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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF



NUCLEAR ENERGY INSTITUTE

DOCKET NUMBER
PROPOSED RULE **PR 50**
(67FR12488)

Alexander Marion
DIRECTOR ENGINEERING
NUCLEAR GENERATION DIVISION

June 3, 2002

Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Attention: Rulemakings and Adjudication Staff

SUBJECT: Comments on Proposed Rule to Incorporate by Reference ASME Code Cases (67 *Fed. Reg.* 12488)

PROJECT NUMBER: 689

The Nuclear Energy Institute¹ (NEI) submits these comments on the proposed rulemaking (67 *Fed. Reg.* 12488), that would incorporate ASME Code Cases into the regulations by reference. Detailed comments are provided in Enclosure 1. In a March 26, 2002 letter, NEI provided comments on the draft regulatory guides (66 *Fed. Reg.* 67335) referenced by the proposed rule. Both sets of comments should be evaluated as part of the proposed rule.

We are concerned that the criteria proposed in 10 CFR 50.55a(i)(2)(ii), (i)(3)(ii), and (i)(4)(ii) would require licensees who have previously implemented a Code Case to immediately implement the later revision if the NRC has imposed a limitation or modification on the later revision. Similar concerns exist for 10 CFR 50.55a(i)(2)(iv), (i)(3)(iv), (i)(4)(iv), which address annulled Code Cases. The proposed regulatory criteria are inconsistent with the existing regulatory requirements contained in 50.55a(f)(4)(ii) and (g)(4)(ii), which permit licensees to defer implementation of new ASME criteria until the end of the 10-year interval. The proposed rule and positions taken on ASME approved Code Cases are new regulatory positions and as such require a backfitting analysis in accordance with 10 CFR 50.109(a)(1), prior to implementation.

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry

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Historically the NRC has used regulatory guides to define regulatory positions with appropriate limitations and modifications of new, renewed or annulled ASME Code Cases. The ASME Code issues Code Cases as alternative rules applicable for a three-year period, following which the Code Case is incorporated into the ASME Code, annulled or renewed. The 10 CFR 50.55a rule has provisions for endorsement of future editions of the ASME Code and addenda and as such it is unnecessary to reference the Code Cases as part of the regulations. The incorporation of the regulatory guides, which incorporate Code Cases by reference, is both inefficient and unlawful since this action establishes new regulatory positions without satisfying the backfitting rule, 10 CFR 50.109. An appropriate alternate process to the proposed rule would be the use of the generic communication process, such as the Regulatory Issue Summary, as the means to communicate acceptable alternatives to the ASME Code.

Furthermore, in a 1989 presentation to the Committee to Review Generic Requirements (PDR Accession Number 9405180406), the NRC staff assessed the application of the 10 CFR 50.109, *Backfitting* regulation, as it applies to revision of 10 CFR 50.55a to adopt new editions and addenda of the ASME Code. Enclosure 2 provides an OGC letter and presentation materials associated with that meeting. This material provides the basis for the NRC staff concluding that routine updates of 10 CFR 50.55a to incorporate by reference new editions or addenda of the ASME Code, are not subject to the backfitting provisions of 10 CFR 50.109. However, the enclosure clearly states that the NRC imposition of modifications or limitations to referenced editions or addenda of the Code are subject to the backfitting rule. (See the fourth page of Enclosure 2). This guidance is applicable to Code Cases that are alternative ASME Code rules.

Lastly, we believe the NRC process for review of ASME Code Cases is inconsistent with the NRC Strategic Goal for improving efficiencies in the regulatory process. In a February 2002 meeting with the NRC staff, the NEI Licensing Action Task Force (LATF) proposed several approaches for streamlining the process for NRC adoption of ASME Code cases. We would like to explore these further and will contact NRC management to schedule a public meeting to discuss options for improvement in the NRC process for dealing with ASME Code Cases.

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If you have questions, please contact me at 202-739-8080, am@nei.org or Kurt Cozens at 202-739-8085, koc@nei.org.

Sincerely,

A handwritten signature in cursive script that reads "Alex Marion".

