

Backfitting and Issue Finality Assessment for the Alignment of Licensing Processes and Lessons Learned from New Reactor Licensing Proposed Rule

[Docket ID NRC-2009-0196]

U.S. Nuclear Regulatory Commission

Office of Nuclear Security and Incident Response

Office of Nuclear Material Safety and Safeguards

Office of Nuclear Reactor Regulation

Enter date when ready to issue 2022



[Page Intentionally Blank]

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations related to the licensing of new nuclear power reactors to ensure consistency in new reactor licensing reviews; promote an efficient new reactor licensing process; reduce the need for exemptions from existing regulations and license amendment requests; address other new reactor licensing issues deemed relevant by the NRC; and support the agency's Principles of Good Regulation, specifically openness, clarity, and reliability. This assessment describes the backfitting and issue finality implications of this proposed rule as applied to holders of pertinent NRC approvals and certain applicants that reference NRC approvals in their applications. The NRC's backfitting provisions for construction permits (CPs) and operating licenses (OLs) appear in Title 10 of the *Code of Federal Regulations* (10 CFR) 50.109, "Backfitting." Issue finality provisions (analogous to the backfitting provisions in 10 CFR 50.109) for early site permits (ESPs) are located in 10 CFR 52.39, "Finality of early site permit determinations"; for standard design certifications (DCs), in 10 CFR 52.63, "Finality of standard design certifications"; for combined licenses (COLs), in 10 CFR 52.83, "Finality of referenced NRC approvals; partial initial decision on site suitability," and 10 CFR 52.98, "Finality of combined licenses; information requests"; for standard design approvals (SDAs), in 10 CFR 52.145, "Finality of standard design approvals; information requests"; and for manufacturing licenses (MLs), in 10 CFR 52.171, "Finality of manufacturing licenses; information requests." NRC Management Directive 8.4, "Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests," describes the Commission's policies on backfitting and issue finality.

II. Proposed Rule Provisions That Would Not Constitute Backfitting or Affect the Issue Finality of 10 CFR Part 52 Approvals

Section III.A of the proposed rule *Federal Register* notice (FRN) describes proposed changes to severe accident treatment requirements. The proposed changes to 10 CFR 50.34(a), "Preliminary safety analysis report," and (b), "Final safety analysis report," to require a CP applicant and OL applicant, respectively, to provide severe accident information in their applications would not constitute "backfitting" as that term is defined in 10 CFR 50.109(a)(1) because these requirements would be imposed on applicants. Applicants (for licenses, permits, and regulatory approvals such as DCs and SDAs) are not, with certain exceptions, within the scope of either the backfitting provisions or any issue finality provisions. The backfitting and issue finality regulations include language delineating when those provisions begin; in general, they begin after the issuance of a license, permit, or approval (e.g., 10 CFR 50.109(a)(1)(iii), 10 CFR 52.98(a)). Furthermore, neither the backfitting provisions nor the issue finality provisions, with certain exceptions, are intended to apply to NRC actions that substantially change the expectations of current and future applicants. These applicants cannot reasonably expect that future requirements will not change.

The proposed change to 10 CFR 50.59(c) to require a future OL holder to seek an amendment to its license if a proposed change, test, or experiment would significantly increase the probability or consequence of an ex-vessel severe accident (i.e., a severe accident in which material from a damaged core escapes the reactor pressure vessel) would not constitute backfitting because it would not affect current holders of OLs. This change would be imposed on holders of OLs issued after the effective date of the final rule, and these entities would not be within the scope of the backfitting provisions when the final rule goes into effect. None of the proposed changes described in Section III.A of the proposed rule FRN would affect the issue finality of an approval issued under 10 CFR Part 52, "Licenses, Certifications, and Approvals for

Nuclear Power Plants,” because the proposed changes would be imposed on only CP and OL applicants under 10 CFR Part 50, “Domestic Licensing of Production and Utilization Facilities.”

Section III.B of the proposed rule FRN describes proposed changes to probabilistic risk assessment (PRA) requirements. The proposed changes to 10 CFR 50.34(a) and (b) to require a CP applicant and OL applicant, respectively, to submit a description of the plant-specific PRA and its results in their applications would not constitute backfitting because these requirements would be imposed on applicants. This proposed change would not affect the issue finality of a 10 CFR Part 52 approval because the proposed change would be imposed on only future 10 CFR Part 50 CP and OL applicants.

The proposed change to 10 CFR 50.69, “Risk-informed categorization and treatment of structures, systems and components for nuclear power reactors,” to allow CP and COL holders and applicants for DCs to use 10 CFR 50.69 would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed change would provide a voluntary alternative requirement. Backfitting is defined in 10 CFR 50.109(a)(1) as, in relevant part, a modification of or addition to the systems, structures, or components (SSCs) or design of a facility, or the procedures or organization required to design, construct, or operate a facility, which results from a new or amended provision in the Commission’s regulations. This proposed rule would not require CP and COL holders and applicants for DCs to use 10 CFR 50.69, so the proposed change would not result in a modification or addition that would be backfitting or affect the issue finality of a 10 CFR Part 52 approval.

The proposed change to 10 CFR 50.71(h)(1) to require the holder of an OL issued after the effective date of the final rule to develop a PRA would not constitute backfitting because this requirement would apply to future OL holders. This proposed change would not affect the issue finality of a 10 CFR Part 52 approval because the proposed change would be imposed on only certain 10 CFR Part 50 OL holders.

The proposed change to 10 CFR 50.71(h)(2) to make the requirement for maintenance and upgrading of plant-specific PRAs applicable to those OL holders that are required to develop a PRA would not constitute backfitting for an OL holder required to develop a PRA under 10 CFR 50.71(h)(1) because that requirement would apply to future OL holders. In addition, this proposed change would also apply to an OL holder with an administrative technical specification that requires the licensee to have a PRA in order to use 10 CFR 50.69. The technical specification requires the licensee to use Regulatory Guide 1.200, “Acceptability of Probabilistic Risk Assessment Results for Risk-Informed Activities,” which describes how the PRA is maintained and upgraded (consistent with the current 10 CFR 50.71(h)). Because this licensee is already required to maintain and upgrade the PRA, the proposed change would not result in a modification or addition constituting backfitting for that licensee. This proposed change would not affect the issue finality of a 10 CFR Part 52 approval because the proposed change would be imposed on only certain 10 CFR Part 50 OL holders.

