

Backfitting and Issue Finality for Rulemaking, Guidance Documents and Generic Communications: OGC Informal Guidance

Purpose

This guidance is directed at working-level staff who prepare rulemaking, guidance documents, and generic communications, to ensure that the staff addresses any applicable backfitting and issue finality provisions that may be applicable to their activity.

NOTE: for purposes of this informal guidance, "rule" means both: (i) regulations codified in the Code of Federal Regulations; and (ii) guidance which may reasonably be considered to be "interpretive rules," (e.g., regulatory guides, regulatory information summaries, and interim staff guidance).

Issues Addressed in this Informal Guidance

- Distinguishing between, and ensuring evaluation of, backfitting and issue finality under Part 52.
- Ensuring that NRC addresses backfitting provisions applicable to materials licenses.
- Complexity in addressing backfitting and issue finality in circumstances involving power reactor licensees as materials licensees.
- Consistency and quality of backfitting and issue finality discussion in various agency documents.

Guidelines

1. Always use the heading/phrase: **Backfitting and Issue Finality** in the *Federal Register* notice or other document addressing this subject matter.
2. Identify the entities to which the rule or guidance will be applied (either as a legally-binding requirement, or as non-binding guidance). You may use Enclosure 1 to help you identify those entities. Enclosure 1 is a form that, when completed, graphically indicates the staff's intent on the applicability of the rule or guidance to various entities protected by backfitting and issue finality provisions. ***If you are sending a document to OGC for NLO or for preparation of the backfitting and issue finality discussion, then this form MUST be completed. OGC will not begin reviewing the backfitting and issue finality aspects of the document, or preparing the backfitting and issue finality discussion unless a completed form is included with the package.*** For your information, the entities protected by backfitting and issue finality provisions are listed in Table 1 to help you make that determination.

3. If the NRC's proposed action does not affect entities protected by backfitting or issue finality provisions, then say so explicitly in the *Backfitting and Issue Finality* discussion.
4. If your rule affects both entities which are subject to backfitting and issue finality provisions, as well as entities who are not subject to such provisions, then treat each set of entities in separate paragraphs in the *Backfitting and Issue Finality* discussion.
5. In general, if the primary audience of a *Backfitting and Issue Finality* discussion is external stakeholders and the purpose of this discussion is to explain to those stakeholders the NRC's position on backfitting/issue resolution with respect to *issuance* of the rule, then OGC recommends that the *Backfitting and Issue Finality* discussion be in both the *Federal Register* notice announcing the proposed rule for comment (if applicable), and in the *Federal Register* notice announcing the issuance or adoption of the final rule.

If the staff's practice is *not* to issue a final *Federal Register* notice announcing the issuance or adoption of the final interpretive rule (guidance), then OGC recommends that both the draft and final *Backfitting and Issue Finality* discussion be in the interpretive rule/guidance itself. The *Federal Register* notice announcing the opportunity for public comment on the draft interpretive rule/guidance should – under the *Backfitting and Issue Finality* heading – state that the detailed discussion of backfitting and issue finality is in the interpretive rule/guidance itself.

6. If you have any questions on backfitting and issue finality as applied to your rulemaking activity, or if you need assistance in drafting the backfitting and issue finality provisions of your documents, then it would be best to consult with OGC early in your rulemaking activity (and certainly before finalizing your rulemaking documents). OGC attorneys who may be consulted on backfitting and issue finality are:

Geary Mizuno, Special Counsel
Office of the General Counsel, Reactor and Materials Rulemaking
O-14D10 415-1639

Howard Benowitz, Senior Attorney
Office of the General Counsel, Reactor and Materials Rulemaking
O-14D4 415-4060

Enclosure 1.

Staff Expectations: Applicability of Rulemaking/Guidance/Generic Communication to Entities Protected by Backfitting or Issue Finality Provisions

This form should be completed by the staff and transmitted to OGC as part of the staff's request for a no legal objection (NLO) of a rulemaking, guidance, or generic communication document, or if the staff expects OGC to prepare the Backfitting and Issue Finality discussion. The information will facilitate OGC's ability to quickly assess the backfitting and issue finality implications of the proposed or final NRC document, and prepare any needed backfitting and issue finality text.

