

ELLEN C. GINSBERG
Vice President, General Counsel & Secretary

1201 F Street, NW, Suite 1100
Washington, DC 20004
P: 202.739.8140
ecg@nei.org
www.nei.org



April 24, 2015

The Honorable Stephen G. Burns
Chairman
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001

Subject: Industry Backfit Concerns Regarding Generic Letter (GL) 2015-01,
Treatment of Natural Phenomena Hazards (NPH) in Fuel Cycle Facilities

Dear Chairman Burns:

The Nuclear Energy Institute, Inc. (NEI)¹ writes to express our concerns with the backfit discussion associated with SECY-15-0045, Issuance of Generic Letter 2015-01, "Treatment of Natural Phenomena Hazards in Fuel Cycle Facilities" (Mar. 27, 2015). We understand that the NRC staff has informed the Commission that it soon intends to issue GL 2015-01. The staff's backfit rule discussion is based on positions similar to those NEI opposed in response to staff's proposal to require certain fuel cycle facilities to create quantitative dermal and ocular exposure standards.² The staff's misapplication of the backfit rule in both instances has the potential to undermine both the rule and Commission efforts to appropriately prioritize regulatory activities in accordance with their safety significance. Accordingly, we request that the Commission review the backfit analysis underlying the GL.

Post-Fukushima Activities at Fuel Cycle Facilities

After the Fukushima Dai-ichi accident, the NRC staff inspected selected fuel cycle facilities to confirm licensees were in compliance with regulatory requirements and facility-specific license conditions. From December 2011 through May 2012, the staff inspected these facilities pursuant to Temporary Instruction 2600/015, "Evaluation of Licensees Strategies for the Prevention and/or Mitigation of Emergencies at Fuel Facilities." Although the staff identified no significant safety issues at 10 CFR Part 70 facilities, it identified some unresolved items (URIs).³ Rather

¹ NEI is the organization responsible for establishing unified 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.

² NEI brought these backfit concerns to the NRC General Counsel's attention in November 2014. Letter from E. Ginsberg, Vice President, General Counsel and Secretary, NEI, to M. Doane, General Counsel, NRC (Nov. 7, 2014) (ML14322B019).

³ See GL 2015-01 at 4 (noting that notwithstanding the potential compliance issues identified in URIs, "the staff believes at this time, that for all the facilities inspected, due to consideration of inherent seismic capacity in SSCs, radiological/chemical source terms and existing safety programs in place (*i.e.*, items relied on for safety), the facilities are adequate to protect public health and safety").

than closing these URIs through the inspection process, the staff decided to develop the GL. In August 2014—more than 2 years after conducting these inspections—the staff issued a draft GL for comment.⁴ NEI and its fuel cycle members commented on the draft and noted the difficulty in assessing the justification and benefits from moving forward with the GL given, among other things, the absence of an identified safety issue, and the lack of staff guidance and criteria for satisfactorily responding to the GL. The staff proceeded to issue draft interim staff guidance (ISG) on NPH in February 2015.⁵ However, before the ISG comment period closed, the staff appears to have finalized the GL and informed the Commission it intends to issue it.

Backfit Discussion in Generic Letter 2015-01

The NRC staff indicates it will issue the GL for two seemingly reasonable purposes:

- (1) to request addressees to submit information to demonstrate compliance with regulatory requirements and applicable license conditions regarding the treatment of natural phenomena events in the facilities' integrated safety analysis (ISA)
- (2) to determine if additional NRC regulatory action is necessary to ensure that licensees comply with their licensing basis and existing NRC regulations⁶

On the surface it thus appears the staff intends to follow a two-phase process similar to the 10 CFR § 50.54(f) hazard reevaluation process underway for power reactors. In discussing the rationale for not conducting a backfit analysis to support the GL, the staff indicates the GL “only asks addressees to provide information regarding their facilities' compliance with the existing applicable regulatory requirements as discussed in this GL. Information collection and reporting requirements are not subject to the purview of the Backfit Rule.” GL 2015-01 at 9. While this statement is somewhat overbroad,⁷ NEI agrees the NRC need not perform any further backfit evaluation to the extent the GL asks for information to confirm compliance with a facility's current licensing basis, orders, or commitments.