The proposed change to 10 CFR 50.71(h)(2) to establish a more flexible schedule for PRA upgrades would not constitute backfitting for an OL holder required to develop a PRA under 10 CFR 50.71(h)(1) because that requirement would apply to future OL holders. In addition, this proposed change would also apply to an OL holder with an administrative technical specification that requires the licensee to have a PRA in order to use 10 CFR 50.69. The technical specification requires the licensee to use Regulatory Guide 1.200, which describes how the PRA is upgraded (consistent with the current 10 CFR 50.71(h)). The proposed PRA upgrade scheduling requirement would be more flexible than the current requirement, such that a licensee could continue to comply with the current requirement and

simultaneously comply with the proposed requirement. Therefore, because this licensee is already required to upgrade the PRA and could meet the proposed scheduling requirement by continuing to implement the current scheduling requirement, the proposed change would not result in a modification or addition constituting backfitting for that licensee. Similarly, this proposed change would not affect the issue finality of a COL because a COL holder could meet the proposed scheduling requirement by implementing the current scheduling requirement.

Section III.C of the proposed rule FRN describes proposed changes to the Three Mile Island (TMI) requirements in 10 CFR 50.34(f). The proposed rule would revise 10 CFR 50.34(f) so that the TMI requirements, with the same exceptions currently given for 10 CFR Part 52 applicants, apply to new power reactor applications submitted under 10 CFR Part 50. In addition, the proposed rule would delete requirements in 10 CFR 50.34(f) that are included in other regulations or are no longer needed or applicable. The proposed rule also would amend the language and applicability of the plant procedures requirement in 10 CFR 50.34(f)(2)(ii). These proposed changes would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because these requirements would be imposed on applicants.

Section III.D of the proposed rule FRN describes proposed changes to fire protection requirements. The proposed change to 10 CFR 50.34(a) to require CP applicants to include in their applications information about how their fire protection design features comply with General Design Criterion 3, "Fire protection," in Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 CFR Part 50, and the proposed change to 10 CFR 50.34(b) to require OL applicants to include in their applications information about how their fire protection design features comply with General Design Criterion 3 and 10 CFR 50.48, "Fire protection," would not constitute backfitting because these requirements would be imposed on applicants. The proposed changes would not affect the issue finality of a 10 CFR Part 52 approval because the proposed changes would be imposed on only 10 CFR Part 50 CP and OL applicants.

Section III.E of the proposed rule FRN describes proposed changes to operators' licenses requirements. The NRC would revise 10 CFR 55.46(c), "Plant-referenced simulators," to give a facility licensee with its facility under construction the option to have the plant-referenced simulator use models relating to nuclear and thermal-hydraulic characteristics that replicate the intended initial core load for the nuclear power reference plant for which an operator's license is being sought. This proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed change would provide a voluntary alternative requirement. Further, the proposed change would not meet the definition of "backfitting" because it would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility.

The proposed changes to 10 CFR 55.4, "Definitions," to amend definitions of "plant-referenced simulator" and "reference simulator" to clarify that these terms are also applicable to simulators that model nuclear power reactors that are under construction would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility. As such, these proposed changes would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval.

The NRC proposes to change 10 CFR 55.45(b), "Implementation—Administration," to amend the plant walkthrough requirement to give facility licensees of new reactors under construction the option of using suitable alternatives to in-plant testing while the plant is under construction. This proposed change would not constitute backfitting or affect the issue finality of

a 10 CFR Part 52 approval because the proposed change would provide a voluntary alternative requirement.

The NRC proposes to change 10 CFR 55.31(a)(4) to require facility licensees at cold plants to maintain the knowledge, skills, and abilities of operator license applicants who have successfully completed the NRC initial licensing examination. This proposed change would not meet the definition of “backfitting” or affect the issue finality of a 10 CFR Part 52 approval because these changes would involve operator license applicants and, thus, would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility.

The proposed change to 10 CFR 55.47, “Waiver of examination and test requirements,” would provide criteria to permit a waiver of portions or all of the written examination and operating test for applicants to be licensed on subsequent units at a multiunit site. This proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed change would provide a voluntary alternative requirement.

Section III.F.1 of the proposed rule FRN describes proposed changes to physical security requirements. The NRC proposes to amend 10 CFR 73.55(a)(4) and 10 CFR 73.56(a)(3) to allow power reactor applicants and licensees to bring unirradiated reactor fuel into the protective area and protect it in accordance with 10 CFR 73.67, “Licensee fixed site and in-transit requirements for the physical protection of special nuclear material of moderate and low strategic significance,” until initial fuel load into the reactor. At that point, the licensee would need to protect the fuel in accordance with the more stringent requirements of 10 CFR 73.55(a)(4) and 10 CFR 73.56(a)(3). COL holders are currently required to protect unirradiated reactor fuel in the protective area in accordance with 10 CFR 73.67 only until the 10 CFR 52.103(g) finding. Thus, the proposed change would relax the requirement by allowing COL holders to protect the fuel under 10 CFR 73.67 for a longer time. However, a COL holder could continue to comply with the current requirement to protect unirradiated reactor fuel in the protective area in accordance with 10 CFR 73.67 only until the 10 CFR 52.103(g) finding and still satisfy the proposed rule. This makes the relaxation nonmandatory and, as explained in Management Directive 8.4, nonmandatory relaxations of regulations generally do not meet the definition of “backfitting.” These proposed changes would provide the voluntary relaxation of a current requirement and, thus, not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval.

The proposed changes to 10 CFR 70.22(k), 73.67(d), and 73.67(f) to clarify the security requirements for Category II and III quantities of special nuclear material (SNM) stored within the owner-controlled area but outside the protected area at 10 CFR Part 50 nuclear power reactors would constitute backfitting. Section III of this document presents the NRC’s documented evaluation of its finding that this backfitting action is necessary for adequate protection. COL holders are currently required to protect Category II and III quantities of SNM under 10 CFR 73.67 even when 10 CFR 73.55, “Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage,” applies. The proposed rule would relieve COL holders of complying with 10 CFR 73.67 once the SNM is located within the protected area and protected under 10 CFR 73.55. This proposed change would not affect the issue finality of a 10 CFR Part 52 approval because it would provide the voluntary relaxation of a current requirement. A COL holder could continue to comply with 10 CFR 73.67 when the SNM is located within the protected area and protected under 10 CFR 73.55 and satisfy the proposed rule.