This form was developed with the assumption that the positions in the NRC document will apply to future applicants and licensees, and therefore does not include entries for future applicants and licensees. If the positions in the document are **not** going to be applied to future applicants and licensees, please check "**NO**" in the following statement, and provide a short explanation as to the reason why the document's positions will not be applied to future applicants and licensees:

NO. The NRC positions in the document are **not** going to be applied to future applicants and licensees.

Explanation why the NRC positions in the document does not apply to future applicants and licensees:

A revised certificate of compliance for a dry storage cask will not adversely affect proposed general licensees under 10 CFR 72.210. Revising a certificate will affect current licensees in that they must revise the analysis performed pursuant to 10 CR 72.212(b)(5). Future general licensees are required to perform this evaluation regardless of which certificate amendment will be used and regardless of whether the amendment has been revised or not.

Title of Document: Direct-Final Rulemaking to add Certificate of Compliance No. 1004, Amendment No. 0 – 11, and Amendment No. 13, Revision No. 1 to 10 CFR 72.214, List of approved spent fuel storage casks.

Proposed or **Final** (*check as applicable*):

The only category applicable to this proposed rulemaking is 10 CFR Part 72 licensees.

Part 72 – Independent Spent Fuel Storage Installations (ISFSIs) and Monitored Retrievable Storage (MRS)

Entity to which the NRC position would be applied	NRC position to be applied to entity (Y = yes; N = no; None = applicable, but no current entities; NA = not applicable)
Holder of general ISFSI license under Subpart K of Part 72	Y
Specific ISFSI or MRS license applicant	N
Specific ISFSI or MRC license holder	N
NOTE: Certificate of Compliance applicant and holders are not currently protected by backfitting provisions in Part 72	

Table 1. Entities Subject to Backfitting and Issue Finality Provisions

Limited work authorizations (LWA) – nuclear power reactors	10 CFR 50.10(f)
Construction permit holders – nuclear power reactors	10 CFR 50.109
Operating license holders – nuclear power reactors	10 CFR 50.109
Renewed operating license applicants – nuclear power reactors	10 CFR 54.30
Renewed operating license holders – nuclear power reactors	10 CFR 54.33 <i>See also 10 CFR 51.91(c) and 10 CFR Part 51, Appendix B for limited scope of environmental review at license renewal</i>
Early site permit (ESP) holders – nuclear power reactors	10 CFR 52.39 <i>See also 10 CFR 51.50(c)(1)</i>
Early site permit (ESP) with limited work authorization authority	10 CFR 52.39 10 CFR 50.10(f) <i>See also 10 CFR 51.50(c)(1)</i>
Final design certification rules (DCR) – nuclear power reactor	10 CFR 52.63 10 CFR 50.109
Individual design certification rule applicants* – nuclear power reactors ABWR System 80+ AP600 AP1000	10 CFR Part 52, Appendices A through D: Section VI. <i>Issue Resolution</i> Section VIII. <i>Processes for Changes and Departures</i>

<i>* there are no “holders” of a design certification rule</i>	
Combined license applicants referencing an ESP or DCR – nuclear power reactors	10 CFR 52.83 50.109
Combined license holders – nuclear power reactors	10 CFR 52.98(a), (b) 50.109
Design approval holders – nuclear power reactors	10 CFR 52.145 10 CFR 50.109
Manufacturing license holders – nuclear power reactors	10 CFR 52.171 10 CFR 50.109
Fuel Cycle Facilities <i>(authorized to possess critical amounts of special nuclear material)</i>	10 CFR 70.76
Independent Spent Fuel Storage Installation (ISFSI)	10 CFR 72.62
Gaseous Diffusion Plants	10 CFR 76.76

NOTE

1. 10 CFR 71.65, which applies to licensees who package, transport, or deliver to a common carrier for transport, radioactive material, provides that the NRC may impose requirements in addition to those specified in Part 71 if the NRC deems it “necessary or appropriate to protect public health or to minimize danger to life or property.” OGC interprets this provision as a restatement and confirmation of NRC authority under applicable statutes, rather than a limiting provision imposing backfitting-like restrictions.