Alexander Marion

KOC/maa
Enclosures

c: Mr. Harry S. Tovmassian, U. S. Nuclear Regulatory Commission

ENCLOSURE 1
COMMENTS ON PROPOSED 10 CFR 50.55A RULE

COMMENT NUMBER	PAGE	PARAGRAPH	COMMENT	PROPOSED REVISION
	12493	(i)(2)(ii)	<p>The proposed regulation states:</p> <p style="padding-left: 40px;">“If a licensee has previously implemented a Code Case and a later version of the Code Case is incorporated by reference in this section, the licensee may apply either the previous or later version of the Code Case, unless a specific limitation or condition is placed on the application of that Code Case, in which case the modification or limitation applies.”</p> <p>This is inconsistent with the existing regulatory requirements contained in 10 CFR 50.55a (f)(4)(ii) and (g)(4)(ii), which are essentially the same. Section (f)(4)(ii) states:</p> <p style="padding-left: 40px;">“(ii) Inservice tests to verify operational readiness of pumps and valves, whose function is required for safety, conducted during successive 120-month intervals must comply with the requirements of the latest edition and addenda of the Code incorporated by reference in paragraph (b) of this section 12 months prior to the start of the 120-month interval, subject to the limitations and modifications listed in paragraph (b) of this section.”</p> <p>As worded, the adoption of a revised Code Case with an NRC imposed condition appears to require immediate implementation by any licensee who has adopted one of these code case. The existing regulations permit a licensee to defer implementation of new ASME Code criteria endorsed by reference in 50.55a until the end of the 120-month interval. Licensees who have already implemented the provisions of a code case in accordance with the NRC’s prior endorsement should not be required to make immediate changes unless the NRC performs a backfit analysis justifying the immediate imposition of its limitations or conditions.</p> <p>This is a change of an existing NRC regulatory position.</p>	<p>Revise paragraph to be consistent with the existing regulations or perform an analysis per 10 CFR 50.109(a)(3) to demonstrate that the proposed change provides a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation are justified in view of this increased protection.</p>

COMMENT NUMBER	PAGE	PARAGRAPH	COMMENT	PROPOSED REVISION
			<p>While the provisions of the 10CFR50.109 backfitting rule do not apply to NRC adoption of new editions of the ASME Code, it does apply to the changes in previous regulatory positions. Adoption of this immediate implementation criterion requires a NRC staff regulatory analysis in accordance with 10 CFR 50.109.</p>	
2	12493	(i)(2)(iv)	<p>The proposed rule states:</p> <p style="padding-left: 40px;">“A licensee that has initiated implementation of a Code Case that is subsequently annulled by the ASME may continue to apply that Code Case until the licensee updates its Section III Code of Record unless 50.55a or Regulatory Guide 1.84 specifically prohibits continued application of the annulled Code Case.”</p> <p>The proposed rule appears to require a licensee to immediately cease using a prohibited annulled Code Case, regardless of the regulatory basis for the licensee’s initial implementation of such a code case. This is inconsistent with the existing regulatory requirements contained in 10 CFR 50.55a (f)(4)(ii) and (g)(4)(ii). The existing regulations permit a licensee to defer implementation of new ASME Code criteria endorsed by reference in 50.55a until the end of the 10-year interval.</p> <p>This is a change of an existing NRC regulatory position. While the provisions of the 10CFR50.109 backfitting rule do not apply to NRC adoption of new editions of the ASME Code, it does apply to the change of the rule. Adoption of this immediate implementation criterion requires a NRC staff regulatory response to the backfitting rule criteria</p> <p>In addition, the current proposed wording addresses Section III as the licensee’s “Code of record.” While Regulatory Guide 1.84 specifically addresses ASME Code Cases that are endorsed for generic use in lieu of the Section III Code requirements, not all licensees may have ASME Section III as a base Code of record for a given component. The corrected text should recognize this.</p>	<p>Revise paragraph to be consistent with the existing regulations or perform an analysis per 10 CFR 50.109(a)(3).</p>

