

should be adopted as alternatives to existing requirements which may be voluntarily adopted by the regulated entity.

The NRC recognizes that if the proposed rule were made mandatory, that several backfitting issues are raised. These backfitting concerns are discussed in more detail in the next section on the "Backfit Rule."

Backfit Rule

As discussed above, the Commission is considering whether the proposed rule, which is currently drafted as providing licensees with a non-mandatory alternative relaxing the requirements for and frequency of containment leakage testing, should be adopted as a mandatory requirement (that is, the requirements of the rule would be imposed on all nuclear power plant licensees). If the alternative is made mandatory, the Commission acknowledges the potential relevance of the Backfit Rule. The Commission believes that the Backfit Rule was intended to constrain the Commission's adoption of mandatory relaxations of Commission requirements, if the mandated change imposed costs upon the licensee and that such mandatory relaxations are "backfits" as defined in § 50.109(a)(1). However, the Commission believes that it has the authority and basis for "waiving" the application of the Backfit Rule to the adoption of this rulemaking. The Commission requests public comments on each of these points.

1. The Proposed Rule Constitutes a "Backfit"

The current version of the Backfit Rule, 10 CFR 50.109, was adopted in substantially its current form in 1985.⁵ 50 FR 38097 (September 20, 1985). Based upon a review of the rulemaking record which led to the final 1985 rule, the Commission's objective in adopting the Backfit Rule was to prevent the imposition of new requirements, not otherwise needed to assure adequate protection or compliance, which were of marginal overall safety benefit or involved implementation costs which were out of proportion to the safety benefits. The SOC explained that under the new backfitting standard "the Commission would not ordinarily expect that safety improvements would

be required as backfits which result in an insignificant or small benefit to the public health and safety or common defense and security, regardless of the implementation costs" (50 FR at 38102). Thus, the aim of the Backfit Rule was to instill into the regulatory process the need for disciplined analysis of proposed new requirements and regulatory initiatives (*See generally* 50 FR at 38101-38102).

The proposed revision relaxes and modifies existing requirements where the Commission believes that the burdens are not commensurate with their safety significance. Furthermore, the proposed rule does not contain any new requirements to address new safety issues not addressed in the original Appendix J rulemaking. However, if imposed as a mandatory requirement the proposed rule would mandate changes in a licensee's program for conducting containment leak rate tests, and would impose short-term costs on the licensee in order to reduce the long-term regulatory burden. However desirable such an imposition may be over the long term, it would nonetheless constitute a "backfit" as defined in § 50.109(a)(1). However, the Commission requests public comment on whether the definition of "backfit" in § 50.109(a)(1) was intended to encompass rulemakings of the type represented by this proposed rule.

2. Waiving the Applicability of the Backfit Rule

The Commission adopted the Backfit Rule as a self-imposed limitation on its rulemaking authority, and under the appropriate circumstances the Commission may "waive" its applicability, subject to the Administrative Procedure Act's requirement in rulemaking for notice and opportunity for public comment. The Commission believes that it is appropriate to "waive" the applicability of the Backfit Rule to the proposed rule if its requirements were made mandatory. The purpose of the rule is to relax and modify existing containment leak rate testing requirements where burdens are not commensurate with their safety significance. It does not contain any new requirements to address new safety issues not addressed in the original appendix J rulemaking. The proposed revision would relax existing marginal-to-safety requirements in order to reduce regulatory burden on nuclear power plant licensees and increase regulatory efficiency. This type of rulemaking complements the objectives of the Backfit Rule by eliminating requirements with little or no positive impact on safety, but whose

regulatory burden is substantial. Therefore, if the Commission determines to impose the proposed rule's requirements, the Commission proposes to "waive" this rule from the requirements of the Backfit Rule.

The Commission requests public comment on the proposed rationale for "waiving" the application of the Backfit Rule to this rulemaking.

Regulatory Guide; Issuance, Availability

A draft regulatory guide, temporarily identified by its task number DG-1037, (on the same subject) "Performance-Based Containment Leak-Test Program" is also being published for comment. The regulatory guide endorses an industry standard which contains guidance on an acceptable performance-based leak-test program, leakage rate test methods, procedures, and analyses that may be used to implement these requirements and criteria.

This draft guide is being issued to involve the public in the early stages of the development of a regulatory position in this area. It has not received complete staff review and does not represent an official NRC staff position.

Public comments are being solicited on the draft guide. Comments should be accompanied by supporting data. Specific comments are solicited on whether the regulatory guide and the industry guideline it endorses will result in a common understanding between licensees and the NRC on how performance will be measured and judged, and can be objectively inspected against. Written comments may be submitted to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Comments will be most helpful if received by May 8, 1995. Comments on the draft regulatory guide may be submitted electronically as indicated elsewhere under the ADDRESSES heading.

Although a time limit is given for comments on these drafts, comments and suggestions in connection with (1) items for inclusion in guides currently being developed or (2) improvements in all published guides are encouraged at any time.

Regulatory guides are available for inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC. Requests for single copies of draft guides (which may be reproduced and are available free to the extent of supply) or for placement on an automatic distribution list for single copies of future draft guides in specific

⁵The Backfit Rule was subsequently amended in 1988 (53 FR 20603, June 6, 1988) in response to a decision of the U.S. Court of Appeals for the D.C. Circuit *Union of Concerned Scientists et al. v. U.S. Nuclear Regulatory Commission*, 824 F.2d 103 which remanded the 1985 rule to the NRC because the rule failed to clearly indicate that costs may not be a consideration in determining whether there is adequate protection to the public health and safety.