence on Guidance says, 'Licensees are expected to review and consider guidance; should they choose not to follow it, they should explain how their chosen alternate approach meets regulatory requirements.	Revise wording to, 'Licensees are expected to review and consider guidance.' ~~; should they choose not to follow it, they should explain how their chosen alternate approach meets regulatory requirements~~	**MAJOR**	Guidance is meant to be guidance. If the licensee is required to meet guidance criteria (even by other means), then it becomes a requirement, not guidance.
5.	2 Background	All aspects of safety and security are included except environmental safety.	Include environmental safety to this policy.	**Clarification**	
6.	2	Requirement "An employer is responsible for assessing the extent, where considered necessary, of the duty to accommodate." needs clarification as to how licensee compliance is demonstrated.	Rewording: An employer is responsible for assessing the extent, where considered necessary, of the duty to accommodate based on licensee produced documents.	**Clarification**	

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
7.	3.1.5	Requirement to address stand-by, on call, and unexpected call in requirements related to fitness for duty ordinarily need to be directly negotiated with the unions and cannot be unilaterally dictated through an Employer policy. The high level policy already addresses this. The statement is too detailed for a Regulatory document requirement.	Remove this requirement or retain as guidance only.	**MAJOR**	This may involve licensees in lengthy grievances and arbitration, with subsequent negative impact on relations with our Unions, with no commensurate safety benefit. Supervisors are trained to detect and react to abnormal behaviour that could potentially be indicative of impairment or other fit-for duty concerns. Industry believes it will be able to address any emergent staffing issues arising from fitness for duty concerns through existing mechanisms, and that these do not need to be codified in a fitness for duty policy.
8.	3.4	Under heading guidance – "directed referral" are these mandatory referrals?	Suggest clarification of language.	**Clarification**	
9.	Section 3.4	The final sentence in the third paragraph, 'These restrictions shall be reported as either temporary or permanent' is a business issue and not appropriate for a regulatory document. Managing employee accommodation is a business issue. From a requirement's perspective, the regulator should only have an interest in whether the employee is fit, unfit, or fit to perform with restrictions. It should not matter to the regulator if the employee has permanent or temporary restrictions.	Remove the sentence.	**Clarification**	
10.	Sections 3.6.2 and 3.8	The term 'detect' is inappropriate in the final three bullet points under the Guidance section ... 'the ability to ***detect***, assess, and effectively respond ...' Supervisors may be trained to recognize behaviours and warning signs for a number of employee matters, but they are not expert. The term detect indicates a higher level of expertise.	Replace 'detect' with 'recognize' in the last three bullet points under Guidance.	**Clarification**	

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	**Impact on Industry,** if major comment
11.	4.1	The designation of safety-sensitive positions found at Section 4.1 of the REGDOC is overly broad. As currently drafted certified workers, security staff and minimum complement staff are all designated as being safety sensitive positions. Licensees are also required to perform a risk-informed analysis to determine whether other positions should be designated as safety sensitive. CNSC Regulatory Document RD-204 establishes the rigorous testing, competency and requalification requirements to certify individuals as qualified to operate a nuclear power plant. The Preface to RD-204 states that the document has been developed in accordance with the Act and regulations in order to *"define requirements regarding certification of persons who work at Canadian nuclear power plants (NPP) in* ***positions that have a direct impact on nuclear safety.***" Through the imposition of the complex and prescriptive qualification and requalification requirements of RD-204 the CNSC has already recognized certified control room staff and would be appropriately designation as safety critical. Due to the nature of their duties armed NRF and NSO security employees are also appropriately designated as safety critical.	Limit the automatic designation of safety sensitive positions to certified control room staff, armed Nuclear Response Force members, and security staff required to patrol and monitor employees and control the ingress/egress from the plant. Rather than impose a blanket safety sensitive designation on "minimum complement" positions, licencees should be permitted to determine which, if any, of the minimum complement positions are safety sensitive through the conduct of a risk-informed analysis.	**MAJOR**	The inclusion of "minimum complement" positions is problematic. On a day-to-day basis there may only be a small fraction of incumbents in "min complement" classifications (e.g. Control Technicians) that are actually regularly considered part of minimum complement. Licensees regularly schedule beyond minimum complement requirements, and in some cases much of the maintenance work is now performed on dayshift using a days-based maintenance model. The identity of specific "minimum complement individuals" is fluid due to staff transfers, promotions, shift change, illness and vacation coverage etc. Testing as set out in the REGDOC would therefore be required for a much larger population than the simple numbers specified in licensee minimum shift complement requirements specified in licensing basis.