Section III.F.2 of the proposed rule FRN describes proposed changes to fitness-for-duty (FFD) requirements. The NRC proposes to amend 10 CFR 26.4(e), 26.4(f), 26.5, “Definitions,” and 26.403(a)–(b) to allow nuclear power plant licensees and other entities to escort certain workers on site. This proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed change would provide a voluntary alternative requirement.

The proposed change to 10 CFR 26.405(b) to allow a licensee the option to require its medical review officer to review a laboratory test result indicating that a urine specimen is dilute would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed change would provide a voluntary alternative requirement.

The proposed change to 10 CFR 26.401(b) to clarify that “entities” includes licensees would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility. As such, this proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval.

The proposed change to 10 CFR 26.419, “Suitability and fitness evaluations,” to clarify that this requirement applies to those individuals who direct the construction of safety- and security-related SSCs would not constitute backfitting or affect the issue finality of a COL holder. This requirement would apply to licensees and other entities that receive, after the effective date of this final rule, a license or other authorization that requires them to be subject to 10 CFR Part 26.

The proposed change to amend the 10 CFR 26.5 definition of “reviewing official” to clarify that this definition is applicable to an FFD program that meets the requirements of 10 CFR Part 26, “Fitness for Duty Programs,” Subpart K, “FFD Programs for Construction,” would not constitute backfitting or affect the issue finality of a COL holder. This requirement would apply to licensees and other entities that receive, after the effective date of this final rule, a license or other authorization that requires them to be subject to 10 CFR Part 26.

The NRC proposes to amend 10 CFR 26.3(a)–(c) and 10 CFR 26.4(e)(1) to permit a licensee to delay the implementation of an FFD program that meets all requirements in 10 CFR Part 26, “Fitness for Duty Programs,” except those in Subpart I, “Managing Fatigue,” and Subpart K, “FFD Program for Construction,” until initial fuel load into the reactor. These proposed changes would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because they would provide a voluntary relaxation of a current requirement. Applicants and licensees could continue to comply with the current requirement and satisfy the proposed rule.

Section III.G of the proposed rule FRN describes proposed changes to emergency preparedness requirements. The NRC would include 10 CFR 50.54(q)(2) among those provisions listed in the introductory text of 10 CFR 50.54, “Conditions of licenses,” as inapplicable before the 10 CFR 52.103(g) finding. This proposed change would not affect the issue finality of a 10 CFR Part 52 approval nor would it meet the definition of “backfitting” because this change would not result in a modification of or addition to SSCs, or the design of a facility or the procedures or organization required to design, construct, or operate a facility.

The proposed changes to 10 CFR Part 50, Appendix E, “Emergency Planning and Preparedness for Production and Utilization Facilities,” Section IV.F.2.a.(i)–(ii), would make the text of that rule consistent across the emergency preparedness exercise provisions by using

numerals instead of spelling out the numbers and clarifying that the exercise required by Section IV.F.2.a.(ii) must occur within 2 years before the scheduled date of initial loading of fuel. These proposed changes would not affect the issue finality of a 10 CFR Part 52 approval nor would they meet the definition of “backfitting” because the changes would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility.

The proposed changes to 10 CFR Part 50, Appendix E, Section IV.F.2.a.(iii), would create a process to allow an applicant or licensee to not conduct an exercise for each new reactor at a site with an existing operating reactor. This proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because it would provide a voluntary relaxation of a current requirement. Applicants and licensees could continue to comply with the current requirement and satisfy the proposed rule.

The proposed change to 10 CFR Part 50, Appendix E, Section IV.F.2.j.(iii), together with the proposed removal of Section IV.F.2.j.(vi), would change the emergency preparedness exercise timing requirement for 10 CFR Part 50 power reactor licensees so that, for a licensee that receives its operating license issued under 10 CFR Part 50 after the effective date of this final rule, the licensee’s 8-calendar-year exercise cycle begins in the calendar year of the completion of the first subsequent exercise conducted to meet the requirements in 10 CFR Part 50, Appendix E, Section IV.F.2.b and c. This proposed change would not constitute backfitting because this requirement would apply to licensees that receive their licenses after the effective date of this final rule.

The proposed change to 10 CFR Part 50, Appendix E, Section IV.F.2.j.(iii), together with the proposed removal of Section IV.F.2.j.(vi), would also change the emergency preparedness exercise timing requirement for 10 CFR Part 52 power reactor licensees. The current requirement for COL holders is that the first 8-year exercise cycle begins in the calendar year of the initial exercise required by 10 CFR Part 50, Appendix E, Section IV.F.2.a. Under the proposed rule, for a licensee that receives its combined license issued under 10 CFR Part 52 after the effective date of this final rule, the licensee’s 8-calendar-year exercise cycle begins in the calendar year of the completion of the first subsequent exercise conducted to meet the requirements in 10 CFR Part 50, Appendix E, Section IV.F.2.b and c. This proposed change would not affect the issue finality of a COL issued under 10 CFR Part 52 because this requirement would apply to licensees that receive their COLs after the effective date of this final rule.

A proposed change to 10 CFR Part 50, Appendix E, Section IV.F.2.j.(iii) would clarify that nuclear power reactor licensees with 8-calendar-year site exercise cycles as of the effective date of this final rule and licensees that receive their operating licenses issued under 10 CFR Part 50 or COLs issued under 10 CFR Part 52 after the effective date of this final rule must maintain their site exercise cycles. Licensees with 8-calendar-year site exercise cycles as of the effective date of this final rule would not need to change their emergency plans to comply with this requirement. Therefore, this proposed change would not meet the definition of “backfitting” or affect the issue finality of a COL holder. For licensees that receive their operating licenses issued under 10 CFR Part 50 or COLs issued under 10 CFR Part 52 after the effective date of this final rule, this proposed change would not constitute backfitting or affect the issue finality of a COL because this requirement would apply to future licensees.