Despite the information collection justification, the GL unnecessarily includes two additional backfit rationales. These second and third rationales appear to allow the staff to implement essentially any regulatory change it deems necessary during the second phase of the GL process without regard to the backfit rule and without consideration of the change's safety benefit and cost. In other words, unlike the section 50.54(f) process for power reactors, the staff apparently plans to exempt itself from following established processes, including the backfit rule, in

⁴ 79 Fed. Reg. 46,472 (Aug. 8, 2014).

⁵ 80 Fed. Reg. 9,755 (Feb. 24, 2015).

⁶ SECY-15-0045, Issuance of Generic Letter 2015-01, “Treatment of Natural Phenomena Hazards in Fuel Cycle Facilities,” Encl. at 1 (Mar. 27, 2015) (ML15036A141) (GL 2015-01).

⁷ NRC staff guidance indicates that while information requests to verify compliance are not backfits, the staff still must include: (1) “A description of the need for the information, in terms of potential safety benefit and any applicable regulatory requirements and references;” (2) “A description of the actions requested from the licensee/certificate holder, and an estimate of the costs incurred by the licensee/certificate holders in responding to the request;” and (3) “A schedule stating when NRC will review and act on the information.” NMSS-LIC-253, Rev. 0, Backfit Guidance for the Office of Nuclear Material Safety and Safeguards at 7 (Nov. 1, 2013) (ML13161A115). Even if viewed solely as an information request, the GL does not appear to satisfy all of these requirements.

determining whether regulatory actions are warranted in response to information gathered through the GL. By rejecting the staff's second and third backfit rationales discussed below, the Commission would add clarity to this process for fuel cycle facilities, similar to the clarity the Commission recently added to the process for power reactors.⁸

In the GL's second backfit rationale, the NRC staff argues that its prior review and approval of ISA summaries was essentially meaningless from a backfit standpoint because those reviews "did not involve a comprehensive review of the underlying ISAs, including the adequacy of either the ISAs consideration of NPH or the supporting documentation." GL 2015-01 at 9. The staff reasons there can be no backfit because it has never taken a position on how licensees treat NPH. But NRC regulations governing the ISA process tell a different story. After an extensive rulemaking effort, the NRC required licensees to perform ISAs to identify potential accidents at their facilities and the items relied on for safety necessary to prevent or mitigate these potential accidents. Given the substantial undertaking this involved, licensees were given 4 years to perform their ISA and submit a summary for NRC approval.⁹ Licensees also were required to make supporting information (including the full ISA) available to the staff so it could "make the determination specified in § 70.66 (i.e., that the performance requirements of the regulation are satisfied)."¹⁰ Relevant here, 10 CFR § 70.62(c)(1) required each ISA to identify potential accidents caused by "credible external events, including natural phenomena." 10 CFR § 70.62(c)(1)(iv). The NRC could only have approved a licensee's submittal if its ISA approach was in accordance with 10 CFR § 70.62(c)(1). 10 CFR § 70.66(c)(1). Therefore, to approve a licensee's submittal *the staff necessarily took a position on and approved a licensee's consideration of NPH.*¹¹

In the GL's third backfit rationale, the NRC staff invokes the compliance exception. According to the staff, 10 CFR § 70.62 requires that a licensee "maintain" its ISA and thus "[a]ny errors, omissions or failures to properly address applicable NRC requirements in ISA summaries, the underlying ISAs, and information necessary to support the ISA . . . must be addressed and reflected in the updated ISAs and ISA summaries." GL 2015-01 at 9. Under this logic, the backfit rule would be inapplicable to *any* reinterpretation of what staff believes is required to comply with *any* of Part 70's broad, performance-based standards because staff could always claim a licensee is not "maintaining" its ISA to conform to a new or different staff position.

As emphasized in our November 7 letter on the dermal and ocular exposure issue, the Commission precisely explained the purpose of the compliance exception in the 1985 final rule promulgating the modern iteration of the backfitting provisions contained in 10 C.F.R. § 50.109:

The compliance exception is intended to address situations in which the licensee has failed to meet known and established standards of

⁸ See, e.g., SRM-COMSECY-14-0037, Integration of Mitigating Strategies for Beyond-Design-Basis External Events and the Reevaluation of Flooding Hazards (Mar. 30, 2015) (ML15089A236) (directing the staff to clarify "how Phase 2 decisions about whether further regulatory actions are necessary will be made within the current regulatory process, including the Backfit Rule").

