

POLICY ISSUE
(Notation Vote)

April 18, 2018

SECY-18-0049

FOR: The Commissioners

FROM: Victor M. McCree
Executive Director for Operations

SUBJECT: MANAGEMENT DIRECTIVE AND HANDBOOK 8.4, "MANAGEMENT OF
BACKFITTING, ISSUE FINALITY, AND INFORMATION COLLECTION"

PURPOSE:

As directed in Staff Requirements Memorandum (SRM) -COMSECY-16-0020, "Revision of Guidance Concerning Consideration of Cost and Applicability of Compliance Exception to Backfit Rule," dated November 29, 2016 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML16334A462), the staff requests Commission approval of Management Directive (MD) and Handbook 8.4, "Management of Backfitting, Issue Finality, and Information Collection." This paper does not address any resource implications.

BACKGROUND:

Backfitting is the process by which the U.S. Nuclear Regulatory Commission (NRC) imposes new or changed regulatory requirements or staff positions on nuclear power reactor licensees or selected nuclear materials licensees. Backfitting normally occurs in one of two ways: a change to the regulations or a change to the staff's interpretation of the regulations that is imposed on the licensee. Although backfitting is a normal part of the regulatory process, the NRC may implement a backfitting action only after a formal, systematic review to ensure that the action is properly justified and suitably defined.

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The regulations for backfitting are in Title 10 of the *Code of Federal Regulations* (10 CFR), 50.109 (the Backfit Rule), 70.76, 72.62, and 76.76. Analogous provisions within the licensing process under 10 CFR Part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants,” (referred to as “issue finality” provisions), appear in 10 CFR 52.31, 52.39, 52.59, 52.63, 52.83, 52.98, 52.145, 52.171, and 52.179.

The regulations for backfitting and issue finality have a similar structure. Unless an exception denoted in the regulation applies, backfitting actions must be justified with a backfit analysis. In general, a backfit analysis must show that (1) the action will provide a substantial increase in overall protection of the public health and safety or common defense and security and (2) the direct and indirect costs of implementing the backfitting action are justified in view of the increased protection. The backfitting requirements generally provide three exceptions to the requirement that a backfit analysis be performed: maintaining or restoring adequate protection, redefining the level of protection considered adequate, and compliance. If the NRC decides to invoke one of the backfitting exceptions, the NRC must provide a documented evaluation, giving a statement of the objectives, reasons for the modification, and the basis for invoking the exception, rather than a backfit analysis. In matters pertaining to adequate protection, the NRC can consider costs only when it identifies more than one way to achieve adequate protection.

As a result of internal agency discussions and interactions with external stakeholders concerning the adequacy and consistency of the staff’s implementation of agency backfitting requirements and guidance, the Executive Director for Operations (EDO), in June 2016, tasked the Committee to Review Generic Requirements (CRGR) with assessing the guidance, training, and knowledge management associated with backfitting and issue finality (ADAMS Accession No. ML16133A575).

The Commission’s November 29, 2016, SRM on COMSECY-16-0020 directed the staff to revise agency guidance concerning application of the Backfit Rule consistent with the guidelines and interpretations outlined in COMSECY-16-0020 and to provide the revised guidance to the Commission for approval. Further, the Commission directed the staff to ensure activities performed in response to the EDO’s June 2016 tasking are consistent with the General Counsel’s interpretation of the statutory requirements applicable to the implementation of the Backfit Rule, as discussed in COMSECY-16-0020 (not publicly available). As such, the EDO supplemented its tasking with a memorandum dated December 15, 2016 (ADAMS Accession No. ML16344A004), which directed the CRGR to consider “all actions and direction related to backfitting issued by the agency since the tasking” in completing its review, including the EDO’s decision on a backfit appeal for Byron and Braidwood Stations (ADAMS Accession No. ML16259A344). A publicly available memorandum, “Summary of COMSECY-16-0020 Recommendation on Revision of Guidance Concerning Consideration of Cost and Applicability of Compliance Exception to Backfit Rule,” dated December 20, 2016 (ADAMS Accession No. ML16355A258), summarizes the General Counsel’s recommendations. In particular, for backfitting actions related to adequate protection, the Atomic Energy Act of 1954, as amended (AEA), requires the NRC to impose the new or changed requirement(s). In addition, when invoking the compliance exception, the NRC must consider the costs of the backfitting action.

On June 27, 2017, in response to the EDO’s direction, the CRGR delivered the “Report of the Committee to Review Generic Requirements on its Assessment of the U.S. Nuclear Regulatory Commission’s Implementation of Backfitting and Issue Finality Requirements and Guidance” (ADAMS Accession No. ML17174B161). The CRGR considered both internal and public feedback and conducted an independent assessment, including review of COMSECY-16-0020 and the associated SRM. The CRGR concluded that opportunities exist to improve backfitting

practices. The CRGR recommended actions intended to improve oversight by NRC senior managers and first-line supervisors; enhance engagement and oversight by the CRGR; improve staff knowledge, skills, and abilities associated with backfitting and generic requirements; and identify and treat potential backfitting issues more consistently.

On July 19, 2017, the EDO responded to the CRGR, supporting the CRGR's recommendations and providing additional direction to the committee as well as other affected offices (ADAMS Accession No. ML17198C141). The directed actions were principally (1) to update and improve the backfitting and issue finality guidance, primarily MD 8.4 and NUREG-1409, "Backfitting Guidelines," (2) conduct near-term and follow-on backfitting training for NRC staff and managers, and (3) capture, store, and transfer backfitting knowledge through the use of knowledge management and knowledge transfer tools.