The proposed change to 10 CFR 52.18, “Standards for review of applications,” to clarify when the NRC consults with the Federal Emergency Management Agency during the review of an ESP application would not affect the issue finality of a 10 CFR Part 52 approval because the

proposed change would affect the NRC's review of an ESP application and would not be imposed on a holder of a 10 CFR Part 52 approval. This proposed change would not meet the definition of "backfitting" because the change would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility.

The proposed change to 10 CFR 52.17(b)(4) would clarify what information is required in ESP applications regarding contacts, arrangements, and certifications with Federal, State, and local governmental authorities. This proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the requirements would be imposed on ESP applicants.

Section III.H of the proposed rule FRN describes proposed changes to the 10 CFR Part 52 licensing process. The NRC proposes to remove the duration of DCs, the requirements for DC renewals, and the expiration dates for 10 CFR Part 52 appendices currently in effect. These proposed changes would not affect the issue finality for a DC. Removing the duration of DCs and the expiration dates for 10 CFR Part 52 appendices currently in effect would not modify, rescind, or impose new requirements on the DC's certification information. The Commission explained in the 2007 10 CFR Part 52 final rule ("Licenses, Certifications, and Approvals for Nuclear Power Plants," (August 28, 2007; 72 FR 49352)) that 10 CFR 52.63(a), which provides the criteria for making changes to certified designs, applies to changes to the certification information (i.e., the information in the generic design control document (DCD) incorporated by reference in a DC appendix in 10 CFR Part 52) but does not apply to changes to the certified design rule language. The duration and expiration dates for 10 CFR Part 52 appendices are in Section VII of the rule language of each appendix.

The proposed changes to remove duration requirements for SDAs and extend the duration of initial and renewed MLs to 40 years would not affect issue finality for SDA and ML holders. The issue finality provision for SDAs in 10 CFR 52.145 does not prohibit the Commission from making generic changes to SDAs through rulemaking. Further, removing SDA duration requirements would not modify the approved design in an SDA. The issue finality provision for MLs in 10 CFR 52.171(a)(1) states that the Commission may not, with certain exceptions, modify, rescind, or impose new requirements on the design of the reactor being manufactured or the requirements for the manufacture of the reactor. Extending the duration of MLs would not modify the design of a reactor being manufactured under an ML or the requirements for the manufacture of the reactor under an ML.

The NRC is proposing to amend regulations in 10 CFR 2.100, "Scope of subpart," 2.101, "Filing of application," 2.110, "Filing and administrative action on submittals for standard design approval or early review of site suitability issues," and 52.3(b)(1) and add a new 10 CFR 52.145(e) to allow SDA holders to make generic changes to SDAs. These proposed changes would not affect issue finality for SDA holders because the proposed changes to these rule provisions would not modify the approved design in an SDA.

The NRC is proposing to amend all DC appendices in effect at the time the final rule goes into effect, to delete the requirement for the plant-specific DCD to use the same organization and numbering as the generic DCD. These proposed changes would not affect the issue finality for a DC because these changes would not apply to the DC's certification information. Also, these changes would apply to COL applicants.

The NRC is proposing to revise section VIII.B.5 in each of the 10 CFR Part 52 DC appendices to include provisions similar to those in 10 CFR 50.59(c)(4). These proposed

changes would not affect the issue finality for a DC because these changes would not apply to the DC's certification information.

The NRC proposes to modify Section VIII.B.5 of each 10 CFR Part 52 DC rule appendix to permit a licensee to construct an SSC in accordance with a proposed change before the 10 CFR 52.103(g) finding. These proposed changes would not affect the issue finality for a DC because these changes would not apply to the DC's certification information.

The NRC is proposing to add regulations to 10 CFR Part 52, Subpart C, "Combined Licenses," in new 10 CFR 52.93(c) and to Part 52, subpart E, "Standard Design Approvals," in 10 CFR 52.145(c) and (d) to allow a CP, an OL, a COL, or an ML applicant to request variances from one or more SDAs that are referenced in their application. These proposed changes would not affect the issue finality of a 10 CFR Part 52 approval because they would apply to applicants, and the applicants would not be required to request variances.

The NRC is proposing to amend regulations in 10 CFR 52.173, "Duration of manufacturing license," to allow an applicant for a CP or a COL, at its own risk, to reference in its application a design for which an ML application has been docketed but not granted. This proposed change would not affect issue finality of a 10 CFR Part 52 approval because the change would apply to CP and COL applicants that reference an ML application. No 10 CFR Part 52 approvals would be involved.

The NRC is proposing to change its regulations to add the definitions of tier information to 10 CFR 52.1, "Definitions." These definitions would apply to future applicants. The NRC also proposes to amend 10 CFR 52.47, "Contents of applications; technical information," to require DC applicants to identify Tier 1, Tier 2, and Tier 2* information in their applications. These proposed changes would not affect issue finality of a 10 CFR Part 52 approval because the changes would apply to DC applicants.

The NRC proposes to amend 10 CFR 52.1 to add a definition of "Essentially complete nuclear power plant design." This proposed change would not affect issue finality of a 10 CFR Part 52 approval because the change would apply to DC applicants.

The proposed changes to 10 CFR 52.63(b)(1), proposed redesignated 10 CFR 52.93(d), and 10 CFR 52.171(b)(2) would remove the requirement to consider standardization as a criterion for justification for making certain changes to a DC, COL, and ML, respectively. These proposed changes would not affect issue finality of a 10 CFR Part 52 approval because these changes would not restrict the applicant's or licensee's ability to request an exemption or departure. Other justifications would still be available. Also, the proposed change to the Commission's ability to grant an exemption or departure would not affect issue finality of a 10 CFR Part 52 approval because the change would be a modification to an NRC process and would not change a certified design or issued license.

The NRC is proposing to remove and reserve Sections IV.A.1 and IV.A.2.a through f of each DC appendix to 10 CFR Part 52 and move those COL application requirements to 10 CFR 52.79(d). These proposed changes would not affect the issue finality of existing DCs and COL holders referencing the existing certified designs because the proposed changes would not amend certification information of any design. Additionally, these changes would apply only to future COL applicants.

