

POLICY ISSUE
(Notation Vote)

May 8, 2017

SECY-17-0059

FOR: The Commissioners

FROM: Victor M. McCree
Executive Director for Operations

SUBJECT: PROPOSED ENFORCEMENT POLICY REVISION FOR PROCESSING
FITNESS-FOR-DUTY CASES RESULTING FROM SITE FITNESS-FOR-
DUTY DRUG AND ALCOHOL VIOLATIONS BY INDIVIDUALS

PURPOSE:

To seek Commission approval to issue a revised enforcement policy to limit the review and processing of cases involving individuals that violate drug and alcohol provisions of site fitness-for-duty (FFD) programs, which are explicitly described in Title 10 of the *Code of Federal Regulations* (10 CFR) 26.75, "Sanctions." This paper does not address any new commitments or resource implications.

BACKGROUND:

On January 31, 2016, the U.S. Nuclear Regulatory Commission (NRC) staff submitted to the Commission SECY 16-0009, "Recommendations Resulting from the Integrated Prioritization and Re-Baselining of Agency Activities" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML16028A189). Enclosure 1, "Re-baselining Recommendations," Item 101, included the staff's recommendations for creating efficiencies in the enforcement process, in part by reducing FFD case processing.

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The Commission approved the staff's recommendation to reduce FFD case processing in Staff Requirements Memorandum 16-009, "Staff Requirements – SECY-16-0009 – Recommendations Resulting from the Integrated Prioritization and Re-Baselining of Agency Activities," dated April 13, 2016 (ADAMS Accession No. ML16104A158).

In developing potential efficiencies in the enforcement program, the staff concluded that not processing cases involving individuals that violate drug and alcohol provisions of site FFD programs, which are explicitly described in 10 CFR 26.75, "Sanctions," would reduce staff resources without impacting safety and security.

In 2014 the NRC staff processed seven cases dealing with FFD drug and alcohol testing issues at licensee sites. The NRC's Office of Investigations (OI) investigates FFD drug and alcohol cases, many of which involve an individual who violates FFD drug and alcohol procedures at a site. Typically, the licensee identifies the issue and has conducted an internal investigation yielding evidence of a FFD drug and alcohol violation by the time the NRC is notified. Under 10 CFR Part 26 (Part 26), the site FFD drug and alcohol policy provides penalties for specific violations and, when effectively implemented, licensees appropriately disposition individual FFD drug and alcohol issues according to the program each licensee has in place. The number of cases, the multiple offices and regions involved in processing each case, and level of effort associated with reviewing investigation materials, taken in the aggregate would yield meaningful resource savings if the staff no longer processed these types of cases. In order to further the underlying goals of Project AIM, this paper proposes changes to the enforcement process with respect to FFD drug and alcohol cases where an individual violates the site FFD drug and alcohol policy, but where there is no indication of a breakdown in the licensee's performance and implementation of the FFD drug and alcohol program itself.

DISCUSSION:

Part 26 requires licensees to establish drug and alcohol testing programs and report test results to the NRC. On March 31, 2008 (73 FR 16965), the NRC amended Part 26, in part to strengthen the drug and alcohol testing requirements and to broaden the scope of such testing to other NRC licensees (e.g., owner operators of uranium fuel fabrication facilities) and to persons who perform safety or security-significant activities within the protected areas of these licensee sites. The NRC implemented an electronic reporting (e-reporting) system¹ to simplify and improve FFD data reporting and to enable the reporting of additional voluntary information to the NRC.

Based on the FFD performance information reported electronically to, and analyzed by, the NRC since 2009, the commercial nuclear industry continues to implement Part 26 drug and alcohol requirements effectively, and the FFD program has directly contributed to public health and safety and the common defense and security.² Licensees are identifying and removing persons under the influence of illicit drugs and/or alcohol from the protected areas of NRC-licensed facilities. In addition, licensees are also identifying persons of questionable

¹ The NRC FFD electronic forms are publicly available at the NRC Web site at

<http://www.nrc.gov/reactors/operating/ops-experience/fitness-for-duty-programs/submit-ffd-reports.html>

² FFD final rule published in 1989 (54 FR 24468) addressed the significance of drug and alcohol testing on public health and safety. The events of September 11, 2001, brought a new recognition that safety, security, and emergency preparedness are integrated activities within the Commission's Strategic Plan (NUREG-1614, Volume 3).

trustworthiness and reliability through rigorous testing methods (e.g., limit-of-detection testing, cutoffs, and effective monitoring during specimen collections). These outcomes help provide reasonable assurance that persons who perform safety or security-significant activities, or who have unescorted access to certain NRC-licensed facilities, information, or material, are fit-for-duty, and that the public and NRC are timely informed of FFD performance. The data indicates no significant adverse trends.³

Voluntary use of the FFD electronic reporting forms by the industry has significantly improved the consistency and accuracy of data reported, enhanced regulatory effectiveness, and reduced the burden on the staff collecting and analyzing the data. This information, along with the real-time data directly reported to the NRC staff through the event reporting notification system, has resulted in increased agency review of potential FFD wrongdoing issues through the NRC's Allegation Review Board, because the NRC staff is now in possession of more timely and detailed information. Taken in total for each individual drug and alcohol-related FFD violation, the Office of Enforcement, Office of the General Counsel, program offices, and the regions expend significant resources reviewing investigation materials, which typically consist of several thousand pages, documenting and dispositioning the final enforcement action.

