



SECRETARY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

July 28, 2011

COMMISSION VOTING RECORD

DECISION ITEM: SECY-11-0039

TITLE: FINAL RULE: DEFINITION OF CONSTRUCTION IN 10 CFR
PARTS 30, 36, 39, 40, 51, 70, AND 150

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of July 28, 2011.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
EDO
PDR

VOTING SUMMARY - SECY-11-0039

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X				X	6/14/11
COMR. SVINICKI	X				X	6/2/11
COMR. APOSTOLAKIS	X					4/18/11
COMR. MAGWOOD	X				X	5/6/11
COMR. OSTENDORFF	X				X	4/28/11

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Chairman Gregory B. Jaczko
SUBJECT: SECY-11-0039 – FINAL RULE: DEFINITION OF
CONSTRUCTION IN 10 CFR PARTS 30, 36, 39, 40, 51,
70, AND 150

Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached None _____



SIGNATURE



DATE

Entered on "STARS" Yes No _____

**Chairman Jaczko's Comments on SECY-11-0039,
"Final Rule: Definition of Construction in 10 CFR Parts 30, 36, 39, 40, 51, 70, and 150"**

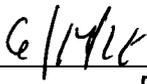
I approve the staff's recommendation to publish this final rule to revise the definition of construction for materials licensees.

On a related matter, pre-construction activities can result in significant environmental impacts and these should be appropriately evaluated in our reviews under the National Environmental Policy Act (NEPA). For example, in the final "Environmental Impact Statement for the Proposed Eagle Rock Enrichment Facility in Bonneville County, Idaho" (NUREG-1945, February 2011), the impacts of pre-construction activities on historic and cultural resources, as well as ecological resources, are estimated as "moderate" while the impacts of actual construction are only "small." Similarly, the impact of pre-construction on air quality is estimated to range from "small to large" while the impact of actual construction is only "small." The EIS states that 90% of the impacts on cultural resources and air quality would occur during pre-construction, as would 80% of the impacts on ecological resources. In recognition of the potential for significant impacts from such activities, the staff should ensure that the impacts from pre-construction activities receive the proper level of evaluation and discussion in future NEPA reviews. The approach used in NUREG-1945, as documented in Chapter 4, seems to be the appropriate level of analysis and disclosure.

I agree with Commissioner Ostendorff that guidance will be particularly helpful in the application of this rule to materials licensees. With respect to Commissioner Svinicki's comment in her vote that, "It was the Commission itself, during a meeting with stakeholders in 2008, which recognized the need for and directed that this rulemaking be undertaken," I would like to clarify that the Staff Requirements Memorandum for that meeting stated that "The staff should budget resources to provide the Commission with a proposed rulemaking to...determine whether limited work authorization provisions are appropriate for in-situ uranium facilities" (emphasis added).



Gregory B. Jaczko



Date

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-11-0039 – FINAL RULE: DEFINITION OF
CONSTRUCTION IN 10 CFR PARTS 30, 36, 39, 40, 51,
70, AND 150

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

06/ 2 /11

DATE

Entered on "STARS" Yes No _____

Commissioner Svinicki's Comments on SECY-11-0039

Final Rule: Definition of Construction in 10 CFR Parts 30, 36, 39, 40, 51, 70, and 150

I approve for publication in the *Federal Register* the notice of final rulemaking (Enclosure 1 to SECY-11-0039), subject to the attached edits. In so doing, I also certify that this rule will not have a significant impact on a substantial number of small entities. It was the Commission itself, during a meeting with stakeholders in 2008, which recognized the need for and directed that this rulemaking be undertaken. I thank the staff for its sustained efforts, which have brought us to this draft final rule.

In light of recent judicial decisions finding the adequacy of the agency's explanations to be lacking, I propose that one comment response, in particular, be strengthened. Although this particular comment response, found on pages 15 and 16 of the *Federal Register* Notice, responds to the commenter's concern regarding the Commission's 2003 *Nuclear Fuel Services* decision, it does not appear to address the crux of the comment. Based on my reading of the comment, as submitted, and the commenter's proposed rule language, the overarching concern is grounded in whether the NRC has the statutory authority under the Atomic Energy Act and National Environmental Policy Act to promulgate proposed §§ 30.33, 40.32, and 70.23. The commenter simply uses the *NFS* case as an example to support its underlying statutory argument. Therefore, OGC should revisit this comment response and expand upon it to encompass the commenter's statutory argument. I recognize that other parts of the *Federal Register* Notice address the question of the NRC's authority pursuant to the AEA, so this comment response should, at the very least, cross-reference to the more fulsome explanation contained in Section III, Discussion.