COMMENT NUMBER	PAGE	PARAGRAPH	COMMENT	PROPOSED REVISION
			<p>Furthermore, the proposed language would permit a regulatory guide to modify the regulation. Delete the text permitting RG 1.84 to be the basis of requiring licensees to stop using a Code Case.</p>	
3	12493	(i)(3)(ii)	<p>The proposed regulation states:</p> <p style="padding-left: 40px;">"If a licensee has previously implemented a Code Case and a later version of the Code Case is incorporated by reference in this section, the licensee may apply either the previous or later version of the Code Case, unless a specific limitation or condition is placed on the application of that Code Case, in which case the modification or limitation applies."</p> <p>As worded, the proposed rule appears to impose immediate actions, regardless of the basis for a licensee's use of such a code case. That is, the adoption of a revised Code Case with an NRC imposed condition would require immediate implementation by the licensee according to the proposed language.</p> <p>This is inconsistent with the existing regulatory requirements contained in 10 CFR 50.55a (f)(4)(ii) and (g)(4)(ii). The existing regulations permit a licensee to defer implementation of new ASME Code criteria endorsed by reference in 50.55a until the end of the 10-year interval.</p> <p>This is a change of an existing NRC regulatory position. While the provisions of the 10CFR50.109 backfitting rule do not apply to NRC adoption of new editions of the ASME Code, it does apply to the change of the rule. Adoption of this immediate implementation criterion requires a NRC staff regulatory analysis in accordance with 10 CFR 50.109.</p>	<p>Revise paragraph to be consistent with the existing regulations or perform an analysis per 10 CFR 50.109(a)(3).</p>
4	12493	(i)(3)(iv)	<p>The proposed rule states:</p> <p style="padding-left: 40px;">"A licensee that has initiated implementation of a Code Case that is subsequently annulled by the ASME may continue to apply that Code</p>	<p>Revise paragraph to be consistent with the existing regulations or perform an analysis per 10 CFR 50.109(a)(3).</p>

COMMENT NUMBER	PAGE	PARAGRAPH	COMMENT	PROPOSED REVISION
			<p>Case through the end of the present interval unless 10 CFR 50.55a or Regulatory Guide 1.147 specifically prohibits continued use of the annulled Code Case. An annulled Code Case may not be applied in a subsequent inservice interval unless as an approved alternative under 10 CFR 50.55a(a)(3)."</p> <p>As worded, the proposed rule appears to impose immediate actions, regardless of the basis for a licensee's use of such a code case. That is, the adoption of a revised Code Case with an NRC imposed condition would require immediate implementation by the licensee according to the proposed language. This is inconsistent with the existing regulatory requirements contained in 10 CFR 50.55a (f)(4)(ii) and (g)(4)(ii). The existing regulations permit a licensee to defer implementation of new ASME Code criteria endorsed by reference in 50.55a until the end of the 10-year interval.</p> <p>This is a change of an existing NRC regulatory position. While the provisions of the 10CFR50.109 backfitting rule do not apply to NRC adoption of new editions of the ASME Code, it does apply to the change of the rule. Adoption of this immediate implementation criterion requires a NRC staff regulatory response to the backfitting rule criteria</p> <p>Furthermore, the proposed language would permit a regulatory guide to modify the regulation. Only a revised rule can modify the regulation. Delete the text permitting RG 1.147 to be the basis of requiring licensees to stop using a Code Case.</p>	
5	12493	(i)(4)(ii)	<p>The proposed regulation states:</p> <p>"If a licensee has previously implemented a Code Case and a later version of the Code Case is incorporated by reference in this section, the licensee may apply either the previous or later version of the Code Case, unless a specific limitation or condition is placed on the application of that Code Case, in which case the modification or limitation applies."</p>	<p>Revise paragraph to be consistent with the existing regulations or perform an analysis per 10 CFR 50.109(a)(3).</p>

