

## NEI COMMENTS ON THE FUTURE ROLE OF THE CRGR

### I. Background

On February 2, 2009, the NRC Office of Inspector General issued a report entitled, "Audit of the Committee to Review Generic Requirements."<sup>1</sup> The purposes of the Audit Report were to determine whether: (1) the CRGR adds value for the Executive Director for Operations' decisionmaking purposes, and (2) the committee's function is still needed.<sup>2</sup>

Following an analysis of the current roles and functions of the CRGR, OIG found that the CRGR no longer functions as originally intended with respect to generic backfit reviews, although the requirement to review generic backfits remains.<sup>3</sup> Consequently, the OIG made two recommendations to the Executive Director of Operations:

1. Develop, document, implement, and communicate an agencywide process for reviewing backfit issues to ensure that generic backfits are appropriately justified based on NRC regulations and policy.
2. Determine what, if any, role the CRGR should perform in NRC's backfit review process, to include whether the CRGR function is still needed.<sup>4</sup>

On November 9, 2009, the CRGR held a public meeting to discuss its proposed response to OIG's the second recommendation – i.e., to determine what role the CRGR should perform in the NRC's backfit review process. During the meeting, the CRGR provided background information and presented four potential options for the future of the CRGR in order to facilitate discussion. NEI and other industry representatives provided their initial reactions to the options presented by the CRGR during the time allotted for public comments. The written comments below expand upon NEI's preliminary oral comments provided at the public meeting.

### II. NEI Comments Regarding the Future of the CRGR

#### a. Independent, High-Level Review of Potential Backfits Remains Necessary

The backfitting rule is unique among NRC requirements, as it represents a self-imposed obligation requiring the agency to justify certain new or amended regulations, as well as the imposition of new or different staff positions interpreting the regulations. While imposing an additional requirement on the NRC staff to justify new or revised positions, a healthy backfitting program promotes an orderly, disciplined, and predictable regulatory process. In addition to

---

<sup>1</sup> NRC Office of Inspector General, "Audit of the Committee to Review Generic Requirements," OIG-09-A-06 (Feb. 2, 2009) (Audit Report).

<sup>2</sup> Audit Report, at i.

<sup>3</sup> Audit Report, at 4-5.

<sup>4</sup> Audit Report, at 13.

providing regulatory stability, the rigorous analysis required by the backfit rule, tempered by judicious use of the exceptions provided in § 50.109, serves to “enhance optimal use of NRC staff and licensee resources” by ensuring that NRC’s regulatory efforts are focused on activities that are required for adequate protection, compliance, or will result in a cost-justified, substantial increase in public health and safety or common defense and security.<sup>5</sup>

It is important that potential backfits are subject to independent review at a high-level within NRC management. The inherent need for independent, high-level management review of potential backfits is reflected in the requirement that the EDO “approve” all backfitting analyses.<sup>6</sup> As the Commission emphasized in the 1985 final rule amending § 51.109, “[s]ection 51.109(e) emphasizes and codifies the Commission’s intent that backfit management is of paramount importance to responsible regulatory practice. Accordingly, the Executive Director for Operations is responsible for implementation of the backfit rule.”<sup>7</sup> Independent review of potential backfits by a group of high-level NRC managers – like the CRGR – will assist the EDO in fulfilling his responsibilities under § 51.109(e).

As noted in the Audit Report, today “primary responsibility for ensuring proper backfit considerations belongs to each sponsoring [NRC staff] office.”<sup>8</sup> This may lead some to conclude that the CRGR is no longer needed. But, in our view, this observation highlights, rather than downplays, the need to ensure CRGR participation in the backfit review process. Specifically, an inherent conflict is created when the NRC staff charged with proposing a new or revised position also has the final word on the validity of the backfit determination accompanying that position. CRGR would mitigate this conflict by providing an independent review of potential backfits by neutral, senior-level NRC personnel. Further, an effective CRGR is especially relevant given the recent growth of the NRC staff, which is coupled with knowledge management challenges posed by recent retirements. In such an environment, systematic and independent review of potential backfits by experienced NRC managers is vital to the fair and disciplined application of both new and existing regulations and guidance.<sup>9</sup> Thus, far from

---

<sup>5</sup> “Backfitting Guidelines,” NUREG-1409 (July 1990), at vii; see 10 CFR 50.109(a)-(c).

<sup>6</sup> See 10 CFR 50.109(e).

<sup>7</sup> 50 Fed. Reg. 38,104.

<sup>8</sup> Audit Report, at 6.

