

Analysis of Comments Received on Proposed Change to Enforcement Policy Regarding Processing Fitness-for-Duty (FFD) Drug and Alcohol (D&A) Cases

The period for submitting public comments on proposed changes to the U.S. Nuclear Regulatory Commission's (NRC's) Enforcement Policy (Policy) expired on November 4, 2016 (81 FR 69010). A summary of the issues raised by the stakeholders, followed by the NRC's responses to the comments, is provided below.

1. Comment Summary: One commenter commented that the NRC (independent entity) needs to continue to monitor and investigate nuclear workers for D&A issues and not to leave it to the licensees. ([ADAMS ML16313A398](#))

Response: The NRC staff disagrees with this comment in part. The NRC will continue to maintain oversight (inspections, performance assessments, enforcement, allegations and investigations) of licensed activities to ensure that the licensees are complying with NRC requirements and license conditions. The NRC will continue to maintain its authority to investigate any or all issues associated within the scope of the NRC's authority, while maintaining it is the responsibility of licensees, certificate holders, and applicants to implement and comply with all regulatory requirements associated with their licenses, including the implementation of the FFD D&A policies and regulations.

2. Comment Summary: One commenter commented that the NRC needs to continue to regulate and monitor licensee's FFD programs and their opinion is that impaired nuclear workers are a very serious concern. ([ADAMS ML16313A401](#))

Response: The NRC staff agrees with this comment. The NRC continues to inspect and enforce licensees' FFD programs. Title 10 of the CFR Part 26, Fitness for Duty, requires licensees' FFD programs to, in part, provide reasonable assurance that individuals are trustworthy and reliable as demonstrated by the avoidance of substance abuse and are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties. The NRC maintains an inspection program to determine whether the licensees are meeting the requirements of the Part 26 FFD program and if violations occur, the NRC will enforce those violations in accordance with the NRC Enforcement Policy.

3. Comment Summary: One commenter's comments indicate they believe the NRC is soliciting comments regarding a FFD rule change rather than proposed changes to the enforcement policy regarding specific FFD and D&A issues. It's the commenter's view that there's serious risks associated with the proposed rule change that the NRC may not have thoroughly considered that the proposed rule change is premature and inadequate in its scope. The commenter recommends that the NRC keep the FFD rule intact. The commenter notes that reviewing historic and related information regarding the FFD program, they believe the NRC is not taking the mandates to protect public and nuclear workers seriously. Allowing the licensees to self-regulate is akin to letting the fox guard the hen house. The commenter provide nine questions in their response with over half of the questions are in regards to the NRC's annual FFD Performance Reports. ([ADAMS ML16313A400](#))

Response: The NRC staff believes that this commenter's response indicates a belief that the *Federal Register Notice* (FRN) was soliciting comments in regards to FFD rulemaking and not the proposed change to the enforcement policy the staff is seeking to change. The commenter referenced numerous questions in regards to the NRC FFD annual report and FFD budget concerns. The NRC staff suggests that the commenter could submit his/her suggestions and concerns to the NRC during the upcoming (2017) public comment period for the proposed revision to the 10 CFR Part 26 FFD D&A testing requirements (NRC-2009-0225;3150-A167). However, NRC staff evaluation of suggested rule changes are outside the scope of this staff initiative.

4. Comment Summary: One commenter commented to continue to keep monitoring nuclear workers and supervisors as stringently as necessary. ([ADAMS ML16313A399](#))

Response: The NRC staff agrees with this comment as noted in the response to Comment #2 above.

5. Comment Summary: A commenter commented on behalf of a nuclear safety group, located in the United Kingdom, which they strongly oppose licensees performing D&A testing. They believe that self-monitoring excludes any public scrutiny and increases the risk of a nuclear accident, damage to public health and the environment. D&A programs should be administered by the regulator and not by the licensees. ([ADAMS ML16313A406](#))

Response: The NRC staff disagrees with this comment as noted in the response to comment # 1 above.

