

July 30, 2001

Mr. Michael J. Meisner, Chief Nuclear Officer
Maine Yankee Atomic Power Company
321 Old Ferry Road
Wiscasset, Maine 04578-4922

SUBJECT: BACKFIT DETERMINATIONS CONCERNING MAINE YANKEE ATOMIC
POWER COMPANY SECURITY PLAN EXEMPTION

Dear Mr. Meisner:

The purpose of this letter is to respond to two recent letters submitted by Maine Yankee Atomic Power Company (MYAPC) that made backfit claims. By letter dated January 4, 2001, MYAPC requested that the U.S. Nuclear Regulatory Commission (NRC) review a MYAPC claim that an NRC request for a license amendment request in addition to an exemption request (submitted by letter dated May 23, 2000), as part of the staff's action to process changes in the security requirements for MYAPC's independent spent fuel storage installation (ISFSI), constitutes a backfit as described in 10 CFR 50.109. In the January 4, 2001, letter, MYAPC stated, "We believe that the NRC request for a license amendment request in addition to an exemption request constitutes a change of NRC position with regard to 10 CFR 50.54(p) and NRC Generic Letter 95-08 by its presumption that prior NRC approval of changes to the Security Plan are required in order to operate an ISFSI under the provisions of 10 CFR 72 Subpart K." By letter dated March 8, 2001, you made a further claim of backfit based on your belief that the NRC is applying a revised staff position in reviewing MYAPC's exemption request and request for amendment submitted on January 4, 2001. This letter provides the basis for the staff's determination that the request for a license amendment, in addition to the exemption request, as well as the staff position being applied to our review of your January 4, 2001, exemption request and request for amendment do not constitute backfits.

Background

On August 6, 1997, the MYAPC Board of Directors decided to permanently cease further operation of the Maine Yankee Atomic Power Station (MYAPS). On August 7, 1997, in accordance with 10 CFR 50.82(a)(1), MYAPC provided to the NRC certifications of permanent cessation of operations and permanent removal of fuel from the reactor vessel. In accordance with 10 CFR 50.82(a)(2), upon docketing of the certification, the facility operating license no longer authorizes MYAPC to operate the reactor or to load fuel into the reactor vessel. The MYAPS spent nuclear fuel is currently being stored in the spent fuel pool, which is protected by a physical protection system meeting the requirements of 10 CFR 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," with exemptions as previously issued by the NRC on June 29, 1998.

To complete the plant site decommissioning process, MYAPC has stated its intention to remove the spent fuel from the spent fuel pool and transfer it to an onsite ISFSI for interim storage. The fuel will be stored under the provisions of 10 CFR 72, Subpart K, "General License for Storage of Spent Fuel at Power Reactor Sites." Under these general license regulations, MYAPC is required to meet the physical protection requirements of 10 CFR 72.212(b)(5) and

10 CFR 73.55 for an ISFSI at an operating reactor site. However, in its May 23, 2000, letter MYAPC requested an exemption from 10 CFR 73.55 for the ISFSI and proposed to implement the physical protection requirements of 10 CFR 73.51, "Requirements for the physical protection of stored spent nuclear fuel and high-level radioactive waste," which were formulated for a stand alone ISFSI site. The MYAPS spent fuel pool would continue to meet the physical protection requirements of 10 CFR 73.55, with the exception of the exemptions previously approved by the NRC, until all spent nuclear fuel has been transferred to the onsite ISFSI.