COMMENT NUMBER	PAGE	PARAGRAPH	COMMENT	PROPOSED REVISION
			<p>As worded, the proposed rule appears to impose immediate actions, regardless of the basis for a licensee's use of such a code case. That is, the adoption of a revised Code Case with an NRC imposed condition would require immediate implementation by the licensee according to the proposed language. The existing regulations permit a licensee to defer implementation of new ASME Code criteria endorsed by reference in 50.55a until the end of the 10-year interval.</p> <p>This is a change of an existing NRC regulatory position. While the provisions of the 10CFR50.109 backfitting rule do not apply to NRC adoption of new editions of the ASME Code, it does apply to the change of the rule. Adoption of this immediate implementation criterion requires a NRC staff regulatory analysis in accordance with 10 CFR 50.109.</p> <p>to the backfitting rule criteria</p>	
6	12493	(i)(4)(iv)	<p>The proposed rule states:</p> <p style="padding-left: 40px;">“A licensee that has initiated implementation of a Code Case that is subsequently annulled by the ASME may continue to apply that Code Case through the end of the present interval unless 10 CFR 50.55a or Regulatory Guide [temporarily designated DG-1089] specifically prohibits continued use of the annulled Code Case. An annulled Code Case may not be applied in a subsequent inservice interval unless as an approved alternative under 10 CFR 50.55a(a)(3).”</p> <p>As worded, the proposed rule appears to impose immediate actions, regardless of the basis for a licensee's use of such a code case. That is, the adoption of a revised Code Case with an NRC imposed condition would require immediate implementation by the licensee according to the proposed language.</p> <p>This is inconsistent with the existing regulatory requirements contained in 10 CFR 50.55a (f)(4)(ii) and (g)(4)(ii). The existing regulations permit a licensee to defer implementation of new ASME Code criteria endorsed by reference in 50.55a until the end of the 10-</p>	Revise paragraph to be consistent with the existing regulations or perform an analysis per 10 CFR 50.109(a)(3).

COMMENT NUMBER	PAGE	PARAGRAPH	COMMENT	PROPOSED REVISION
			<p>year interval.</p> <p>This is a change of an existing NRC regulatory position. While the provisions of the 10CFR50.109 backfitting rule do not apply to NRC adoption of new editions of the ASME Code, it does apply to the change of the rule. Adoption of this immediate implementation criterion requires a NRC staff regulatory analysis in accordance with 10 CFR 50.109.</p> <p>Furthermore, the proposed language would permit a regulatory guide to modify the regulation. Delete the text permitting DG-1089 to be the basis of requiring licensees to stop using a Code Case.</p>	

UNITED STATES
 NUCLEAR REGULATORY COMMISSION
 WASHINGTON, D. C. 20555

March 15, 1989

MEMORANDUM FOR: Eric S. Beckjord, Director
 Office of Nuclear Regulatory Research

FROM: Stuart A. Treby
 Assistant General Counsel for
 Rulemaking and Fuel Cycle
 Office of the General Counsel

SUBJECT: APPLICATION OF THE BACKFIT RULE (10 CFR § 50.109) TO
 AMENDMENTS TO CODES AND STANDARDS REGULATION (10 CFR § 50.55a)

By memorandum dated October 20, 1988, you requested OGC concurrence on a proposed rulemaking package to amend 10 CFR 50.55a, "Codes and standards," to incorporate by reference Subsection IWE of Section XI, Division 1, of the ASME Boiler and Pressure Vessel Code ("ASME Code"). This office reviewed that rulemaking package. On November 2, 1988, OGC returned the package to the RES contact, Mr. W.E. Norris, noting that although OGC had several editorial comments that it wanted incorporated, OGC had no legal objection to the action being proposed. Because the concurrence package proposing the rulemaking did not include a concurrence page, RES requested a formal written memorandum from OGC confirming its position of "no legal objection" to the proposed action and stating OGC's position both on the general applicability of the "backfit rule" to routine updates to § 50.55a and on the specific "backfit" issue raised by the proposed action. Those are the purposes of this document.

With respect to routine updates to 10 CFR 50.55a, it has consistently been the position of the Office of the General Counsel that such routine updates, which incorporate by reference new Editions and/or Addenda of the ASME Code, are not subject to the backfit provisions of 10 CFR 50.109. The legal bases for this position are: (1) the Section III, Division 1, updates apply only to new construction (i.e., the Edition and Addenda of the ASME Code to be used in the construction of a plant are selected based upon the date of the construction permit and are not changed thereafter, except voluntarily by the licensee); (2) licensees are fully aware that § 50.55a requires that they update their inservice inspection program every 10 years to the latest Edition and Addenda of Section XI of the ASME Code incorporated by reference into § 50.55a twelve months before the start of the next inspection interval; and (3) endorsing and updating references to the ASME Code, a national consensus standard developed by participants (including both the NRC and representatives of the regulated industry) with broad and varied interests, is consistent with both the intent and spirit of the backfit rule (i.e., the NRC provides for the protection of the public health and safety but does not unilaterally impose an undue burden on applicants or licensees).