6. Comment Summary: A commenter commented that they do not support the passing of the proposed change to the NRC Enforcement Policy to Section 4.1 which is entitled "Considerations in Determining Enforcement Actions Involving Individuals". The commenter thinks the NRC should continue to review and enforce the decisions of licensees in D&A cases, because the employees and licensees that are under the authority of this code are entrusted with a lot of responsibility considering they have access to nuclear materials. Although data has shown that licensees have done a satisfactory job with ensuring that individuals who violate the D&A rules are given the proper sanctions, there is always a possibility that this ethical standard could deteriorate. It would not be tactful to entrust such a power with individual entities such as licensees without having at least some kind of oversight from one overarching power. ([ADAMS ML16313A405](#))

Response: The NRC staff disagrees with this comment in part as noted in the response to comment # 1 above.

7. Comment Summary: One commenter commented that they were in favor of the proposed revision. They believed if the NRC needs to make improvements to the FFD D&A policy then it's a positive change and hopes it improves the efficiency of the enforcement policies and oversight of the D&A program. ([ADAMS ML16313A404](#))

Response: The NRC staff agrees with this comment.

8. Comment Summary: One commenter noted they supported the revision. ([ADAMS ML16313A403](#))

Response: The NRC staff agrees with this comment.

9. Comment Summary: An industry stakeholder commented on behalf of the nuclear energy industry, the Nuclear Energy Institute supports the NRC staffs actions towards efficiencies in the FFD D&A process. ([ADAMS ML16313A402](#))

Response: The NRC staff agrees with this comment.

10. Comment Summary: One commenter commented that the NRC should continue to monitor safety issues that have direct proportional effects to danger the public. It should go without saying that a part of that would be insuring the plant operators are fit for duty. ([ADAMS ML16330A255](#))

Response: The NRC staff agrees and disagrees with this comment. The NRC staff agrees that the NRC should monitor licensee performance commensurate with the regulatory, safety, or security significance of the activity being performed and notes that this is currently being accomplished by the NRC inspection program. However, the NRC staff disagrees with the latter portion of the comment in part as noted in the response to comment # 1 above.

11. Comment Summary: A commenter submitted four specific comments regarding the FFD D&A FRN solicitation. A summary of each comment is listed:

- I. The NRC should continue regulating and expand its duties as a regulator of FFD programs at licensee's sites and not allow the licensees to regulate themselves and that the FFD rule should be expanded to a zero tolerance regulation and expanded to all NRC licensees e.g. uranium mining.
- II. The NRC should continue to regulate, oversee, and investigate D&A use at nuclear power stations and fuel facilities, but should also increase and improve oversight and public transparency of the events.
- III. The commenter recommends a system that requires alcohol breath test prior to entering the facilities.
- IV. The commenter also believes the NRC has violated the clear writing rule when writing this Federal Register Notice. ([ADAMS ML16330A253](#))

Response:

- I. The NRC staff disagrees with this comment in part. The NRC will continue to maintain oversight (inspections, performance assessments, enforcement, allegations and investigations) of licensed activities to ensure that the licensees are complying with NRC requirements and license conditions. The NRC will continue to maintain its authority to investigate any or all issues associated within the scope of the NRC's authority, while maintaining it is the responsibility of licensees, certificate holders, and applicants to implement and comply with all regulatory requirements associated with their licenses. However, the NRC disagrees with issuing any amendment to its FFD regulation that would implement a zero tolerance performance standard because such a proposed provision would not meet the Commission's backfitting requirements provided in 10 CFR 50.109. The current FFD rule, limited to those licensees identified in 10 CFR 26.3, provides adequate

protection of public health and safety, promotes common defense and security, and protects the environment.

- II. The NRC staff agrees and disagrees with this comment. It is the mission of the NRC to license and regulate the Nation's civilian use of byproduct, source, and special nuclear materials to ensure adequate protection of public health and safety, promote the common defense and security, and protect the environment. This is achieved, in part, by implementing the principles of good regulation (independence, openness, efficiency, clarity, reliability). Regarding increasing oversight or enhancing transparency, these suggestions are outside the scope of this staff initiative.
- III. The NRC staff disagrees with this comment. The NRC licensees shall implement the provisions of 10 CFR Part 26 – Fitness for Duty Programs. Title 10 of the CFR 26.23 provides the five performance objectives that a FFD program must meet. Furthermore, the current requirements set forth in 10 CFR Part 26 provide reasonable assurance that all individuals subjected to the requirements of 10 CFR Part 26 FFD program are fit for duty and trustworthy and reliable. That being said, the NRC staff will continue to monitor industry performance and recommend rule and guidance changes as necessary, based on operating experience, societal changes in substance abuse, or when adverse trends in FFD performance are identified. The NRC staff evaluation of suggested rule changes are outside the scope of this staff initiative.
- IV. The NRC staff disagrees with this comment. It's the NRC's policy to implement, "The Plain Writing Act of 2010". The NRC has a long and proven history of supporting that Act. The NRC also believes plain writing is important to keeping the public informed of and involved in our regulatory, licensing, and oversight activities. Prior to issuing the FFD D&A FRN, an independent review was conducted to verify the FRN met The Plain Writing Act of 2010.