<sup>9</sup> For example, concerns often arise over application of the compliance exception. See 10 CFR 50.109(a)(4)(i). Specifically, as the definition of compliance evolves in a particular area, the NRC staff sponsoring perceived improvements to interpretive guidance or regulations in that area may invoke the compliance exception in order to avoid having to perform a full “substantial increase” backfit analysis. But such use of § 51.109(a)(4)(i) is inappropriate because that provision was originally intended to:

[A]ddress situations in which the licensee has failed to meet known and established standards of the Commission because of omission or mistake of fact. *It should be noted that new or modified interpretations of what constitutes compliance would not fall within the exception and would require a backfit analysis and application of the standard.*

being an anachronism overtaken by changes in regulatory practice and philosophy, robust CRGR review of potential backfits is vital to the continued utility of the NRC's backfit program.

**b. Specific Recommendations for Future Function of CRGR**

As discussed above, NEI believes that the independence provided by CRGR review of backfitting decisions is vital to the continued utility of the NRC's backfit program. While several aspects of the options presented at the November 9 public meeting were encouraging (e.g., development of a clear appeals process for generic and facility-specific backfits, increased training for NRC staff, identification of backfitting points of contact in each NRC office), NEI believes that more direct enhancements to the scope of CRGR's responsibilities are needed. At the same time, we understand the potential resource constraints that exist today and the concern that CRGR involvement may delay regulatory initiatives.

Mindful of these considerations, NEI makes the following specific recommendations:

**Rulemaking.** CRGR's responsibilities should include review of the backfit analyses contained in rulemaking packages. Since significant changes to regulatory positions occur through the promulgation of rules, significant generic backfitting concerns often also arise during rulemaking.<sup>10</sup> The Commission has long recognized the importance of rulemaking from a backfitting perspective, having modified its backfit rule to specifically include new or revised rules over twenty years ago.<sup>11</sup> With respect to CRGR involvement in rulemaking, NEI recommends the following:

- *Encourage Early Consultation on Rulemaking Packages:* NRC staff consultation with the CRGR should be strongly encouraged during the development of proposed rules. While the detailed "substantial increase" analyses<sup>12</sup> may not be available early in the process, the NRC staff should have the option to request CRGR review of its positions as to

---

50 Fed. Reg. 38,103 (emphasis added). The NRC's backfitting guidance recognizes the need for high-level review in such situations, and specifically relies on review by the CRGR to counteract overly expansive interpretations of the compliance exception. See NUREG-1409, at 14.

<sup>10</sup> One recent example of a rulemaking that would have benefitted from CRGR review was the proposed Decommissioning Planning rule. The proposed rule was published for public comment on January 22, 2008 (73 Fed. Reg. 3812) and NEI submitted extensive comments taking issue with the NRC's backfit analysis on May 8, 2008. On June 20, 2008, NEI made a request to present backfitting arguments to the CRGR, however, given the CRGR's limited role with respect to rulemaking, that request was denied. In November of 2008, NEI was afforded the opportunity to reiterate its concerns with the proposed Decommissioning Planning rule at a public meeting with the NRC staff. While the meeting was productive in other respects, in the area of backfitting the meeting consisted primarily of industry representatives repeating their views to the NRC staff. While this meeting provided an additional opportunity to interact with the staff, no change in the staff backfitting position resulted and – more importantly – industry received no further explanation or greater understanding of what it viewed as an opaque and inadequate backfit position.

<sup>11</sup> 50 Fed. Reg. 38,101.

<sup>12</sup> See 10 CFR 50.109(a)(3), (c).

whether the proposed changes meet the definition of a backfit, as well as the applicability of any exceptions to the backfit rule. Further, the NRC staff should have the option to request CRGR review of any “substantial increase” analyses prior to issuance of a proposed rule. In furtherance of a transparent regulatory process, these early interactions should be conducted publicly whenever possible. This advisory function should be included as part of the CRGR’s responsibilities going forward, and procedures for its execution should be formalized.<sup>13</sup>

- *CRGR Resolution of Adverse Backfitting Comments on Proposed Rules:* Following issuance of the proposed rule for public comment, any adverse backfitting comments should be forwarded to the CRGR for formal review and resolution. The CRGR would deliberate over and resolve such adverse comments during the time allotted for resolution of public comments by the NRC staff. CRGR’s deliberations on adverse backfitting comments could include public meetings with relevant stakeholders and NRC staff, as appropriate. After deliberating, the CRGR’s proposed resolution of backfitting comments would be forwarded to the EDO and, ultimately, to the Commission with the draft final rulemaking package. The Commission would then vote on publication of the final rule, including the CRGR’s resolution of adverse backfitting comments, consistent with current practice.