Since March 31, 2008, when the NRC amended Part 26, the NRC has processed approximately 40 FFD drug and alcohol-related cases in which OI investigated instances of individuals violating FFD drug and alcohol procedures at licensee sites. These types of cases result from a range of issues including failed drug tests, alleged attempts to subvert FFD testing, alleged possession or use of illegal drugs or alcohol, or alleged misuse or failure to report the use of prescription drugs. Typically, licensees discover, investigate, and report the issues to the NRC using the e-reporting system; for significant FFD policy violations or programmatic failures, the event will be reported to the NRC within 24 hours of its discovery. By the time the NRC implements the process to investigate, the licensees have typically already imposed the appropriate Part 26 sanctions.

From an enforcement perspective, in many regards, Part 26 is unique; for example, explicit sanctions are specified for individuals. 10 CFR 26.75, "Sanctions," specifies, in part, the minimum sanctions that licensees and other entities shall impose when an individual has violated the drug and alcohol provisions of their FFD policy (e.g., immediate unfavorable termination of the individual's authorization for at least 14 days for first violation and 5 years for the second violation, and permanent denial of access for any act or attempted act to subvert the testing process). The regulation also states that the licensee or other entity may impose more stringent sanctions.

10 CFR 26.23(a) requires licensees to have a FFD program that must provide reasonable assurance that individuals are trustworthy and reliable as demonstrated by the avoidance of substance abuse. An individual violation of a site FFD policy, particularly if the program identifies the violation and the licensee has already imposed at least the minimum sanctions required by Part 26, does not, as a routine matter, call into question the efficacy of the FFD program such that the licensee is in violation of Part 26. Furthermore, with no underlying violation to the licensee, there is generally no violation to the individual for deliberate

³ 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.

misconduct (10 CFR 50.5(a)(1)). In some cases, it is possible that the individual has committed a violation of 10 CFR 50.5(a)(2) by submitting inaccurate information to the licensee. This is typically true in instances of attempted subversion of FFD testing.

The NRC will continue to investigate FFD cases in which the NRC staff identifies an apparent breakdown of the licensee's FFD program, e.g., violations involving potential wrongdoing, significant FFD policy violations, or program weaknesses that are safety or security significant. The enforcement process considers what role the individual in question plays in the case. If the individual that allegedly committed the violation is the focus of the investigation, is subject to Part 26 FFD regulations, has violated FFD policy, and the licensee has already imposed at least the minimum sanctions required by Part 26, then there likely is no Part 26 violation to the licensee because the FFD program is adequate. If the individual who is the focus of the investigation is the one who is charged with implementing the FFD policy pursuant to 10 CFR 26.27(a), and that individual has failed to adequately do so, then it is possible that the licensee's FFD program itself does not meet the requirements of the regulation. In this case, there is potentially a Part 26 violation to the licensee as well as deliberate misconduct by the individual. Accordingly, the NRC will continue to review any case involving an alleged breakdown of the FFD program itself and consider it for an NRC enforcement sanction.

As noted throughout this paper, the staff believes that substantial resource savings would be achieved if the NRC typically deferred to the licensee's processes to handle individual violations of its FFD drug and alcohol policy, as required by 10 CFR 26.75. The NRC could implement this policy change by revising the NRC Enforcement Policy at the end of Section 4.1, "Considerations in Determining Enforcement Actions Involving Individuals." Accordingly, a separate paragraph would be added stating:

For FFD violations involving non-licensed individuals that violate drug and alcohol provisions of site FFD programs, which are explicitly described in 10 CFR 26.75, "Sanctions," the NRC will not typically consider FFD drug and alcohol-related violations for enforcement action unless there is an apparent deficiency in the licensee's FFD program to take the required sanctions against the individual(s) or deficiencies in implementation of the licensee FFD program.

On October 5, 2016, the NRC published a notice in the *Federal Register* (81 FR 69010) soliciting public comments of the proposed change to the enforcement policy. Several stakeholders provided comments on the proposed revision. The Nuclear Energy Institute commented on behalf of the nuclear energy industry that they supported the NRC staff's proposed revision to the enforcement policy. The staff's responses to those comments are available in ADAMS (ADAMS Accession No. ML16355A045).

RECOMMENDATION:

The NRC staff recommends the Commission approve the staff's recommended policy revision as shown in the Enclosures (original and annotated versions).

COMPLETION SCHEDULE:

If approved, the staff will revise the Enforcement Policy available on the NRC internal and external Web pages within 30 days following approval, but will not make available hardbound copies until a future revision to the policy.

COORDINATION:

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

/RA/

Victor M. McCree
Executive Director
for Operations

Enclosures:

1. Recommended Revision to Enforcement Policy
2. Recommended Revision to Enforcement Policy, Annotated

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DRUG AND ALCOHOL VIOLATIONS BY INDIVIDUALS DATE: MAY 8, 2017.

ADAMS Package: **ML16355A048**

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