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
12.	**Section 4.1**	The list beneath the statement, 'Safety-sensitive positions shall include:' is too sweeping. Some members of minimum shift complement (e.g. the Shift Advisor Technical, the Shift Resource Coordinator, members of the off-site survey team) may, through analysis, be shown to not be in a safety-sensitive position. Clarity is required to ensure these requirements apply to regular staff only and not contractors, Appendix A employees, etc.	Revise to, "Safety-critical" positions shall include the following unless documented as not safety-critical through risk-informed analysis:" Insert a statement that confirms, "Companies with contract employees working in safety- critical positions at high-security nuclear facilities must enforce fitness for duty requirements consistent with this document."	**MAJOR**	Broad declarations such as 'safety-sensitive positions ***shall*** include' certified workers and minimum shift complement workers are unduly restrictive. Without the ability to use risk-informed analysis to truly determine all safety-critical positions, this requirement may be applied to minimum shift complement roles with no corresponding safety benefit.
13.	**Section 4.1**	There should be additional information on how certified workers on temporary assignments to non-safety critical positions are handled.	Add the following to section 4.1: 'Certified workers on temporary assignments in positions that are not identified as safety-critical may be treated the same as the broad population of workers. When the certified workers are providing relief coverage during their temporary assignment, all Section 4 requirements shall apply. The licensee shall document the treatment of certified staff on temporary assignments in their governing documents.'	**MAJOR**	If applied to all certified staff performing any role, this requirement this will lead to undue administrative burden with no corresponding safety benefit.
14.	**4.1 and 4.3.2, Glossary**	2. the following security personnel: Nuclear Security Officers (NSOs), onsite nuclear response force (NRF) members, and designated non-NRF personnel. Industry does not understand the term "Designated non-nuclear response force personnel", and as such cannot comment on whether the proposed requirements are reasonable. Further discussion on this point is required.	Clarification/definition as to who is a 'designated non-NRF personnel' A clear definition should be provided consistent with current usage.	**MAJOR**	Without a clear understanding of what this is intended to be, industry cannot reasonably provide comment on this point, or understand the potential impact on the licensee. Further discussion on this point is required so that all are clear on this, to allow for consistent compliance.