By telephone call on December 14, 2000, the NRC informed MYAPC that the staff had concluded that 10 CFR 73.51 is not applicable to a Part 50 licensee storing fuel under a general license. In the Statements of Consideration for NRC Final Rule, "Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste," 63 FR 26955 (May 15, 1998), the NRC found that a general licensee does not fall within the scope of 10 CFR 73.51. However, the staff informed MYAPC that it had determined that it could consider exemptions from specific portions of 10 CFR 73.55 for the MYAPS ISFSI. Accordingly, in the December 14, 2000, telephone call, the NRC staff identified several items it required to consider MYAPC's request. MYAPC had to: (1) resubmit its exemption request identifying the specific provisions of 10 CFR 73.55 from which it seeks exemption, (2) submit the proposed security plan for NRC staff review to determine whether the proposed plan met the provisions and requirements of 10 CFR 73.55 for the ISFSI, and (3) submit a license amendment request that would modify license condition 2.B.(6)(d), Physical Protection, to reflect the date of this revision to the Security Plan.

By letter dated January 4, 2001, MYAPC submitted a revised exemption request and request for amendment. In addition, in the submittal, MYAPC made its initial backfit claim.

By letter dated March 8, 2001, MYAPC made its second backfit claim.

Discussion

As applicable here, "backfitting," as discussed in 10 CFR 50.109, is the modification of procedures required to operate a facility that may result from the imposition of a regulatory staff position interpreting the Commission's rules that is either new or different from a previously applicable staff position.

MYAPC's position is that, once a licensee has been granted the exemption it seeks, it should be allowed to make changes to its security plan using 10 CFR 50.54(p), which would require submission of an amendment request only if the licensee determined that the changes would result in a decrease in effectiveness of the security plan. According to MYAPC, requiring the submittal of an amendment request in addition to its exemption request in these circumstances constitutes a backfit.

The staff believes that MYAPC is mistaken. As discussed in the Statements of Consideration (SOCs) for Part 52 and Part 54 (the License Renewal Rule), the Backfit Rule was intended to assure regulatory stability. This means that once the NRC issues a license, the terms and conditions for operating under the license would not arbitrarily be changed post hoc by the Commission. When, however, a licensee seeks relief from a Commission requirement, the licensee (not the NRC) is requesting authority to do what is not currently permitted under its license and applicable regulations. In this circumstance, the licensee has no valid expectations protected by the Backfit Rule regarding the terms and conditions for obtaining the new authority which is not permitted under the current license and the regulations. Thus, a request by the

staff for additional information, or, indeed, a different type of submittal than that provided by the licensee, would not involve a backfit. MYAPC could choose to comply with 10 CFR 72.212(b)(5). Once MYAPC chooses to seek relief from this regulation, thus necessitating changes to its security plan, including the approval of alternatives to the provisions of 10 CFR 73.55(b) through (h), it is not a backfit for the staff to request information to understand specific changes to be made, to ensure that changes to the security plan are in conformity with NRC regulations, and to require that the changed security plan be incorporated into the license by a license amendment. An exemption is granted at the discretion of the Commission and, as long as the information and/or types of submittals requested relate to the exemption sought, it is not subject to the Backfit Rule.

The staff has reviewed MYAPC's claims of backfit and it is our position that our request for MYAPC to submit an amendment application to process granting the revised security program for the MYAPS ISFSI does not constitute a backfit. Furthermore, while the NRC has the authority to grant exemptions, it must first determine that such exemptions are authorized by law and will not endanger life or property or the common defense. It must make that determination consistent with the appropriate regulations applicable to that facility. Clearly, MYAPC has chosen to store its spent fuel under the general license provisions of Subpart K of 10 CFR Part 72. Consequently, the staff finds that its evaluation of your proposed physical security program for the MYAPS ISFSI against the applicable physical security regulations of 10 CFR 73.55 for a generally licensed ISFSI does not constitute a backfit.

If you choose to appeal the staff's backfit determinations, you must do so within 60 calendar days of the date of this letter.

If you have any questions regarding this matter, please contact Ms. Janice Moore of the NRC's Office of the General Counsel. Ms. Moore can be reached at (301) 415-1797.

Sincerely,

/RA/

John A. Zwolinski, Director
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

Docket No. 50-309

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Sincerely,

/RA/

John A. Zwolinski, Director
 Division of Licensing Project Management
 Office of Nuclear Reactor Regulation

Docket No. 50-309

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