

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

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August 17, 2015

The Honorable Stephen Burns  
Chairman  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852

Dear Chairman Burns:

On September 19, 2014, we wrote the commission to express concerns about the inappropriate use of “qualitative factors” by Nuclear Regulatory Commission (NRC) staff in the development of cost-benefit analysis for regulatory decisions.<sup>1</sup> The expansion of this practice threatens to undermine NRC’s long established practice of conducting rigorous, quantitative, cost-benefit analysis to justify its regulatory decision-making. Increased reliance on the subjective judgments also undermines NRC’s core principles of regulatory practice, specifically the need for clarity and reliability.<sup>2</sup>

Subsequent to our letter, both Government Accountability Office (GAO) and NRC Inspector General (IG) inquiries have affirmed risks to NRC’s credibility when it bases regulation off of flawed cost-benefit analyses and does not fully adhere to its own established rulemaking processes.<sup>3</sup> GAO found that NRC relied on inaccurate cost estimating procedures that misinformed NRC’s regulatory analysis and recommended NRC align its procedures with relevant cost estimating best practices. Recently, the NRC IG stated:

The agency may be vulnerable to errors, delays, wasted effort, and flawed decision-making because of the limited experience of its cost estimators. It also increases the

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<sup>1</sup> Energy and Commerce Committee letter to Nuclear Regulatory Commission Chairman, The Honorable Allison M. Macfarlane, September 19, 2014. Accessible at:

<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/091914NRCLetter.pdf>

<sup>2</sup> Nuclear Regulatory Commission, “Principles of Good Regulation.” Accessible at: <http://www.nrc.gov/about-nrc/values.html>

<sup>3</sup> Government Accountability Office, “*Nuclear Regulatory Commission: NRC Needs to improve Its Cost Estimates by Incorporating More Best Practices, (GAO-15-98)*” December 2014. Accessible at:

<http://www.gao.gov/assets/670/667501.pdf>

Nuclear Regulatory Commission Inspector General, “*Audit of NRC’s Regulatory Analysis Process, OIG-15-A-15,*” June 24, 2015. Accessible at: <http://pbdupws.nrc.gov/docs/ML1517/ML15175A344.pdf>

potential to make less than optimal rulemaking decisions because the NRC Commission uses regulatory analysis to determine whether to move forward with rulemaking.

Moreover, analyses untethered to objective data increases the risks that subjective judgments will be substituted to support preferred regulatory outcomes, no matter how marginal the safety benefit. Should this become the NRC's practice, licensees will no longer be able to rely on a robust and fully developed cost benefit analysis, which will create regulatory uncertainty and impact the economic determination of whether to continue reactor operations.

In spite of the previous concerns and caution expressed by this committee, NRC appears to be expanding the use of qualitative factors in two proposals currently pending before the commission: *Proposed Mitigation of Beyond-Design-Basis Events (MBDB)* and *Evaluation of Containment Protection and Release Reduction for Mark I and Mark II Boiling Water Reactors Rulemaking Activities (Containment)*.

The NRC staff usage of qualitative factors in both cases contradicts the commission's previous direction that "[t]he appropriate degree of weight of application of qualitative factors in regulatory decision making ultimately lies with the Commission."<sup>4</sup> This disregard for commission direction opens the door for unfettered and unrestrained staff justifications that contradict NRC's rulemaking process, which is a key component of the United States' "Gold Standard" level of nuclear regulation.

In both the MBDB and Containment rulemakings, NRC staff relies on qualitative arguments to justify regulatory rulemaking in the absence of quantitative cost-benefit justification. These actions could undermine the commission's credibility as a fair and thorough regulator. We encourage the commission to carefully consider the extent that staff proposals rely on qualitative factors to justify imposing the backfit rule.

To assist the committee in its oversight of this matter, please respond to the following questions no later than August 31, 2015:

1. What is the current status of the staff's response to SECY-14-0087 Commission Memorandum on qualitative factors and backfit analyses?
2. What is the extent of usage of qualitative factors in additional rulemakings currently pending before the commission?
3. How does the commission's policy to permit staff consideration of qualitative factors in policy recommendations align with the explicit direction to reserve those considerations solely for the commission?

If you have any questions regarding this letter, please contact Andy Zach of the committee staff at (202) 225-2927.

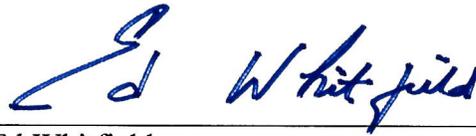
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<sup>4</sup> Nuclear Regulatory Commission, "*Staff Requirements – SECY-14-0087-Qualitative Consideration of Factors in the Development of Regulatory Analyses and Backfit Analyses*," March 4, 2015. Accessible at: <http://pbadupws.nrc.gov/docs/ML1506/ML15063A568.pdf>

Sincerely,

A handwritten signature in blue ink, appearing to read "Fred Upton", written above a horizontal line.

Fred Upton  
Chairman

A handwritten signature in blue ink, appearing to read "Ed Whitfield", written above a horizontal line.

Ed Whitfield  
Chairman  
Subcommittee on Energy and Power

cc: The Honorable Frank Pallone, Jr., Ranking Member

The Honorable Bobby Rush, Ranking Member  
Subcommittee on Energy and Power