⁹ 10 CFR § 70.62(c)(3)(ii); Final Rule, Domestic Licensing of Special Nuclear Material; Possession of a Critical Mass of Special Nuclear Material, 65 Fed. Reg. 56,211 56,215 (Sept. 18, 2000).

¹⁰ 65 Fed. Reg. at 56,213.

¹¹ This conclusion is supported by the fact that the Commission conditioned the backfit rule's application for such facilities on the staff's approval of a licensee's ISA summary. 10 CFR § 70.76(a).

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.¹²

The GL fails to show the NRC approved any ISA summary based on an “omission or mistake of fact” that caused a licensee to fail to “meet known and established standards.” To the contrary, the staff suggests it may backfit licensees based on the fact that “the state of knowledge of NPH has evolved significantly since the licensing of many fuel cycle facilities.” GL 2015-01 at 5. Far from arguing that its original approvals were the result of an omission or mistake of fact based on what the agency and licensees knew when those approvals were issued, *the GL explains that “new information” developed after the ISA summaries were approved has caused the staff to reinterpret what licensee actions are required to comply with Part 70.*¹³ This is precisely the type of “new or modified” interpretation that, according to the Commission, falls outside the compliance exception. Accordingly, the Commission should require the staff conduct a backfit analysis before imposing any regulatory action addressing information in GL responses.

Conclusion

The purpose of the backfit rule is to help ensure NRC and licensee resources are devoted to activities that yield significant safety benefits and are cost-justified. By directing the staff not issue the GL or directing the staff to correctly apply the backfit rule before determining whether to impose additional requirements to address NPH information in licensee GL responses, the Commission will help to ensure a safety-focused and effective regulatory framework for fuel cycle facilities.

We appreciate your timely consideration of these issues. If you have any questions or require additional information, please contact me (202-739-8140; ecg@nei.org) or Jonathan Rund (202-739-8144; jmr@nei.org).

Sincerely,



Ellen C. Ginsberg

cc: The Honorable Kristine L. Svinicki, COMM/OCMKS, NRC
The Honorable William C. Ostendorff, COMM/OCMWO, NRC
The Honorable Jeff M. Baran, COMM/OCMJB, NRC
Ms. Catherine Haney, Director, NMSS, NRC
Margaret Doane, Esq., General Counsel, OGC, NRC

¹² Final Rule, Revision of Backfitting Process for Power Reactors, 50 Fed. Reg. 38,097, 38,103 (Sept. 20, 1985).

¹³ The staff has also used the “new information” argument in the dermal and ocular exposure context, stating: “The NRC believes that these events [*i.e.*, chemical exposures occurring since the initial approval of ISA summaries] demonstrate the need for fuel cycle facilities to address all pathways when updating their safety programs, ISAs, and ISA summaries.” 80 Fed. Reg. 21,274, 21,275 (Apr. 17, 2015).

CHAIRMAN Resource

From: GINSBERG, Ellen <ecg@nei.org>
Sent: Friday, April 24, 2015 3:25 PM
To: CMRBURNS@nrc.gov
Cc: CMRSVINICKI Resource; CMROSTENDORFF Resource; CMRBARAN Resource; Haney, Catherine; Doane, Margaret; RUND, Jonathan
Subject: Industry Backfit Concerns Regarding Generic Letter (GL) 2015-01, Treatment of Natural Phenomena Hazards (NPH) in Fuel Cycle Facilities
Attachments: 2015 04 24 NEI Letter to Commission re SECY-15-0045 and GL 2015-01.pdf

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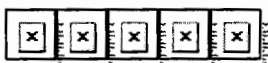
Sincerely,

Ellen C. Ginsberg
Vice President, General Counsel and Secretary
Nuclear Energy Institute
1201 F Street, NW, Suite 1100
Washington, DC 20004
www.nei.org
P: 202 739 8140
M: 202 437 0660
E: ecg@nei.org



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