The NRC proposes to remove Section IX of Appendix D to 10 CFR Part 52, because it is redundant with 10 CFR 52.99, "Inspection during construction," and 10 CFR 52.103, "Operation

under a combined license.” This proposed change would not affect the issue finality of the existing DC and COL holders referencing the existing certified design because the proposed change would not amend certification information of the design.

The proposed changes to 10 CFR 52.99(a) would reduce COL holders’ reporting requirements. Completion schedules for inspections, tests, analyses, and acceptance criteria (ITAAC) would be submitted every 60 days instead of every 30 days, beginning 6 months instead of 1 year before the scheduled date for initial loading of fuel. This proposed change would not affect the issue finality of a COL because it would provide the voluntary relaxation of a current requirement. A COL holder could continue to comply with the current reporting requirement and still satisfy the proposed rule.

The NRC is proposing to amend regulations in 10 CFR 52.73(a), 52.79(c), 52.133(a), and 52.153(b) to clarify that applicants for a COL, a CP, or an ML may reference more than one SDA if each referenced SDA represents a major portion of the same reactor design. This proposed change would not affect issue finality of a 10 CFR Part 52 approval because it would apply to applicants.

The NRC is proposing to remove and reserve 10 CFR 50.34(h), 52.17(a)(1)(xii), 52.47(a)(9), 52.79(a)(41), 52.137(a)(9), and 52.157(f)(30) to remove the requirement for an applicant to evaluate conformance of its application with NUREG-0800, “Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition.” These proposed changes would not constitute backfitting or affect issue finality of a 10 CFR Part 52 approval because they would apply to applicants.

The proposed change to 10 CFR 50.100, “Revocation, suspension, modification of licenses, permits, and approvals for cause,” would address an inconsistency with 10 CFR 50.55, “Conditions of construction permits, early site permits, combined licenses, and manufacturing licenses,” on timely completion of construction requirements for a holder of a COL under 10 CFR Part 52. This proposed change would not affect the issue finality of a 10 CFR Part 52 approval because the proposed change would clarify an inconsistency in the regulations.

The NRC is proposing to amend Section V.A of Appendices D and E to 10 CFR Part 52 to include 10 CFR Part 52 in each appendix’s list of applicable regulations. These proposed changes would not affect the issue finality of a 10 CFR Part 52 approval because the proposed changes would clarify an inconsistency in the regulations.

The NRC is proposing to amend 10 CFR 52.157(f)(6) to require an ML applicant to include a description of its 10 CFR 50.49(b) environmental qualification program. This proposed change would not affect issue finality of a 10 CFR Part 52 approval because it would apply to ML applicants.

The proposed change to 10 CFR 52.136, “Contents of applications; general information,” would require SDA applications to contain the information required by 10 CFR 50.33(a) through (c) and (j), instead of 10 CFR 50.33(a) through (d) and (j). This proposed change would not affect issue finality of a 10 CFR Part 52 approval because it would apply to SDA applicants.

Section III.I of the proposed rule FRN describes a proposed change to environmental requirements. The proposed change to 10 CFR 51.50(a), “Construction permit stage,” would clarify that a CP applicant can incorporate by reference information from a final environmental document previously prepared by the NRC staff. This proposed change would not constitute backfitting because the requirement would be imposed on applicants and would not affect the

issue finality of a 10 CFR Part 52 approval because the proposed change would be imposed on only CP applicants.

Section III.J of the proposed rule FRN describes proposed changes involving NRC processes related to the 10 CFR Part 52 licensing process. The NRC proposes to change the definition of “contested proceeding” in 10 CFR 2.4, “Definitions,” to explicitly incorporate hearings on a licensee’s compliance with the acceptance criteria that are a part of the ITAAC included in a COL. This proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because changes to NRC administrative procedures do not meet the definition of backfitting or constitute changes affecting issue finality of a 10 CFR Part 52 approval.

The proposed change to 10 CFR 50.71(e)(3)(iii) would remove the requirement for annual updates to the final safety analysis report for COL applicants that are not actively pursuing a COL and COL holders not actively pursuing construction. This proposed change would not affect the issue finality afforded a COL. The issue finality provision for COLs located in 10 CFR 52.98 provides, in relevant part, that the Commission may not modify, add, or delete any term or condition of a COL except in accordance with the provisions of 10 CFR 50.109. Under 10 CFR 50.109, removing a requirement is not backfitting because removing a requirement does not create a new requirement and does not amend a requirement because amending means the requirement still exists in some form. Further, this reporting requirement would not satisfy the definition of backfitting because it would not involve a procedure or organization required to operate a facility.

The proposed changes to 10 CFR 50.109 and 10 CFR 52.171 to clarify backfitting and issue finality provisions for SDAs, MLs, and ESPs would not constitute backfitting because changes to the backfitting process would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility. The proposed changes would not affect the issue finality of a 10 CFR Part 52 approval because the changes would clarify inconsistencies and inaccuracies in the rule text.

The proposed changes to 10 CFR 2.500, “Scope of subpart,” and 10 CFR 2.501, “Notice of hearing on application under Subpart F of 10 CFR part 52 for a license to manufacture nuclear power reactors,” to delete the content of Part 2, “Agency Rules of Practice and Procedure,” subpart E, “Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Manufacture Nuclear Power Reactors To Be Operated at Sites Not Identified in the License Application and Related Licensing Proceedings,” would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because changes to NRC administrative procedures do not meet the definition of backfitting or constitute changes affecting issue finality.

The proposed changes to section VIII.C.5 of 10 CFR Part 52, Appendices A, D, E, and F, would clarify the requirements that apply to a hearing petition seeking to admit a contention that an operational requirement approved in the DCD or a technical specification derived from the generic technical specification must be changed. These proposed changes would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because changes to NRC administrative procedures do not meet the definition of backfitting or constitute changes affecting issue finality.

Section III.K of the proposed rule FRN describes proposed changes to various requirements related to the 10 CFR Part 50 and 10 CFR Part 52 power reactor requirements. The proposed change to 10 CFR 2.106(b)(2)(ii) would clarify what information is required to be included in a notice of issuance in the case of a finding under 10 CFR 52.103(g) that the

acceptance criteria in the ITAAC for a COL are met. This proposed change would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because changes to NRC administrative procedures do not meet the definition of backfitting or constitute changes affecting issue finality.