12. Comment Summary: A commenter submitted four specific comments regarding the FFD D&A FRN solicitation. A summary of each comment is listed:

- I. The FRN 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". The commenter disagrees with the NRC annual FFD performance report, dated 2013, that there are no adverse trends in the FFD program and believes a change to the enforcement policy without current public information is critical for public confidence.
- II. Title 10 of the CFR 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?
- III. The FRN quoted 40 examples of FFD D&A cases that OI investigated. FFD performance data shows from 2013 to 2015, thousands of individual D&A

violations were reported. 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?

- IV. In accordance with Item 101 on page 36 of Enclosure 1 of SECY-16-0009, it states 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.
[\(ADAMS ML16330A254\)](#)

Response:

- I. The NRC staff believes this comment is questioning the data associated with the 2013 NRC FFD annual report and not specifically commenting on the proposed change to the enforcement policy regarding FFD D&A violations for individual actions. The NRC staff acknowledges that increasing trends are apparent in the FFD performance reports, such as those associated with the pre-access testing and subversion attempt rates, and notes that this data did inform the staff prior to its proposed change to the Enforcement Policy. However, the use of the phrase "No adverse trends were identified," is in reference to the NRC staff position that an adverse trend is one in which the NRC would evaluate the necessity to undertake a scalable response based on the severity or significance of the trend. NRC response could include, but not be limited to, inspection, issuance of guidance, licensing, or rulemaking. Please see staff Response III to Comment 11.

The staff-proposed changes to the Enforcement Policy are more focused on addressing (i.e., minimizing) the NRC staff effort on FFD policy violations that (1) licensees have already implemented adequate corrective actions, such as the issuance of sanctions, and (2) do not represent a significant FFD policy violation. As such, this staff initiative is principally focused on a small subset of the aggregated information presented in the annual FFD Performance Reports.

- II. The NRC staff disagrees with this comment. Title 10 of the CFR 26.75, "Sanctions," does provide the minimum sanctions that licensees and other entities shall impose when individuals violate the drug and alcohol provisions of the FFD policy. Furthermore, all licensees and other entities, subject to 10 CFR Parts 26 and 73, are required to implement additional requirements prior to granting unescorted access authorization to individuals. These requirements include but are not limited to academic, criminal history, and employment checks. Furthermore, many licensees have voluntarily imposed more stringent sanctions providing higher assurance that these individuals are not afforded unescorted access to our nation's commercial nuclear power plants or Category I fuel cycle facilities without appropriate licensee adjudication. The proposed change to

the enforcement policy is only for an individual FFD D&A violation, not the other requirements associated with 10 CFR Part 26.

- III. The NRC agrees with the commenter in part. The NRC agrees that the data shows there are over a thousand individual D&A violations reported annually, but due to the specific case circumstances, not all violations are investigated by the NRC's Office of Investigation. Of the 40 reported, the NRC staff believes an efficiency can be gained in the enforcement program if the NRC elects to no longer pursue certain FFD D&A cases. The NRC will continue to investigate and pursue enforcement actions when the NRC staff identifies an apparent violation or program weakness in the licensee's FFD program.
- IV. The NRC staff agrees in part with the commenter. In accordance with item 101 on page 36 of Enclosure 1 of SECY-16-009, the NRC staff reported to the NRC Commission that a savings of approximately 2.0 FTE per year may be achieved by implementing the recommended efficiencies in the enforcement program. The NRC staff believe that each FFD D&A enforcement case is unique in itself. While the NRC staff did not specifically analyze the specific FTE savings for this one efficiency, in accordance with item 101, the staff did analyze the totality of all recommended efficiencies and if all items associated with item 101 are approved, the staff believe a 2.0 FTE savings may be achieved.