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	**Impact on Industry,** if major comment
15.	**4.3.1.**	Additional clarification is required regarding the guidance statement, 'When conducting the certified workers' medical assessment, the medical practitioner should be guided by a recognized medical standard' such as *American National Standards Institute (ANSI) 3.4 Medical Certification and Manitoring of Personnel Requiring Operator Licences for Nuclear Power Plants.*	Suggest a Canadian standard equivalent.	**MAJOR**	Industry needs to know if appropriate resources are available local to the licensee's premises Through inter-utility discussions, licensees will need to further understand the requirements of this ANSI document to appreciate the scope of the medical assessments and how it compares to similar Canadian medical assessments.
16.	**Section 4.3.3**	Including the statement, 'CSA Group nuclear standard N293, Fire Protection for CANDU Nuclear Power Plants [15] requires emergency response teams (ERT) / industrial fire brigade members to undergo a medical assessment annually, and after each medical leave of absence' is too specific a reference.	Remove specifics and rewrite to say, 'CSA Group nuclear standard N293, Fire Protection for CANDU Nuclear Power Plants [15] specifies requirements for medical assessments for emergency response teams (ERT) / industrial fire brigade members.'	**MAJOR**	Do not document specific requirements that are outlined in a separate standard. Simply point to the standard and state what requirements are therein. CSA documents may be revised, resulting in a potential conflict between regulatory requirements.
17.	**4.4**	The requirement to psychologically assess all safety sensitive positions is too sweeping. Regulation 18.2 of the *Nuclear Security Regulations* already provides that security staff are subject to a pre-appointment psychological test. The unions have accepted and negotiated appropriate protocols to address the regulation. There are no other classifications at OPG where individuals are required by law to submit to psychological testing as a condition of their employment. For certified staff RD-204 contains extensive prescriptive requirements for the selection, testing and evaluation of candidates. Industry has wide latitude to select candidates who exemplify the behavioural and technical attributes required for the job. Candidates undergo years of extensive classroom and simulator training, testing and evaluation and are closely monitored and observed in both classroom and operational settings. A large percentage of initial	Limit psychological testing to security staff as referenced in regulation 18.2 of the *Nucleor Security Regulations*.	**MAJOR**	Collective agreements contain detailed provisions for the selection of staff. Factors such as education, skills, qualifications and seniority must be considered and applied. Industry collective agreements do not expressly contemplate psychological testing as part of the selection process. The unilateral imposition of such testing for safety critical positions will be subject to legal challenge, and will negatively affect labour relations. This requirement is unlikely to provide relevant information on cancidate suitability or fitness for duty for a certified position. The identification and diagnosis of psychological concerns is often completed over a period of time and may be dependent on a number of factors in the external environment. It is inappropriate and too broad to appropriately diagnose an individual on one assessment which would impact their ability to obtain an offer of employment. In conjunction with the imposition of mandatory alcohol and drug testing, this requirement may create a chilling effect on recruitment efforts for certified positions.

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
		candidates are screened out prior to certification. In summary, there is ample evidence that the actual certification and requalification processes required of certified staff would supplant any requirement for psychological testing. No evidence has been provided that such testing would improve selection processes or improve licensee fitness for duty programs.			
18.	**Section 4.4.1**	See comment on Section 4.1 regarding certified staff on temporary assignments.	See comment on Section 4.1 regarding certified staff on temporary assignments.	**MAJOR**	If applied to all certified staff performing any role, this requirement this will lead to undue administrative burden with no corresponding safety benefit.
19.	**Section 4.5.3**	There are concerns with referencing NFPA in the statement, 'In developing requirements for physical fitness standards for industrial fire brigades, licensees should consider the 13 essential job tasks of a local fire department defined in the National Fire Protection Association (US) Standard on Comprehensive Occupational Medical Program for Fire Departments NFPA 1582 (2013) [16] in the context of fire response for an industrial fire brigade at a nuclear facility.'	Remove the quote from the Standard and reference to National Fire Protection Association NFPA 1582. Reference should be made to CSA N293 *Fire Protection for Nuclear Power Plants* instead.	**MAJOR**	CSA N293 *Fire Protection for Nuclear Power Plants* is in the process of being revised to address fitness standards. CNSC is encouraged to have these requirements established in that nuclear standard rather than pointing to a separate document.
20.	**Section 4.6.1**	The statement 'Licensees shall require ***all*** applicants to a safety-sensitive position to submit to alcohol and drug testing' is overly broad and generates significant human resources issues.	Rewrite to say, 'Licensees shall require all successful candidates to a safety-critical position to submit to alcohol and drug testing as a condition of placement.'	**MAJOR**	As currently written, this requirement will lead to undue administrative burden with no corresponding safety benefit.
21.	**Section 4.6.2**	Guidance regarding for-cause alcohol and drug testing using the broad definition of 'safety significance' provided is open to interpretation and potential challenge. This document would be strengthened if licensees' fitness for duty governance documents defined the circumstances that would prompt for-cause testing at their particular facilities.	Rewrite the first sentence slightly to say, 'Licensees shall define within their fitness for duty governance documents when workers in safety-critical positions will be required to submit to for-cause testing under reasonable grounds and post-incident circumstances.'	**MAJOR**	Without clarity in governance documents on what would prompt for-cause testing, we can anticipate varied and potentially conflicting interpretations and worker challenges.