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Unlike routine updates to § 50.55a, the proposed action would incorporate by reference the provisions of Subsection IWE of Section XI, Division 1, of the ASME Code. A Subsection not heretofore incorporated by reference, Subsection IWE would impose some new and additional inservice inspection requirements on existing licensees. Thus, this action raises the question whether such incorporation by reference constitutes a backfit within the scope of § 50.109. The specific backfit question raised by the proposed action was addressed at an August 4, 1988, meeting between RES and OGC personnel and again at a meeting between OGC and NRR personnel on January 23, 1989. OGC recognizes that the provisions of Subsection IWE were developed through the process used to formulate national consensus standards and, consequently, received review and comment by NRC personnel and representatives of the regulated industry as well as by other individuals with expertise in the subject matter addressed by Subsection IWE. OGC also agrees with the RES position that Subsection IWE provides acceptable minimum requirements for the inservice inspection of certain specified containment types and, therefore, represents responsible application of engineering judgment to assure adequate protection of the public health and safety. It is, therefore, OGC's opinion that §§ 50.109(a)(2) and (a)(3) of the backfit rule do not apply because this action is within the scope of § 50.109(a)(4)(ii). The justification for imposing the requirements of Subsection IWE as adequate protection of the public health and safety is discussed in Appendix B of the regulatory analysis which is entitled "50.109 Documented Evaluation."

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Stuart A. Treby
 Assistant General Counsel for
 Rulemaking and Fuel Cycle
 Office of the General Counsel

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ASME CODE CASES IN
REGULATORY GUIDES 1.84, 1.85, 1.147
ANNUAL REVISIONS

TYPE OF REVISION

CRGR REVIEW

ROUTINE PICK-UP OF CODE CASES WITH
NO MODIFICATIONS OR LIMITATIONS

GUIDE SUBMITTED FOR INFORMATION

PICK-UP CASES WITH MODIFICATIONS
OR LIMITATIONS

PRESENTATION TO CRGR ON MODIFICATIONS
OR LIMITATIONS PORTION

PROCESSING OF AMENDMENTS TO
 10 CFR 50.55A RELATIVE TO BACKFIT RULE
 INVOLVING SECTIONS III AND XI OF THE ASME CODE

<u>TYPE OF AMENDMENT</u>	<u>BACKFIT</u>	<u>CRGR REVIEW</u>
ROUTINE UPDATE WITH NO MODIFICATIONS OR LIMITATIONS	NOT SUBJECT TO BACKFIT PROVISIONS OF 50.109	PROPOSED: RULE SUBMITTED FOR INFORMATION. PRESENTATION NOT REQUIRED. FINAL: RULE PACKAGE INCLUDING RESOLUTION OF PUBLIC COMMENTS SUBMITTED FOR INFORMATION. PRESENTATION ONLY IN EVENT OF SIGNIFICANT PUBLIC COMMENTS.
UPDATE WITH SPECIFIED NRC MODIFICATIONS OR LIMITATIONS	MODIFICATIONS ^{OR} OF LIMITATIONS SUBJECT TO BACKFIT, BALANCE OF UPDATE NOT SUBJECT TO BACKFIT.	PROPOSED AND FINAL - PRESENTATION TO CRGR ON MODIFICATIONS OF LIMITATIONS PORTION.
INCORPORATION OF PORTIONS OF ASME CODE NOT PREVIOUSLY ENDCRSED	SUBJECT TO BACKFIT	PROPOSED AND FINAL - PRESENTATIONS TO CRGR

NOTE: WE BELIEVE IN MOST CASES EDO HAS AUTHORITY TO APPROVE ISSUANCE OF RULE.