The proposed changes to revise definitions in 10 CFR Part 21, "Reporting of Defects and Noncompliance," to clarify the applicability of these terms to holders of 10 CFR Part 52 approvals would not affect the issue finality of a 10 CFR Part 52 approval because the changes would clarify inconsistencies in the rule text.

The proposed change to 10 CFR 50.34(f)(2)(iv) to remove the requirement for applicants to have a standalone console to display important plant parameters and trends would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed change would apply to applicants.

The proposed changes to 10 CFR 50.46(a)(3)(i) and (iii) would relax certain reporting requirements related to those SDAs and DCs that are not referenced in any application for the construction or operation of a reactor. These proposed changes would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed changes would apply to applicants.

The proposed change to replace the requirement in 10 CFR 52.6(b) to notify the Regional Administrator of information having a significant implication for public health and safety or common defense and security with a requirement to notify the Director of the Office of the Nuclear Reactor Regulation would not affect the issue finality of a 10 CFR Part 52 approval because changes to NRC administrative procedures do not constitute changes affecting issue finality.

The proposed changes to 10 CFR 52.47(a)(21), 52.79(a)(2), 52.137(a)(21), and 52.157(f)(28) would revise these provisions to reflect that the NRC has discontinued the use of the priority ranking model to identify significant generic issues and instead uses a risk-informed method to identify significant generic issues that an applicant should address in its submittal to the NRC. These proposed changes would not affect the issue finality of a 10 CFR Part 52 approval because the proposed changes would apply to applicants.

The proposed change to the language in 10 CFR 52.97(a)(2) from stating that acceptance criteria "have been met" to stating that acceptance criteria "are met" would not affect the issue finality of a 10 CFR Part 52 approval because the proposed change would clarify an inconsistency in the regulations.

The proposed change to add 10 CFR 50.71(i) to require all future 10 CFR Part 50 power reactor licensees and 10 CFR Part 52 COL holders to promptly notify the NRC of the successful completion of power ascension testing would not constitute backfitting or affect the issue finality of a 10 CFR Part 52 approval because the proposed change would apply to future power reactor licensees.

The proposed changes to 10 CFR 50.54 to clarify the applicability of various provisions in that section to 10 CFR Part 50 nonpower production or utilization facility licensees would not meet the definition of "backfitting" because the change would not result in a modification of or addition to SSCs or the design of a facility or the procedures or organization required to design, construct, or operate a facility.

III. Documented Evaluation of Proposed Backfitting Action

A. Introduction

The NRC proposes to change 10 CFR 70.22(k), 73.67(d), and 73.67(f) to revise the security requirements for Category II and III quantities of SNM stored within the owner-controlled area but outside the protected area of a holder of a 10 CFR Part 50 license to operate a nuclear power reactor. These changes would constitute backfitting. The NRC concludes that this backfitting action would be justified under the backfitting provisions of 10 CFR 50.109(a)(4) because the proposed action would be necessary to ensure that these facilities provide adequate protection of the health and safety of the public and are in accord with the common defense and security.

B. Background

The NRC's regulations classify SNM into three categories: a Category I quantity, also known as a "formula quantity," of strategic special nuclear material; a Category II quantity, also known as "special nuclear material of moderate strategic significance"; or a Category III quantity, also known as "special nuclear material of low strategic significance." The security requirements for each category of SNM are graded, taking into account the SNM isotope, quantity, and uranium-235 enrichment and also considering the ease in which the SNM can be fabricated into an improvised nuclear device (IND). For example, some forms of Category I SNM could be directly used by an adversary to construct an IND, whereas an adversary would need to steal multiple numbers of Category III quantities of SNM and perform significant additional processing to construct an IND. Nevertheless, the Commission noted in 1978 that, although "not directly usable in the manufacture of a nuclear weapon," Category II and III quantities of SNM "could be of substantial assistance in such a project" ("Special Nuclear Material of Moderate and Low Strategic Significance: Safeguards Requirements; Proposed Rule," 43 FR 22216 (May 24, 1978)).

The risk to the public health and safety and the common defense and security associated with unirradiated SNM is the theft or diversion of the SNM for its use in an IND. This risk is mitigated by requiring entities licensed to possess and use these materials to protect these materials through a physical protection program. The physical protection program requirements in 10 CFR Part 73 are graded commensurate with the IND risk posed by the different categories of SNM. As the risk significance of the material increases, so does the rigor of the required physical protection measures. Compliance with these requirements provides a presumption of adequate protection of the public health and safety and the common defense and security considering the risk significance of the material being protected.¹

The security requirements in 10 CFR 73.67 set the level of physical protection required for licensees that possess Category II or III quantities of SNM. Unirradiated SNM brought onsite currently constitutes a Category III quantity of SNM. Because of its low enrichment, unirradiated SNM poses a very low risk to the common defense and security. The security requirements for Category III quantities of SNM in 10 CFR 73.67(f) require licensees to store or use the material only within a controlled access area, monitor the area with an intrusion alarm to detect unauthorized penetrations or activities, assure that a watchman or offsite response force will

¹ In the preamble to the 1988 final rule on backfitting, the Commission stated that adequate protection "is presumptively assured by compliance with the regulations and other license requirements." ("Revision of Backfitting Process for Power Reactors," 53 FR 20603, 20606 (June 6, 1988)).

respond to all unauthorized penetrations or activities, and establish and maintain response procedures for dealing with threats or thefts. Given the low risk posed by Category III quantities of SNM, the Commission has determined that a licensee implementing the security requirements in 10 CFR 73.67(f) is presumed to be adequately protecting the public health and safety and the common defense and security.