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
22.	Section 4.6.2	The last sentence in the second paragraph, 'The grounds for for-cause testing shall be independently verified by at least two people (one of whom is the supervisor)' is too narrowly focused.	Rewrite to say, 'The grounds for for-cause testing shall be independently verified by at least two people (one of whom is ~~the~~ a supervisor).'	Clarification	
23.	4.6.4	Random Alcohol and Drug testing The CNSC need to take into account the recent Supreme Court ruling in the Irving case where it was found that Irving's program of random alcohol testing infringed on privacy rights. Additionally, arbitrators and the courts have identified the deficiencies of drug testing as an effective tool for determining fitness for duty, given the fact that drug testing through urinalysis cannot definitively confirm impairment. While drug testing may be justified in "for cause" situations, or as a follow up where an employee with acknowledged substance abuse problems is subject to unannounced testing for a defined period, we are not aware of any example in the Canadian jurisdiction where a program of random drug testing has been upheld as reasonable.	Suggest that CNSC consider the challenges arising from the Supreme Court of Canada ruling in the finalization of this document.	MAJOR ISSUE	Regardless of the limitations in the current fitness for duty policy for random testing (only employees in safety sensitive positions, with unescorted access to nuclear specific sites) the fact remains that the implementation of such a policy in a workplace creates much uncertainty for industry. There is no way for industry to know whether any requirement will withstand challenge/judicial scrutiny. Arguably the nuclear facility setting may be perceived as fulfilling the requirement of a demonstrated enhanced safety risk. However, until tested through anticipated legal challenge this is not certain.
24.	Section 5.1	Clarity is sought for the final paragraph under Guidance, which states, 'The examining medical practitioner would then complete the MER and forward it to the licensee's duly qualified medical practitioner(s), where information would be reviewed and a medical certificate – categorized as fit, unfit, or fit with employment limitations – would be forwarded to the licensee's management.' Inconsistent use of language.	Replace 'employment limitations' with 'work restrictions' to ensure consistency in use of language throughout.	Clarification	

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#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
25.	**Section 5.2**	The first sentence of the second paragraph indicates 'The psychological assessment shall include an interview and one or more tests.' If a requirement is implemented, the business should have final determination of what kind and number of assessments they feel is appropriate. This is a business issue and not appropriate for a regulatory document. This is too specific for a regulatory document.	Remove requirement.	**MAJOR**	Impedes industry capability to implement the requirements in the most optimum way.
26.	**Section 5.2**	The final bullet, which says the certificate should: "include any temporary or permanent work restrictions,' is a business issue and not appropriate for a regulatory document.	Remove the sentence.	**MAJOR**	Managing employee accommodation is a business issue. From a requirement's perspective, the regulator should only have an interest in whether the employee is fit, unfit, or fit to perform with restrictions. It should not matter to the regulator if the employee has permanent or temporary restrictions.
27.	**Section 5.4.1**	Additional clarity is sought on breath alcohol testing processes maintained by licensees versus those of contracted service providers. Requirements are currently detailed in the 4th paragraph, which says, 'Licensees shall establish, implement, and maintain procedures for the administration of evidential breath alcohol testing.'	Replace third paragraph with, 'For licensee-maintained processes, licensees shall establish, implement, and maintain procedures for the administration of evidential breath alcohol testing. For retained services, licensees shall ensure service providers maintain procedures for the administration of evidential breath alcohol testing.' This is consistent with the second paragraph of this section, which indicates licensees may "retain or maintain" competency for this process.	**Clarification**	

