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NRC Enforcement Policy Revision; Processing Fitness-for-Duty Drug and Alcohol Cases

Comment On: NRC-2016-0185-0001
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General Comment

See attached file(s)

Attachments

Enforcement Policy

Comment on NRC-2016-0185 "Processing Fitness-for-Duty Drug and Alcohol Cases"

Comment 1: The Federal register notice says that "Based on the FFD performance information reported electronically to the NRC since 2009 and a comparison of this information to previous years and other indicators….The data indicates no adverse trends."

First, I looked at your Performance Reports on the NRC website, http://www.nrc.gov/reactors/operating/ops-experience/fitness-for-duty-programs/performance-reports.html. No Performance Report is available for either 2014 or 2015. A change to the enforcement policy without information available to the public to understand if any "adverse trends" exist in the most recent years seems to be critical to having confidence in this proposed policy change.

Second, I disagree with your statement about "no adverse trends" and based my disagreement on information in your Performance Report for 2013

- page 6 - "An adverse upward trend over the past 5 years has been the increasing share of amphetamine positive test results". I don't understand how you can say that "no adverse trends" exist when your own report says there is one.

- page 7 - 2 construction sites conducted 5.8 percent of the industry tests and had 17.7 percent of the positives and testing refusals. That seems like a lot more drug users at those sites. How come that's not an adverse trend?

- page 9 - forty 24-hour reportable events were received which are for "significant violations of an FFD program involving supervisory or NRC-licensed individuals" and that 17 of these events were for supervisors and 12 were for licensed operators – that's 29 of the 40 reports in the year. "The data shows that the substance of abuse is alcohol and marijuana and a potential increasing trend with reportable events involving licensed operators." I also saw in Table 1 on pages 17 and 18 that summarizes these 24-hour reportable events, that 3 of the supervisor and licensed operator events were for arrests for possession of a controlled substance offsite or a DUI. A "potential increasing trend" doesn't seem like the data indicate "no adverse trends"

Third, you describe that this electronic report system has been in use since 2009, but that statement seems a bit misleading because use of the system hasn't been universal. The Performance Report for 2013 listed that 93% of facilities used it. However, the Performance Report for 2012 provided information on how many facilities used the system since 2009 --- in 2009 only 25% used it, in 2010 use was at 69%, in 2011 use was 80%, and in 2012 use was 88%. Realistically, it doesn't seem NRC has had more than 2 years where close to 90 percent of the industry used this electronic system, based on the last information that I could find in the publically available Performance Reports.

- Is that enough time to talk about adverse trends? Don't you need all sites to use the system to ensure that good information is being received and the full trends evaluated?

Fourth, I did a Google search to see if I could find any more recent information about FFD performance. I was able to find 2 presentations that NRC made for the Drug Testing Advisory Board. It looks like in those presentations some additional adverse trends may have been presented, although the slides don't use the term "adverse".

- 2014 results (http://www.samhsa.gov/sites/default/files/meeting/nrc-fitness-duty-programs-harris.pdf)
    - Slide 8 titled "Subversion attempts – 2012-2014". Between 148 and 187 people per year were caught cheating (that's between 14.7% and 16.5% of violations per year that were subversions). How is this not an adverse trend with so many people cheating?
- 2015 results (http://www.samhsa.gov/sites/default/files/meeting/documents/harris-nrc-dtab-may-2016.pdf)
    - Slide 11 "Subversion attempts" presents information for 2015, 19.3% of violations were subversion attempts (that's 231 individuals). The percent of violations that were subversions continues to rise. This seems like a clear adverse trend?
    - Slide 14 "Multi-Substance Positive Results 2015" presents information on how many individuals that tested positive had more than one substance in their body at the time of testing. Of the 61 individuals identified, 29 were identified on random, for cause, post-event, and followup – that means that these individuals were working in a power plant – correct? How is that not an adverse trend? Also, your 26.75 sanctions don't address this type of situation, would enforcement action be taken in these cases?

Comment 2: Your notice states that 26.75 includes specific minimum sanctions that are imposed on an individual for violating the FFD policy. These sanctions apply to an individual that tests positive on a drug or alcohol test and the denial period increases based on number of times the person tested positive. The sanctions also include a permanent denial for an individual identified as subverting a test. However, the 26.75 sanctions include no minimum sanctions for other violations of the FFD policy, so presumably, variability may exist between licensees. How is the public protected by reliance on site specific sanctions, if for example, a person can just go to another nuclear power plant and possibly get a job?

- Does the NRC keep track of FFD violations that are not positive drug or alcohol tests or subversion attempts?
- Perhaps it would be reasonable that additional enforcement might not be necessary for the clear sanctions described in 26.75 because the denial period is long (i.e. for the 5

year denial and the permanent denial), but what about for other FFD violations that do not have a 26.75 minimum sanction?

Comment 3: The federal register notice stated that since the March 2008 Part 26 rule changes, a total of about "40 FFD D&A related cases in which OI investigated instances of individuals violating FFD D&A procedures at licensee sites." The notice states that the FFD D&A cases included failed drug tests, alleged attempts to subvert FFD testing, alleged possession or use of illegal drug or alcohol, and alleged misuse or failure to report the use of prescriptions. What's surprising to me is that in 2013, 1007 individuals had a drug or alcohol violation, in 2014 it was 1,132 individuals, and in 2015 it was 1,199 individuals. Why is NRC proposing to eliminate enforcement for FFD violations when this approach is rarely used, on 40 FFD D&A cases since 2008 when licensees have reported over 1,000 positive results each year?

Comments 4: The federal register notice stated that about 40 enforcement cases were completed since the 2008 rule change (so that seems like only 5 or 6 cases per year?). I looked at Item 101 on page 36 of Enclose 1 of SECY-16-0009 and it says that NRC expected to save 2.0 FTE per year, which is about 4,200 hours if you consider an average worker works 40 hours per week and works 52 weeks per year. "Reducing Fitness For Duty (FFD) case processing" is only one small item in a long list of the "Create efficiencies in the Enforcement Process" so I'm wondering how much is being saved by this policy change.

"Proposed Shed, De-prioritization, Reduced Resource"
"Create efficiencies in the Enforcement Process. Examples include increasing the use of virtual and modified panels, reducing the review of unsubstantiated OI cases and reducing Fitness For Duty (FFD) case processing. The Office of Enforcement would also decrease its support for the following: (1) the review of 2.206 petitions, rulemaking, & policy revisions; (2) the development of prerecorded video training; (3) domestic outreach activities with other federal agencies; (4) would undertake less frequent updates of Management Directives; and (5) would eliminate duplication of back end FOIA reviews for discrimination cases."

"Staff's Assessment of Impact with respect to the Re-baselining criteria of mission, the Principles of Good Regulation, and NRC's Values"
"The staff believes that there is minimal adverse impact on our mission, principles or values for this item. Most eliminated or reduced activities are discretionary. The "back end" review of FOIA requests for discrimination cases is a redundant check to minimize the potential release of alleger identity. This change would require changes to Commission approved documents such as the Enforcement Policy and the Commission's Policy on FFD case processing. The changes and revisions, along with Commission review and Decision, would take 12 months to implement."