



NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555
March 15, 1989

AC93-1
PDR

MEMORANDUM FOR: Eric S. Beckjord, Director
Office of Nuclear Regulatory Research

FROM: Stuart A. Treby
Assistant General Counsel for
Rulemaking and Fuel Cycle
Office of the General Counsel

SUBJECT: APPLICATION OF THE BACKFIT RULE (10 CFR § 50.109) TO
AMENDMENTS TO CODES AND STANDARDS REGULATION (10 CFR § 50.55a)

By memorandum dated October 20, 1988, you requested OGC concurrence on a proposed rulemaking package to amend 10 CFR 50.55a, "Codes and standards," to incorporate by reference Subsection IWE of Section XI, Division I, of the ASME Boiler and Pressure Vessel Code ("ASME Code"). This office reviewed that rule making package. On November 2, 1988, OGC returned the package to the RES contact, Mr. W.E. Norris, noting that although OGC had several editorial comments that it wanted incorporated, OGC had no legal objection to the action being proposed. Because the concurrence package proposing the rulemaking did not include a concurrence page, RES requested a formal written memorandum from OGC confirming its position of "no legal objection" to the proposed action and stating OGC's position both on the general applicability of the "backfit rule" to routine updates to § 50.55a and on the specific "backfit" issue raised by the proposed action. Those are the purposes of this document.

With respect to routine updates to 10 CFR 50.55a, it has consistently been the position of the Office of the General Counsel that such routine updates, which incorporate by reference new Editions and/or Addenda of the ASME Code, are not subject to the backfit provisions of 10 CFR 50.109. The legal bases for this position are: (1) the Section III, Division 1, updates apply only to new construction (i.e., the Edition and Addenda of the ASME Code to be used in the construction of a plant are selected based upon the date of the construction permit and are not changed thereafter, except voluntarily by the licensee); (2) licensees are fully aware that § 50.55a requires that they update their inservice inspection program every 10 years to the latest Edition and Addenda of Section XI of the ASME Code incorporated by reference into § 50.55a twelve months before the start of the next inspection interval; and (3) endorsing and updating references to the ASME Code, a national consensus standard developed by participants (including both the NRC and representatives of the regulated industry) with broad and varied interests, is consistent with both the intent and spirit of the backfit rule (i.e., the NRC provides for the protection of the public health and safety but does not unilaterally impose an undue burden on applicants or licensees).

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Unlike routine updates to § 50.55a, the proposed action would incorporate by reference the provisions of Subsection IWE of Section XI, Division 1, of the ASME Code. A Subsection not heretofore incorporated by reference, Subsection IWE would impose some new and additional inservice inspection requirements on existing licensees. Thus, this action raises the question whether such incorporation by reference constitutes a backfit within the scope of § 50.109. The specific backfit question raised by the proposed action was addressed at an August 4, 1988, meeting between RES and OGC personnel and again at a meeting between OGC and NRR personnel on January 23, 1989. OGC recognizes that the provisions of Subsection IWE were developed through the process used to formulate national consensus standards and, consequently, received review and comment by NRC personnel and representatives of the regulated industry as well as by other individuals with expertise in the subject matter addressed by Subsection IWE. OGC also agrees with the RES position that Subsection IWE provides acceptable minimum requirements for the inservice inspection of certain specified containment types and, therefore, represents responsible application of engineering judgment to assure adequate protection of the public health and safety. It is, therefore, OGC's opinion that §§ 50.109(a)(2) and (a)(3) of the backfit rule do not apply because this action is within the scope of § 50.109(a)(4)(ii). The justification for imposing the requirements of Subsection IWE as adequate protection of the public health and safety is discussed in Appendix B of the regulatory analysis which is entitled "50.109 Documented Evaluation."

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