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28.	5.4.2	The requirements for the implementation of a program of drug testing through urinalysis in the workplace are expensive, and may not be effective in demonstrating fitness for duty. One union has expressed the view that drug testing will be opposed in all circumstances unless such testing can be shown to confirm impairment.	Provide for flexibility for alternate test methods to test for potential impairment where these are where appropriate and available, or are likely to become available.	**MAJOR**	There will be significant costs associated with implementation, with no demonstrated safety benefit. As it is not clear that drug testing by urinalysis can confirm impairment, industry anticipates challenges to any such drug testing program. In some cases other testing methods may provide a better indication of impairment, such as oral fluid testing for marijuana, close to being approved by US DOT. (Also applies to guidance.)
29.	5.4.2	Although the drugs to be tested for are identified in Appendix D, tables D2 and D3 and D4, there should be flexibility and references made to be able to add any drug or drugs to the testing panel as may be dictated by circumstances, by introduction of new drugs to the community, or by requirement as the need may be. This will expedite such testing as opposed to having to re-write the policy.	Add flexibility and references to be able to add any drug or drugs to the testing panel as may be dictated by circumstances.	**Clarification**	
30.	5.4.2	Canada Standards Council does not specifically accredit/certify gold standard workplace drug testing program laboratories. Such accreditation is only available through HHS/SAMHSA.	Change accreditation standard reference.	**Clarification**	
31.	5.4.2	All test results (negative, positive, invalid, adulterated, substituted, etc.) should be reported to a qualified and certified Medical Review Officer (MRO) who is a licensed physician who has undergone training and written certification examination in compliance with the requirements contained with U.S. Department of Transportation regulation 49 CFR Part 40. Note that there are no formal MRO training and/or certification programs available in Canada. They are only available in the U.S. Interpretation should only be done by an appropriately certified MRO.	Include requirements for tests to be reported to an appropriately certified MRO and that only such MRO be allowed to interpret.	**MAJOR**	Consistency in interpretation by an appropriately trained and qualified individual is required to maintain the integrity of any mandated test program, should this be successfully implemented. Industry recommends that if this document is to be implemented, an appropriate accreditation program be established in Canada before this portion is implemented.

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
32.	5.4.2	Guidance – no provision for shy lung.	Revise bullet to "protocol for shy bladder or shy lung".	**Clarification**	
33.	5.4.2	Guidance - Only MRO specialists are trained and certified in North America for the purpose of reviewing workplace drug testing programs.	Remove duly qualified forensic toxicologists or duly qualified pharmacists from list of those who may be considered for review and interpretation.	**Clarification**	
34.	5.4.2	Guidance - Where a valid and verified medical explanation exists for a positive laboratory test result, the MRO should determine the result to be negative, and will comment on safety sensitive issues where necessary.	Revise action by MRO in these cases.	**Clarification**	
35.	5.4.3	This requires that workers who provide a verified positive alcohol or drug test be removed from their safety sensitive duties and referred to EAP, and that the individual cannot be reinstated to those duties without a recommendation from a duly qualified health care provider. This provision pre-supposes a determination that the worker suffers from a substance abuse problem that requires the assistance of the EAP program. A test that only fractionally exceeds a policy limit and where the employee does not otherwise acknowledge a substance abuse problem would automatically require a referral to EAP. It is not clear what assistance EAP could offer in such circumstances, or whether the unions will challenge this part of the process as unreasonable.	Provide flexibility for employer response to individual cases.	**MAJOR**	It is not clear what assistance EAP could offer in cases of minimal exceedances, or where employee does not acknowledge a problem. This provision may result in Union challenges to this part of the process as unreasonable. In standard North American workplace drug testing programs (most noticeably, U.S. DOT), workers who are in violation of an employer's drug and alcohol program are referred to a Substance Abuse Professional (SAP) who are certified in compliance with SAP provisions contained within U.S. DOT drug testing regulation 49 CFR Part 40. EAP is a program for self-referral prior to a drug and alcohol program violation occurring. That said, in some circumstance, some service providers provide both SAP and EAP services. But it is still important to note the difference between self-referral circumstances, and policy violation circumstances.
36.	5.5	Licensees shall establish, implement and maintain an assessment process to evaluate workers in safety-sensitive positions for substance abuse and or dependency. This is a duplication of the drug and alcohol program addressed in the document.	Remove this redundant requirement.	**Clarification**	