Category II quantities of SNM are more attractive to an adversary to construct an IND than Category III quantities of SNM. Consequently, the physical protection afforded Category II quantities of SNM is greater than that provided for Category III quantities of SNM. Given this greater risk, in addition to the types of measures for Category III quantities of SNM, the security requirements for Category II quantities of SNM in 10 CFR 73.67(d) provide for additional access authorization measures and searches to detect diversion of the SNM. A licensee implementing the security requirements in 10 CFR 73.67(d) is presumed to be adequately protecting the public health and safety and the common defense and security. Commercial nuclear power reactors currently do not possess or use Category II quantities of SNM; however, many advanced reactors currently under development are planning to use higher enriched uranium that would be Category II SNM.

Although Category II and III quantities of SNM present risks of varying degrees to the public health and safety and common defense and security, those materials are not as attractive to adversaries as irradiated fuel. Given the greater risk associated with irradiated fuel, the security requirements in § 73.55 that protect irradiated fuel from sabotage events inside the licensee's protected area are much more stringent than the security requirements in 10 CFR 73.67 for both Category II and III quantities of SNM. A licensee implementing the security requirements in 10 CFR 73.55 is presumed to be adequately protecting the public health and safety and the common defense and security.

Sufficient amounts of Category II and III quantities of SNM could be used in the creation of an IND, albeit through extensive and laborious processing. Despite this fact, an exception from the 10 CFR 73.67 physical security requirements for an OL holder appears in 10 CFR 70.22(k) and 10 CFR 73.67(d) and (f). This exception relieves these 10 CFR Part 50 licensees from the requirement to have a security plan and implement the security requirements in 10 CFR 73.67(d) and (f) for the protection of Category II and III quantities of SNM. Thus, an OL holder that possesses Category II or III quantities of SNM within its owner-controlled area but outside the protected area is not required to protect this SNM under a physical security program. Note that such an exception does not exist for Part 52 or Part 70 licensees.

The basis for this exception is not explicitly provided in the regulatory history of Part 50, Part 52, Part 70, or Part 73. The exception apparently was rooted in the expectation that OL holders would keep Category II and III quantities of SNM, such as in-core detectors and unirradiated reactor fuel, inside the licensee's protected area. While inside the licensee's protected area, this material would be subject to the physical protection requirements of 10 CFR 73.55. As a result of this expected level of protection for Category II and III quantities of SNM, licensees would provide adequate protection of the public health and safety and the common defense and security for special nuclear material inside the protected area. This expectation is documented in two final rulemakings.

The first is the final rulemaking that established the physical security requirements for Category II and III quantities of SNM in 10 CFR 73.67(d) and (f) with a corresponding provision in 10 CFR 70.22(k) and the exception for holders of a 10 CFR Part 50 license to operate a nuclear power reactor ("Safeguard Requirements for Special Nuclear Material of Moderate and

Low Strategic Significance,” 44 FR 43280 (July 24, 1979)). The NRC stated that “[p]hysical protection requirements for independent spent fuel storage installations and nuclear power reactors are presently covered under 10 CFR 73.40, 73.50, and 73.55 and therefore are not included in these amendments.” At that time, 10 CFR 73.40 and 73.55 required nuclear power reactors to protect SNM, including Category II and III quantities of SNM, under the provisions of 10 CFR 73.55. These provisions applied within the licensee’s protected area. Thus, the Commission expected holders of licenses to operate a nuclear power reactor to protect Category II and III quantities of SNM within the protected area under the requirements of 10 CFR 73.55. Before being licensed to operate, these entities would be required to protect this material under the requirements of 10 CFR 73.67.

The second final rulemaking is the 2009 update to the NRC’s physical security requirements for nuclear power reactors (“Power Reactor Security Requirements,” 74 FR 13926 (March 27, 2009)). In that rule’s physical protection requirements in 10 CFR 73.55(a)(4) and access authorization requirements in 10 CFR 73.56(a)(3), the Commission required certain entities to implement the requirements of 10 CFR 73.55 and 73.56 “before fuel is allowed onsite (protected area).” The words “onsite (protected area)” show that the Commission anticipated that, when licensees would bring unirradiated fuel—which is Category III SNM—onsite, the licensee would locate it within the licensee’s protected area and protect that SNM under the requirements of 10 CFR 73.55.

The 2007 Part 52 final rule did not address this issue. The preamble to that rule was silent regarding this exception, and that rule did not amend Part 70 or 10 CFR 73.67.

C. Proposed Backfitting

As part of this proposed rule, the NRC is proposing to revise 10 CFR 70.22(k) and 10 CFR 73.67(d) and (f) to remove the exception from the 10 CFR 73.67 requirements for the holder of a 10 CFR Part 50 license to operate a nuclear power reactor when the Category II or III quantities of SNM are located within the owner-controlled area but outside the protected area. This proposed rule would ensure that these 10 CFR Part 50 nuclear power reactor licensees protect all Category II and III quantities of SNM stored in the owner-controlled area and outside the protected area, at a minimum under 10 CFR 73.67(d) or (f), as appropriate.

This amendment would constitute backfitting under 10 CFR 50.109 for current 10 CFR Part 50 nuclear power reactor licensees. In 10 CFR 50.109(a)(1), “backfitting” is defined, in part, as the modification of or addition to the procedures or organization required to operate a facility that results from a new or amended provision in the Commission’s regulations. This proposed rule would meet this definition because the proposed change would eliminate the exception from the 10 CFR 73.67 requirements and require OL holders to protect Category II or III quantities of SNM under 10 CFR 73.67(d) or (f) unless the SNM is located in the protected area and protected under 10 CFR 73.55. This change in the Commission’s regulations would apply to nuclear power plant licensees in their capacity as 10 CFR Part 50 licensees and could impose a change to the licensees’ required physical security program, thereby meeting the definition of “backfitting” in 10 CFR 50.109(a)(1).

D. Adequate Protection Justification

Under 10 CFR 50.109(a)(3), every backfitting action must be justified through a backfit analysis unless one of the exceptions to this requirement in 10 CFR 50.109(a)(4) applies. The

NRC finds that one of the exceptions applies to this proposed rule change. That exception is in 10 CFR 50.109(a)(4)(ii), which states that regulatory action is necessary to ensure that a facility provides adequate protection to the health and safety of the public and is in accord with the common defense and security. Therefore, the NRC has not prepared a backfit analysis to support the proposed backfitting.

