

December 14, 2023

Mr. Anthony Bowers
Chief, Reactor Security Branch
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: NEI Comments on NRC Draft Resolution of SFAQ 2022-02, “SAE Program Requirements”

Project Number: 689

Dear Mr. Bowers:

The Nuclear Energy Institute (NEI)¹, on behalf of its members, appreciates the opportunity to comment on the NRC’s Draft Resolution of SFAQ 2022-02 (Draft Resolution). These written comments are consistent with and expand upon the oral comments provided by NEI at NRC’s November 16, 2023, public meeting on this topic.

NEI believes that the Draft Resolution inappropriately relies upon the preamble to the 2008 final fitness-for-duty (FFD) rule² to impose a categorical requirement to include Substance Abuse Experts (SAE) in licensee FFD programs. Imposition of such a categorical requirement applicable to SAEs is inconsistent with the two-part test found in paragraph (g) of 10 CFR 26.4, “FFD program applicability to categories of individuals.”

NEI requests that the Draft Resolution be revised to reflect the legally binding regulations promulgated by the Commission in the 2008 final rule, as explained more fully below. In the alternative, if the NRC decides not to revise the Draft Resolution, NEI respectfully requests that SFAQ 2022-02 be withdrawn from consideration so that the industry and the NRC can work

¹ The Nuclear Energy Institute (NEI) is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI’s members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

² NRC, “Fitness for Duty Programs: Final rule,” 73 Fed. Reg. 16966 (March 31, 2008)(“Final Rule”).

toward a common understanding of the agency's position on how the requirements of 10 CFR 26.4(g) should be applied when evaluating program applicability to SAEs.

10 CFR 26.4 "FFD program applicability to categories of individuals"

The applicability of the NRC's FFD program requirements to different categories of individuals are governed by the regulations found at 10 CFR 26.4. Specifically, paragraphs (a) through (h) of section 26.4 describe categories of individuals that are subject to all or part of the NRC's FFD program requirements, while paragraph (i) describes individuals who are specifically excluded from the NRC's FFD program requirements.

SAEs assist in the implementation of licensee FFD programs by conducting substance abuse evaluations of a non-clinical nature. Specifically, SAEs evaluate substance levels of use or abuse and make recommendations for further referral, education, or treatment by specially trained substance abuse professionals. While SAEs play an important role in FFD program implementation, they perform evaluations of a non-clinical nature. The field treating clinician (as opposed to an SAE) performs any necessary diagnostic assessment and would recommend any additional requirements based on that diagnosis.

The determination of whether an SAE should be included in a licensee's FFD program is governed by the two-part test articulated in 10 CFR 26.4(g). Paragraph 26.4(g) states:

All FFD program personnel who are involved in the day-to-day operations of the program as defined by the procedures of the licensees and other entities. . . and whose duties require them to have the following types of access or perform the following activities shall be subject to an FFD program that meets all of the requirements of this part, except subparts I and K of this part, and, at the licensee's or other entity's discretion, subpart C of this part:

- (1) All persons who can link test results with the individual who was tested before an FFD policy violation determination is made, including, but not limited to the MRO;
- (2) All persons who make determinations of fitness;
- (3) All persons who make authorization decisions;
- (4) All persons involved in selecting or notifying individuals for testing; and

(5) All persons involved in the collection or onsite testing of specimens.

The first part of the two-part test articulated above requires licensees to determine whether program personnel are involved in the day-to-day operations of the FFD program – as defined by the procedures of the licensees and other entities. If so, then the second part of the test requires licensees to determine whether the individual's duties require the types of access or performance of the activities listed in paragraphs (g)(1)-(5). If an individual meets both aspects of the test, then the individual must be subject to certain portions of the licensees FFD program.

SFAQ 2022-02 and NRC's Draft Resolution

SFAQ 2022-02 was submitted by NEI on February 23, 2022, and requests clarification of the NRC's application of the two-part test articulated in 10 CFR 26.4(g) to SAEs. Specifically, the SFAQ requested clarification of how to interpret the "day-to-day operations" language contained in paragraph (g).

The NRC's Draft SFAQ resolution concludes that, based upon statements in the preamble to the 2008 final FFD rule, "all individuals that perform in the position of SAE under 10 CFR Part 26 are subject to a licensee's . . . FFD program."³ The Draft Resolution appears to state that the two-part test articulated in 10 CFR 26.4(g) applies to an individual other than an SAE and that SAEs are categorically included in licensee FFD programs, in spite of the rule language contained in paragraph (g) – *i.e.*, whether they are involved in day-to-day operations or not. This was also NEI's interpretation of the position articulated by the NRC staff during the November 16, 2023, public meeting held to discuss SFAQ 2022-02.

Preamble to the 2008 FFD Final Rule (73 Fed. Reg. 16966; March 31, 2008)

The language that the NRC relied upon to support the position communicated in the Draft Resolution is contained in the preamble to the 2008 final rule that imposed the current FFD program requirements.⁴ Specifically, the preamble to the Final Rule contains a lengthy discussion of the NRC's response to comments relating to the breadth of personnel covered by language contained in the proposed rule, and the agency's decision to add paragraph 26.4(i) to the

³ Security Frequently Asked Questions (SFAQ) Request Form, SFAQ Number: 2022-02, at pg. 4.