Attachment 1
OPG Comments on Draft REGDOC 2.2.4 Fitness for Duty

#	Document/ Excerpt of Section	Industry Issue	Suggested Change(*if applicable*)	Major Comment/ *Request for Clarification* [1]	Impact on Industry, if major comment
37.	Appendix B	The requirements are unclear. Industry does not understand which work groups are being referred to and therefore industry cannot determine if the requirements are appropriate.	Clarify the affected work groups.	MAJOR	Industry does not understand if requirement is appropriate, and would potentially be unable to comply.
38.	Appendix C	Page 25, Station 2b – Stair climb station. This requirement was temporarily eliminated from the testing due to safety concerns raised by industry. CNSC regulatory correspondence issued to Bruce Power under e-doc4413805 dated, 23 April 2014 provides this direction. The safety-related concerns still exist. The CNSC is asked to explain the basis for re-introducing this unsafe practice.	Remove the direction for personnel **not** to use the railing during the stair climb.	Clarification	
39.	Appendix D.2	This appears to be missing Oxymorphone. This is inconsistent with accepted practice, where Oxymophine is also identified in the panel when submitting a drug test to a reputable laboratory.	Add Oxymorphone.	Clarification	
40.	Appendix D.3	This appears to be missing Oxymorphone. This is inconsistent with accepted practice, where Oxymophine is also identified in the panel when submitting a drug test to a reputable laboratory.	Add Oxymorphone.	Clarification	
41.	Appendix D.4	The proposed Dilution substance test has not been broadly accepted for workplace testing programs. Dilution substance testing protocols have not been broadly accepted for workplace testing programs, and may be difficult to defend if challenged.	Remove reference to dilution protocols, replace with licensee to establish acceptable protocol.	MAJOR	Dilution substance testing protocols have not been broadly accepted for workplace testing programs, and may be difficult to defend if challenged. In addition, there are very few accredited labs available to perform these tests, making compliance a challenge for licensees.

ATTACHMENT 2

OPG Comments on Impact Statement for Draft REGDOC 2.2.4

Fitness for Duty - Drug

Attachment 2

OPG Comments on Impact Statement for draft REGDOC 2.2.4 Fitness for Duty

Document section/ excerpt of section	Industry issue	Suggested change(if applicable)	Major Comment/ request for clarification [1]	Impact on industry if major comment
Potential Impacts	Statement that industry has many of the programmatic elements in place is not correct, and underestimates the effort required to revise existing programmatic framework. Existing physical and psychological testing requirements for security staff arise directly from the Nuclear Security Regulations. The actual implementation of such testing requirements was negotiated with the employees' union representatives. There are currently no physical, psychological or drug and alcohol testing requirements for certified or minimum complement staff other than "for cause". Their job duties and accountabilities are dissimilar to those of security staff.	Revise to acknowledge true programmatic burden in implementing expanded scope, and potential for significant delays implementation.	**MAJOR**	Beyond a mere expansion of existing programs, Industry anticipates lengthy negotiations with our unions and potential legal challenges, will be required to implement the proposed changes. As a result, beyond considerations of economic cost the requirements of the REGDOC will create a significant impact on OPG's relationship with our employees and their unions. Preliminary estimates as to ongoing costs of the requirement assuming only certified and security staff are designated as "safety critical "is of the order of $4,000,000 per year for a multiunit licensee .
Potential Impacts	The Statement provides no actual evidence of improvement in nuclear safety or security by the implementation of such an extensive program, or issues with the current fitness for duty programs.	Provide more specifics as to benefits.	**MAJOR**	Industry acknowledges the potential deterrent effect of these programs, but has no evidence that there is an actual problem that requires resolution. Industry has several tools already available to ensure staff is fit for duty. Effort and costs to implement such as wide-spread program (not fully recognized here) will necessarily be diverted from other initiatives, and need to be balanced with actual benefits as licensees are constrained as to revenues.
General	The Impact Statement is incomplete. It speaks only in broad terms with no true analysis of how these requirements will impact licensees' union agreements, medical infrastructure or worker	Rewrite to provide a comprehensive, impact analysis on licensees and their employees.	**MAJOR**	Without a comprehensive impact statement, licensees are unsure whether the financial and human resource levels needed to comply with these requirements are proportionate to the nuclear safety risk being addressed.

Document section/ excerpt of section	Industry issue	Suggested change(if applicable)	Major Comment/ request for clarification [1]	Impact on industry if major comment
	accommodation challenges. The statement acknowledges that additional requirements will "impose immediate and long-term financial costs" on licensees, then declares those costs justified without offering data to support whether they are proportionate to the perceived risk being addressed.			