Kristine L. Svinicki

06/2/11

action and would violate NEPA. The remaining three commenters were supportive of an LWA process.

One commenter states that an LWA process would permit only limited construction activities and the environmental impacts associated with activities would be evaluated in an Environmental Impact Statement (EIS) before the LWAs would be issued. However, that commenter also suggests that the NRC lacks the statutory authority to restrict the construction activities of some materials licensees, although the commenter did not identify which materials licensees were affected. This commenter offered suggested changes to the proposed rule. As an initial matter, the commenter suggests that the NRC revise the proposed rule to eliminate the concept of "commencement of construction." This particular proposal is based, in part, on the commenter's belief that the NRC lacks the statutory authority necessary to prohibit a materials license applicant from engaging in construction. As is discussed further in Section III, Discussion, the NRC disagrees with this proposition. The Atomic Energy Act of 1954, as amended (AEA) confers on the NRC the authority to establish by rule and regulation such standards as the NRC "deems necessary or desirable" to ensure the public health and safety from radiological hazards, including limitations on an applicant's or licensee's ability to engage in construction. See § 161b. of the AEA. The NRC also disagrees with the commenter's claim that the term "commencement of construction" is no longer necessary for materials licenses. The term "commencement of construction" operates to place the materials license applicant on notice that a site preparation activity may also be considered as construction requiring prior NRC approval if it has a reasonable nexus to radiological health and safety or common defense and security. Accordingly, this final rule language will retain the definition for "commencement of construction." Finally, this commenter also suggested other minor textual changes to the proposed rule that the NRC ^{does} ~~do~~ not believe necessary for the purposes of this rule.

The remaining two commenters address an LWA-like process that would be applicable primarily to *in situ uranium* recovery (ISR) licensees. The commenters state as an initial

NRC's authority. This rule makes clear that any activity related to the radiological public health and safety or common defense and security is subject to NRC review and regulations. Driving of piles is not specifically identified as a site preparation activity that can be conducted without an NRC license. The Statement of Considerations on the LWA Rulemaking clarifies that the driving of piles for reactor licensees has a reasonable nexus to radiological health and safety, and/or common defense and security; and therefore would be considered construction subject to NRC authority for reactor licensees. (72 FR at 57428; October 9, 2007). Whether the driving of piles is a site preparation activity for materials licensees (that is, whether the driving of piles has a reasonable nexus to radiological health and safety or common defense and security) would have to be determined on a case-by-case basis with consideration of which activities would be subject to the materials license.

Comment: One commenter states that the NRC should exert jurisdiction over site preparation activities. The commenter concludes that if the NRC does not monitor and evaluate these actions, then no one will.

Response: The NRC is unable to extend its jurisdiction beyond the authority granted in the AEA. As discussed in Section III, Discussion, the AEA expressly limits the NRC's authority to matters concerning the radiological public health and safety and common defense and security and non-radiological hazards to the extent such hazards result ^{from} ~~for~~ the actual processing or possession of by-product material, and the Commission has determined that this authority does not extend to site preparation activities having no nexus to radiological health and safety or common defense and security. As previously stated, the private site preparation activities that occur, while not subject to NRC authority, may be subject to the regulatory authority of another Federal, State or local agency through either a permitting or licensing process. It is during these other processes that concerns pertaining to the site preparation activities undertaken by potential materials license applicants could be considered by other Federal,

non-radiological constituents, protection of cultural resources, and mitigation of any environmental impacts associated with the facility, not just those associated with radiological health and safety or the common defense and security.

Response: The NRC acknowledges that NEPA provides a Federal mandate to evaluate environmental impacts associated with licensing actions. The NRC remains committed to fulfilling these responsibilities. This final rule does not change this commitment. Rather, this final rule identifies certain actions that are outside of the scope of the NRC's licensing authority and for which prior approval from the NRC is not required. Those actions that are beyond the scope of the NRC's authority may later be considered as part of the cumulative impact for purposes of the NRC's NEPA review, if, at a later date, the NRC receives an application for an NRC license for a facility at the site or an amendment to modify an existing materials license.