⁴ NRC, "Fitness for Duty Programs: Final rule," 73 Fed. Reg. 16966 (March 31, 2008)("Final Rule").

regulations to more clearly articulate individuals that would be categorically excluded from licensee FFD programs.⁵

In that discussion, the NRC made it clear that SAEs were not covered by the exclusion in the new paragraph (i) and admittedly made strong statements that SAEs were required to be subject to the requirements of 10 CFR Part 26 under paragraph (g). That discussion focused entirely on the importance of the activities performed by SAEs.⁶ While recognizing the “logistical difficulties and costs” associated with including SAEs in a licensee’s FFD program, the NRC concluded that “SAEs play such critical roles in the effective functioning of an FFD program that ensuring their continuing honesty and integrity” warranted their inclusion in these programs.⁷

NEI’s Position

The preamble to a regulation may “serve as a source of evidence concerning contemporaneous agency intent.”⁸ However, it is well-settled that preambles are not operative parts of statutes or regulations, and that where the operative parts of a statute or regulation are unambiguous, the meaning of the regulation “cannot be controlled by language in the preamble.”⁹

While NEI understands that, if read in isolation, the preamble language discussed above could be interpreted as describing a requirement to categorically include SAEs in licensee FFD programs, the legally binding regulations imposed by the Commission in the Final Rule contain no such requirement. To the contrary, as discussed above, the regulation in paragraph 26.4(g) unambiguously requires application of a two-part test to SAEs and other individuals to determine program applicability. And the first step in that test is for the licensee to determine whether the individual is involved in “day-to-day operations of the program as defined by the procedures of the licensees and other entities.”¹⁰ If so, then applicability would be determined by the duties of the

⁵ *Id.* at 73 Fed. Reg. 17003.

⁶ *Id.* (referencing the discussion of section 26.187 in the preamble for a detailed discussion of the roles and responsibilities of an SAE in implementing a licensee’s FFD program and describing “the key role SAEs play in determining whether an individual is fit to safely and competently perform the duties that require the individual to be subject to” the requirements of Part 26.)

⁷ *Id.*

⁸ *Association of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C.Cir.1977)(also explaining that the principles governing interpretation of the preamble to a regulation are no different than the principles governing interpretation of the preamble of a statute).

⁹ *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 885 (4th Cir. 1984)(citing *Association of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (DC Cir. 1977), *Yazoo Railroad Co. v. Thomas*, 132 U.S. 174, 188 (1889), *Hughes Tool Company v. Meier*, 486 F.2d 593, 596 (10th Cir. 1973), *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 563 (1892).

¹⁰ 10 CFR 26.4(g)(emphasis added).

individual, pursuant to paragraph (g)(1) through (5). The NRC could not have imposed a different, categorical rule applicable to SAEs in the preamble to the Final Rule, as the Draft Resolution seems to indicate.

Instead, the preamble language can and should be read in a manner that is consistent with the legally binding requirements imposed in the Final Rule. Specifically, the focus of the preamble discussion was clearly on the importance of the duties performed by the SAE, rather than on whether an SAE meets the criteria of being involved in “day-to-day operations of the program.” NEI agrees that the duties performed by the SAE are important to the successful implementation of FFD programs and that if an SAE is involved in “day-to-day operations of the program,” they would fall within the duties in 10 CFR 26.4(g)(1)-(5) and be included in the program.

The language in the preamble could be reasonably read as communicating the Commission’s position that: (1) SAEs are not categorically excluded from inclusion in FFD programs under paragraph 26.4(i), and (2) the duties performed by an SAE are included in the duties articulated in paragraph 26.4(g)(1)-(5). Thus, if an SAE is “involved in the day-to-day operations of the [FFD] program, as defined by the procedures of the licensees and other entities” identified in paragraph 26.4(g), then they must be included in the FFD program.¹¹

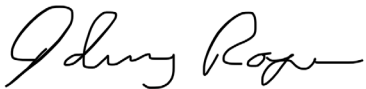
Since publication of the Final Rule, licensees have applied the two-part test provided in paragraph 26.4(g) to determine whether SAEs should be included in FFD programs. SAEs who are routinely on site and involved in frequent FFD program activities meet the two-part test in paragraph 26.4(g) and are placed in the FFD program. But many SAEs perform duties infrequently from remote locations. These SAEs may not be “involved in day-to-day operations of the program, as defined by the procedures of the licensees and other entities” and, thus, are not required to be included in the FFD program under paragraph 26.4(g). We are not aware of any operational issues or concerns with application of the rule evidenced by inspections or internal audits.

¹¹ If necessary, the NRC staff could make the Commission aware that it is interpreting the preamble in this way to ensure consistency with the legally binding requirement promulgated in the Final Rule.

We appreciate the NRC staff's willingness to discuss this issue and the opportunity to comment on the Draft Resolution to SFAQ 2022-02.

Please contact me with any questions or comments at jdr@nei.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Johnny Rogers". The signature is fluid and cursive, with a long horizontal stroke at the end.

Johnny Rogers, Senior Project Manager

c: Brian Zaleski, NSIR/DPCP/RSB