This proposed backfitting action would be needed to ensure that the storage of Category II and III quantities of SNM in the owner-controlled area and outside the protected area by OL holders provides adequate protection to the public health and safety and is in accord with the common defense and security. As noted in Section III.F.1 of the proposed rule FRN, most 10 CFR Part 50 nuclear power reactor licensees that store Category III quantities of SNM in the owner-controlled area, outside of an operating protected area, voluntarily comply with the 10 CFR 73.67(f) security requirements. These licensees' implementation of 10 CFR 73.67(f) requirements provides adequate protection of the public health and safety and the common defense and security. However, the NRC is aware of recent instances in which certain 10 CFR Part 50 nuclear power reactor licensees have stored non-fuel SNM outside the protected area but within the owner-controlled area without protecting the SNM in accordance with 10 CFR 73.67(f). For example, in 2012, a Part 50 licensee's SNM receiving process did not identify a package of in-core fission detectors containing less than one gram of SNM, which were then transferred to an unapproved storage location without being entered into the site's SNM accounting program. In another instance, in 2016, a Part 50 licensee discovered eight low-power range monitors containing non-fuel SNM in a warehouse outside the protected area boundary.

The practice of storing SNM outside the protected area but within the owner-controlled area without protecting the SNM in accordance with 10 CFR 73.67(f) does not provide a level of protection commensurate with the level of risk associated with this material because the security measures typically implemented within the owner-controlled area are less stringent than the security requirements provided by 10 CFR 73.67(d) and (f) for the protection of Category II and III quantities of SNM, respectively. This practice does not meet the Commission's expected level of protection for Category III quantities of SNM, and, accordingly, does not provide adequate protection of the public health and safety and the common defense and security. As described above, Category III quantities of SNM could be of substantial assistance to an adversary to construct an IND. In the cases described above, the licensees agreed to protect the SNM under 10 CFR 73.67(d) or (f) or move the SNM into the protected area and protect it under 10 CFR 73.55. Nonetheless, as directed by the Commission in SRM-SECY-99-063, "Staff Requirements—SECY-99-063—The Use by Industry of Voluntary Initiatives in the Regulatory Process," dated May 27, 1999 (Agencywide Documents Access and Management System Accession No. ML992810068), matters required for adequate protection cannot be addressed through voluntary industry or licensee actions. Moreover, under a literal reading of the current regulations, a CP holder would be required to protect this SNM under the requirements of 10 CFR 73.67, but if the CP holder receives its OL and keeps the SNM outside the protected area, the OL holder would no longer be required to protect the SNM. The NRC must address the gap in its regulations for the protection of Category III quantities of SNM so that all Part 50 nuclear power reactor licensees provide adequate protection of the public health and safety and the common defense and security in all cases.

Furthermore, current OL holders could use advanced fuels (e.g., High Assay Low Enriched Uranium (HALEU)) in the future. Fresh HALEU fuel would be considered a Category II quantity of SNM, as opposed to current (<5% enrichment LEU) unirradiated fuel, which is a Category III quantity of SNM. HALEU fuel would be more attractive to an adversary for making

an IND because of its higher enrichment. These Part 50 licensees would not be required to protect this fuel under a physical security program if the HALEU fuel were stored inside the owner-controlled area but outside the protected area. In contrast, a current Part 52 nuclear power reactor licensee would be required to protect this fuel under either the stringent requirements of 10 CFR 73.67(d) or the even more stringent requirements of 10 CFR 73.55 if the fuel were stored inside the protected area. The NRC must address the gap in its regulations for the protection of Category II quantities of SNM so that all Part 50 nuclear power reactor licensees provide adequate protection of the public health and safety and the common defense and security in all cases. Although future applicability is not a consideration for the proposed backfitting, the staff notes that this lack of protection for Part 50 nuclear power reactor licensees would also apply to future advanced reactors licensed under 10 CFR Part 50 that use HALEU fuel.

This rulemaking presents the opportunity to ensure that this SNM is adequately protected when stored outside the protected area of a holder of a Part 50 license to operate a nuclear power reactor. The NRC learned that new reactor licensees under 10 CFR Part 52 want to receive fuel on site but before establishing a protected area. The proposed changes to 10 CFR 70.22(k) and 10 CFR 73.67(d) and (f) would explicitly state what is already required of 10 CFR Part 52 licensees under these provisions: these licensees must protect Category II and III quantities of SNM, which includes unirradiated fuel, under 10 CFR 73.67(d) or (f) until they are required to protect it under 10 CFR 73.55. To more closely align the physical security requirements for 10 CFR Part 50 and 10 CFR Part 52 nuclear power reactor licensees, the NRC is proposing to require 10 CFR Part 50 nuclear power reactor licensees to meet the same requirements as the 10 CFR Part 52 licensees. This will ensure that Category II and III quantities of SNM that are stored in a 10 CFR Part 50 or 10 CFR Part 52 nuclear power reactor licensee's owner-controlled area and outside the protected area provide adequate protection to the public health and safety and are in accord with the common defense and security. Without this proposed change, the holders of 10 CFR Part 50 licenses to operate nuclear power reactors would continue to not be required to protect this material when it is located inside the owner-controlled area but outside the protected area. Because the issue of concern involves the language of a regulation, the only means to generically resolve the issue is to revise the regulation through rulemaking.

E. Imminent Threat Analysis

The issue that the proposed changes to 10 CFR 70.22(k) and 10 CFR 73.67(d) and (f) would address does not present an imminent threat to public health and safety or the common defense and security. Very few 10 CFR Part 50 licensees have stored Category III quantities of non-fuel SNM outside the protected area but within the owner-controlled area without protecting the SNM in accordance with 10 CFR 73.67(f). In these instances, the NRC has addressed the concerns with the licensees to ensure adequate protection of the public health and safety and common defense and security. Also, licensees are not yet using advanced fuels that would be considered Category II SNM. Therefore, immediate regulatory action is not necessary, and the NRC can address this issue through rulemaking.

F. Conclusion

The NRC has determined that its proposed changes to 10 CFR 70.22(k) and 10 CFR 73.67(d) and (f) would constitute backfitting under 10 CFR 50.109 and that an adequate protection exception to the requirement to prepare a backfit analysis would apply. Therefore, the NRC has not prepared a backfit analysis to support the proposed backfitting.