This approach has several advantages. First, it would provide independent review and resolution of disputes over the implementation of the backfit rule by senior-level NRC management outside of the program office sponsoring the rulemaking. In this way, this approach would serve a similar function as a generic backfit appeal, while leaving the current rulemaking process undisturbed. Further, this approach is mindful of demands for additional staffing resources in that CRGR involvement would primarily be required in cases where adverse backfitting comments are received, and the scope of CRGR’s review in these cases would be bounded by the content of such comments. In sum, this approach would utilize the existing rulemaking process, while also providing the independent review that backfitting determinations warrant.

**Regulatory Guides/NUREGs.** These important regulatory documents often provide guidance on acceptable methods of compliance with NRC regulatory requirements. While these documents do not impose legally binding requirements, they often contain NRC staff positions on, and interpretations of, the agency’s regulations. The Commission has long recognized the importance of guidance from a backfitting perspective. Specifically, in its 1985 final rule amending 10 CFR 50.109, the Commission stated:

Many of the most important changes in plant design, construction, operation, organization, and training have been put in place at a level of detail that is expressed in

---

<sup>13</sup> The NRC working group that recommended removal of the CRGR from the rulemaking process estimated that eliminating CRGR review “may save as much as 2 weeks in the overall rulemaking schedule.” “Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan,” SECY-07-0134 (Aug. 10, 2007), at Enclosure, pp. 26. It should be noted that a CRGR review of even several weeks would have been virtually unnoticeable in many of the recent major rulemakings, such as Fitness for Duty, Power Reactor Security, Aircraft Impact, and Decommissioning Planning.

staff guidance documents which interpret the intent of broad, generally worked regulations. The NRC has determined that the correct focus for backfit regulation is the establishment of effective management controls on existing staff processes for the interpretation of regulations that are known to result in valuable upgrades in industry safety performance. Thus, the Commission opts to adopt a management process not only for the promulgation of regulations as backfit instruments, but also for the lower tier staff review and inspection processes known to result in reactor plant changes.<sup>14</sup>

Thus, Regulatory Guides and NUREGs that include NRC staff interpretations of regulatory requirements should be subject to at least the same level of CRGR review as rulemakings.<sup>15</sup> Specifically, as explained above, the NRC staff should be encouraged to consult with the CRGR on backfitting issues early in the process of developing such guidance. This advisory function should be included as part of the CRGR's responsibilities going forward, and procedures for its execution should be formalized. Further, all Regulatory Guides and NUREGs that include NRC staff positions on, or interpretations of, regulatory requirements should be published for public comment in proposed form prior to being finalized. Resolution of adverse backfitting comments on proposed Regulatory Guides and NUREGs would follow the process outlined above for rulemaking – i.e., adverse backfitting comments would be forwarded to CRGR for formal review and resolution during the time allotted for resolution of other public comments by the NRC staff. The CRGR's formal review may include public meetings to discuss the adverse backfitting comments, as appropriate.

**Generic Communications.** All generic communications should be reviewed by the CRGR prior to issuance, consistent with current practice. Further, if the generic communication is published for public comment, and there are adverse backfitting comments on the communication, CRGR should formally review and resolve such comments. The CRGR's formal review may include public meetings to discuss the adverse backfitting comments, as appropriate.

**Appeal Process.**<sup>16</sup> Consistent with the process for resolution of adverse backfitting comments on potential generic backfits, the appeal process for facility-specific backfit appeals should be refocused to avoid resolution of the appeal by the program office sponsoring the action in question.<sup>17</sup> Simply put, the prospect of facing review at multiple levels within the program

---

<sup>14</sup> 50 Fed. Reg. 38,101.

<sup>15</sup> Given that the procedural protections applicable to rulemakings do not always apply to the development of guidance (e.g., regulatory guides, NUREGS, generic communications), NEI believes the threat of unanalyzed backfits may be greatest in guidance space. Thus, CRGR involvement in the development of guidance is also vital to ensuring an efficient and fair regulatory process.

<sup>16</sup> Given NEI's recommendations for CRGR resolution of adverse backfitting comments on rulemaking, guidance, and generic communications, NEI is not proposing development of a stand-alone "appeal process" for generic backfits. While we do not oppose development of a generic backfit appeal process, we make the recommendations described above as a method to obtain the benefits of an appeal-type proceeding (i.e., independent review of generic backfitting disputes), without disturbing the current rulemaking and guidance development processes.