On August 16, 2017, Yellow Announcement (YA) -17-0077, "Commission Direction and Staff Actions Related to Backfitting and Issue Finality" (ADAMS Accession No. ML17206A094), communicated the Commission direction broadly to the staff. Meanwhile, the staff was developing MD 8.4, consistent with the procedures for revision of management directives. The announcement noted that, consistent with Commission direction, the staff immediately began applying the guidance from the General Counsel (as summarized in the publicly available memorandum) and that the in-process revision of MD 8.4 would reflect the Commission's direction.

Consistent with the EDO's direction, in December 2017 the staff initiated a series of backfitting seminars, referred to as "backfitting reset training," for all regions and applicable headquarters staff. The seminars were completed in January 2018. The staff plans to conduct more extensive follow-on training beginning in June 2018.

DISCUSSION:

Agency Policy and Guidance for Backfitting and Issue Finality

The primary focus of the staff's guidance development has been on MD and Handbook 8.4, the NRC's policy document for implementing its backfitting and issue finality provisions. As directed by the EDO and in accordance with SRM-COMSECY-16-0020, the staff has completed the enclosed draft of MD and Handbook 8.4. This revision to MD and Handbook (DH) 8.4 sets forth the NRC's policy on backfitting, issue finality, and information collections and is provided for Commission approval. The next section summarizes important enhancements to MD and DH 8.4. Once the staff has incorporated any comments from the Commission, the staff plans to issue the revised MD.

The staff is in the process of revising and updating the detailed implementation guidelines in NUREG-1409, "Backfitting Guidelines" (ADAMS Accession No. ML032230247) to conform with the revised MD. The staff plans to issue a draft version of the NUREG for public comment in summer 2018 and subsequently revise it to reflect the NRC's consideration of stakeholder comments and any applicable Commission direction on MD 8.4. Consistent with Commission direction, the staff will provide the revised draft NUREG-1409 to the Commission for approval before final issuance. NUREG-1409 will provide the sole implementation guidelines for backfitting actions, superseding all previous office or regional guidance and thus ensuring consistency of implementation across the NRC. If policy issues arise in the finalization of NUREG-1409 that are not addressed in Commission review of MD 8.4 or other prior

Commission decisions, the staff will provide a separate paper to the Commission to resolve these issues before NUREG-1409 is finalized.

While office or regional procedures may continue to refer to backfitting or issue finality, these office-level procedures will not contain additional backfitting guidance; they will instead reference NUREG-1409. The staff plans to complete all needed revisions to office and regional procedures within 1 year after issuance of the revised NUREG-1409.

NUREG/BR-0058, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission" (ADAMS Accession No. ML17100A480), currently in draft form, contains guidance for performing regulatory analyses. NUREG/BR-0058 will include guidance for estimating costs in regulatory analyses. These costs can be used to support backfitting determinations and will reference guidance in NUREG-1409. The staff provided NUREG/BR-0058 to the Commission for approval as described in SECY-18-0042, "Draft Final NUREG/BR-0058, Revision 5, 'Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission,'" dated March 28, 2018 (ADAMS Accession No. ML17221A000).

Significant Changes to Guidance

There are many revisions to the management directive; the most significant are summarized below.

Title Change

Because of the changes made in the revision, the title of MD 8.4 has changed from "Management of Facility-Specific Backfitting and Information Collection" to "Management of Backfitting, Issue Finality, and Information Collection." This change reflects the inclusion of both facility-specific backfitting policy and generic backfitting policy, as well as issue finality.

Applicability to All Backfitting and Issue Finality Actions

The previous version of MD and Handbook 8.4 applied to facility-specific backfitting and information collection only. The revised management directive now applies to both facility-specific and generic backfitting and issue finality actions and continues to include information collection policy.

The objective of addressing all backfitting within the same management directive is to achieve consistency across the agency for implementing backfitting and issue finality requirements.

Consideration of Adequate Protection Backfitting as a First Priority

Adequate protection backfitting, whether used to ensure that adequate protection is maintained or to define or redefine the level of protection that should be regarded as adequate, does not require a finding of substantial safety or security improvement, nor does it require that costs be considered. If a backfitting action is deemed necessary for adequate protection, it must be implemented, as required by the AEA. A documented evaluation as described in the backfitting provisions is also required. A notable revision to MD 8.4 is direction to first consider the proposed change under the adequate protection provisions before being considered under any other of the NRC's backfitting or issue finality provisions. This policy enhancement should ensure that the NRC is imposing requirements for matters of adequate protection, as required by the AEA.

Improved Guidance for Implementing Compliance Backfitting

The revised MD 8.4 contains updated direction for the use of the compliance exception. This update reflects Commission direction in SRM-COMSECY-16-0020 and is informed by recent agency experience with the use of the compliance backfitting provision. Most noteworthy is the emphasis on considering whether the issue was an error or omission at the time of licensing or relevant license revisions.

Requirement to Consider Costs to Support Compliance Backfitting Determinations

While the backfitting regulations themselves do not require costs to be considered for compliance backfitting, the revised MD 8.4 does require the NRC staff to consider cost in support of compliance backfitting as directed by the Commission in SRM-COMSECY-16-0020. NUREG-1409 will provide guidance that describes how cost should be considered in support of compliance backfitting.

RECOMMENDATION:

The staff recommends that the Commission approve the revision to MD 8.4.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection.

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Victor M. McCree
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Enclosure:
Draft MD and Handbook 8.4

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DATED APRIL 18, 2018.

Ticket: SRM-CMSY16-0020 -1

ADAMS Accession Nos.: Package: ML18072A150;
SECY Paper: ML18071A382; Enclosure: ML17277A924

*via e-mail

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