Comment: Several commenters state that § 40.32(e) does not apply to ISR facilities, as these facilities do not require the tailings management and disposal facilities required by conventional uranium milling facilities for operations and post-operational long-term control of § 11e.(2) byproduct material onsite.

Response: The NRC disagrees with these comments. As is more fully discussed in subsection (2) of this section and in Section III, Discussion, ISR facilities are subject to the requirements of § 40.32(e).

Comment: Several commenters question whether the NRC has statutory authority to license construction of materials and fuel cycle facilities. X

Response: As is more fully discussed in Section III, Discussion, the NRC has authority under the AEA to regulate construction activities of materials and fuel cycle facilities when those activities have a reasonable nexus to radiological health and safety or the common defense and security.

Comment: One commenter asks that the NRC reconcile its decision in *Nuclear Fuel Services, Inc. (Erwin, Tennessee)*, CLI-03-03, 57 NRC 239 (2003) (*Nuclear Fuel Services*), with its regulations imposing prohibitions on construction contained in §§ 30.33, 40.32, and 70.23.

Response: In *Nuclear Fuel Services*, an existing licensee, NFS, requested NRC authority to amend its license to permit the production of low enriched uranium (LEU) oxide, receipt and storage of LEU nitrate, downblending of high enriched uranium to LEU, and conversion of LEU nitrate to LEU oxide. The license amendment(s) resulted in the creation of an additional complex (three new buildings) on the licensee's site. The applicable regulation, § 70.23(e), prohibits construction at the facility prior to conclusion of the environmental review. Violation of this prohibition could result in denial of the license amendments. The NRC staff had completed the environmental review for the first of the three license amendments. Several organizations jointly petitioned the NRC to enjoin all construction activities that had begun on the building associated with the first amendment, as well as enjoin NFS from commencing construction on the buildings associated with the remaining two license amendments. The Petitioners acknowledged that some of the activities for which it was seeking the injunction did not require NRC approval. The Commission treated the Petitioners' request as a petition for enforcement under 10 CFR 2.206, the end result of which would be an enforcement action against the licensee – suspension of construction activities. *Id.* at 245. The Commission, after finding ~~that~~ it unnecessary to order NFS to cease all construction activities associated with the overall project, denied the Petitioners' request. In reaching this decision, the Commission questioned whether, in the circumstances of that case, it had the authority to halt NFS' pre-licensing construction. *Id.* at 246 – 250.

The decision in *NFS* is not contrary to the determinations in this rule. It is important to note that the Commission limited its finding in *Nuclear Fuel Services* to the circumstances of that case. Those circumstances consisted of a licensee that had submitted three amendments,

purpose of laying a foundation for a building that will be used to enrich uranium or for the purpose of creating a mill tailings impoundment, an evaporation pond, a tailings impoundments, a central processing plant, a satellite plant, or a pipeline that will be used to transport radioactive material where such excavation directly impacts the functions or the NRC's safety evaluation of these structures as related to radiological health and safety or the common defense and security, then these actions would be prohibited by virtue of the "commencement of construction" definition, which precludes site preparation activities that have a reasonable nexus to radiological health and safety or the common defense and security. The varied nature of materials facilities requires that the rules establishing the criteria for permitted site preparation activities be applied to the specific activity being taken by the materials license applicant so as to determine whether that specific activity impacts radiological health and safety or common defense and security. The scenario presented by the commenter may involve excavation activities that require prior approval. The scenario presented by the commenter may also involve excavation in an inappropriate location or in accordance with specifications that could ultimately result in the NRC's non-approval of the license application.

Comment: One commenter states that pre-licensing activities should be limited and only occur when an applicant for a materials license has applied for and received specific permission to conduct such activities.

Response: The current requirements arguably are inconsistent with Commission pronouncements on the limits of its AEA authority. Moreover, the NRC has in place inconsistent regulations regarding the definition of construction. It is inappropriate to leave in place inconsistent regulatory approaches.

By identifying those site preparation activities that are not considered construction, the NRC avoids piecemeal regulation and licensing actions and brings more uniformity to the application of the NRC's regulatory authority to matters of construction. The NRC cannot

Response: Any site preparation activities that an applicant chooses to engage in are done so at the applicant's own risk. The NRC retains complete discretion to deny a license application or to impose licensing conditions, as needed. Previously expended resources do not enter into the NRC's decision as to whether or not a license application meets regulatory requirements.