<sup>17</sup> The facility-specific backfitting process is described in "Management of Facility-specific Backfitting and Information Collection," Management Directive 8.4 (Oct. 28, 2004)(MD 8.4).

office – the very office that seeks to impose a facility-specific backfit – discourages individual licensees from exercising the appeal process.

The current plant-specific appeal process is outlined in Figures 1 and 2 of MD 8.4. Figure 1 indicates that the facility-specific backfit process starts with a backfitting issue or concern being raised (most likely by a licensee). The sponsoring program office or regional office then determines whether a backfit is, in fact, being imposed. If the sponsoring staff determines that no backfit exists, Figure 1 indicates that “the issue [is] dropped and [the] originator informed.”<sup>18</sup> If the office sponsoring the facility-specific action determines that a backfit is being imposed, the NRC staff will initiate the backfit control process. If the staff determines that the backfit is justified (either through application of an exception or a “substantial increase” analysis), it will seek management approval and the backfit will be issued by the sponsoring division director. If a licensee wishes to appeal imposition of the approved backfit, Figure 2 indicates that the claim must first be brought back to the responsible division director and, assuming an adverse decision by the division director, that subsequent appeals may be taken to the office director and the EDO.<sup>19</sup> This forces a licensee to reassert its backfit claim with the division director and office director from the sponsoring office before reaching the EDO.

This process should be restructured so that licensees may appeal either: (1) the initial determination that a proposed action is not a backfit, or (2) the justification for an action recognized as a backfit, directly to the CRGR. The CRGR would deliberate and resolve the backfit appeal and, in the event of an adverse CRGR decision, the licensee should then have the option of appealing to the EDO. Such a process would give a licensee access to independent review by CRGR without having to work through multiple levels of the project office sponsoring the action in question.

Further, MD 8.4 explicitly provides for the filing of facility-specific backfit appeals only by individual licensees. In order to ensure that the backfit appeal process is utilized to its full potential, NEI should be permitted to bring facility-specific backfit appeals on behalf of licensees in situations where the organization determines that facility-specific backfits are, or have the potential to become, generic industry issues. NEI is well-positioned to identify such issues, and can potentially be more efficient in bringing them to the NRC’s attention through the backfit appeal process than individual licensees who are directly regulated by the NRC staff sponsoring the potential backfit.

**Periodic Assessments.** NEI concurs with the CRGR proposal for annual assessments, and 5-year audits, so long as both are performed by independent CRGR personnel.

**Program Office Responsibilities.** Program offices should continue to perform backfitting analyses with respect to initiatives originating from their office(s), however, as outlined above, those analyses should be subject to CRGR review, and approval by the EDO pursuant to 10 CFR

---

<sup>18</sup> If read in isolation, Figure 1 could be interpreted as precluding a licensee appeal of an NRC staff position that an action does not constitute a backfit. But such appeals are specifically allowed elsewhere in the Management Directive. See MD 8.4, at Handbook, pp. 19-20.

<sup>19</sup> While Figure 2 indicates that the licensee’s backfit claim will be reviewed by the responsible division director, this step is not described in the substantive description of the facility-specific appeals process provided elsewhere in the Management Directive. See MD 8.4, at Handbook, pp. 19-22.

50.109(e). Program offices should have well-trained points of contact that are responsible for coordinating program office backfit analyses, as well as interactions with the CRGR on backfitting issues.

**NRC Staff Backfitting Training.** The CRGR should establish a comprehensive, graded training program concerning backfitting. Training for key backfitting personnel, such as the proposed points of contact, should go beyond the general familiarity/awareness level. Training for these individuals should cover the history and purposes of the backfit rule, as well as the details and nuances associated with implementation of the rule. Such detailed training will be crucial in assuring appropriate future consideration of backfitting issues. A comprehensive training program is particularly important in light of potential significant staff turnover, which is occurring during a dynamic regulatory environment where NRC regulations and guidance are being amended to accommodate the licensing and operation of new plants.

**CRGR Resources.** As discussed during the November 9, 2009, public meeting, the CRGR is currently supported by ½ of an FTE in the Office of Nuclear Reactor Research. Although we believe that the recommendations above appropriately provide for CRGR involvement primarily in situations where there are actual backfitting disputes, we also recognize that implementation of our recommendations will likely require additional FTE to support the CRGR. For the reasons explained above, NEI believes that adequately staffing a revitalized CRGR – possibly through reallocation of existing staff resources – should be a high priority for the agency.<sup>20</sup>

---

<sup>20</sup> During its most robust initial years, the CRGR was supported by six full-time senior technical experts. Audit Report, at 5.