Mitman, Jeffrey

From: Mitman, Jeffrey INRR
Sent: Tuesday, December 22, 2009 5:45 PM
To: Galloway, Melanie INRR
Cc: Cunningham, Mark; James, Lois; Ferrante, Fernando
Subject: Who is required to demonstrate that adequate protection has not been met?

In our recent discussion, Mark has ask: Who has responsibility for determining that a licensee does not have adequate protection; the licensee or the NRC? I've re-read 10CFR50.109 (the backfit rule) with this question in mind. After this review, it is clear that Mark is correct, it is the NRC's responsibility to determine that a plant does not have adequate protection. The pertinent discussion can be found in 50.109(a)(4) which states in part:

> The provisions of paragraphs (a)(2) and (a)(3) [These are the sections requiring a backfit analysis.] of this section are inapplicable and, therefore, backfit analysis is not required and the standards in paragraph (a)(3) of this section do not apply where the ***Commission or staff***, as appropriate, ***finds and declares***, with appropriate documented evaluation for its findings, either: ...

It then proceeds to discussion the 3 backfit exclusions, i.e., compliance, adequate protection, and regulatory action which redefines protection levels which are adequate. I mention this final point because if we decide that Duke is not in compliance with the existing requirements, the NRC needs to have a "documented analysis" substantiating that finding.

Jeff

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