Comment: One commenter states that the proposed regulations fail to state whether the installation of monitoring wells, a significant component of uranium recovery facilities, including in situ leach facilities, is a "construction" activity or is exempted from the definition of "construction."

Response: Installation of monitoring wells that have the specific purpose of measuring radiological attributes is a construction activity. For example, installation of monitoring wells that are only intended to be used to collect background data or perform background aquifer testing might be permissible. However, monitoring wells that are part of an ISR wellfield monitoring network would not ^{be} permissible because such facilities are necessary to ensure the radiological health and safety of the public and that the licensed facility is operating within standards determined by the NRC; therefore, these wells have a reasonable nexus to radiological health and safety and do not qualify as a site preparation activity.

By virtue of the exemption process that exists in part 40, the NRC has had the opportunity to identify some activities that have a reasonable nexus to radiological health and safety and would therefore constitute construction. For instance, most recently in response to an exemption request submitted by Lost Creek ISR, LLC (ADAMS Accession No. ML09140438) the NRC has previously determined that certain activities are "construction," including construction of the processing plant, which serves to concentrate, precipitate, and dry yellowcake; and construction of any structure or system to manage waste, such as deep disposal wells (ADAMS Accession No. ML093350365).

Regulatory Commission, 678 F.2d 222 (D.C. Cir. 1982), rev'd on other grounds, *Metropolitan Edison Company v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

X It is important to note that while the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) amended the AEA to give the NRC⁶ the authority necessary "to protect the public X health and safety and the environment from radiological and non-radiological hazards associated with the processing and with the possession of such material . . ." with respect to certain byproduct material (§ 84.a.(1) of the AEA), the NRC's authority over non-radiological hazards is limited to those hazards specifically associated with the processing and possession of byproduct material. Contrary to some of the commenters assertions, UMTRCA did not operate to expand the NRC's jurisdiction to private actions not specifically associated with the processing or possession of radioactive material.

X A second set of commenters also question⁶ whether the NRC has authority to impose a X prohibition against construction on materials licensees. While the NRC's authority to protect the public health and safety may be limited to radiological hazards, its primary authority under the AEA is grounded in its authority to grant, deny and condition licenses for certain nuclear materials and facilities. With respect to materials licenses, the NRC has authority over the manufacture, production, transfer, possession, use, ownership, import and export of radioactive material. See AEA §§ 51, 53, 61, 62, 63, and 81. Section 161b. authorizes the NRC to—

Establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect [the radiological] health or to minimize danger to life or property [from radiological hazards].

It is this grant of authority that allows the NRC to establish as a condition of licensing that materials license applicants not engage in construction impacting common defense and

agency's substantive powers"). This determination was also explained in the LWA Rulemaking, in which the NRC stated the following in its statement^s of considerations:

[W]hile NEPA may require the NRC to consider the environmental effects caused by the exercise of its permitting/licensing authority, the statute cannot be the source of the expansion of the NRC's authority to require . . . other forms of permission for activities that are not reasonably related to radiological health and safety or protection of the common defense and security. Since NEPA cannot expand the Commission's . . . authority under the AEA, the elimination of the blanket inclusion of site preparation activities in the [then existing] definition of construction does not violate NEPA.

(72 FR 57416, 57427; October 9, 2007).

The commenters also claim that the NRC is inappropriately segmenting the site preparation activities from the licensed facility construction activities at the site to avoid NEPA. This is not the case. Generally, the NEPA segmentation problem arises when the environmental impacts of Federal actions are evaluated in a piecemeal fashion and, as a result, the comprehensive environmental impacts of the entire Federal action are never considered or are only considered after the agency has committed itself to continuation of the project. Another associated segmentation problem arises when pieces of a Federal action are evaluated separately and, as a result, none of the individual pieces are considered "major Federal actions" requiring an EIS.

The site preparation activities identified in the rule are activities that any private entity can undertake on property that they own or to which they have legal rights. Site preparation activities are separate and independent from construction of any aspect of the proposed facility that would be directly related to the manufacture, production, use, transfer, or ownership of an NRC-licensed material. The question of whether site preparation activities are impermissibly segmented from the facility construction turns on whether these activities are viewed as "connected actions." The courts have determined that "projects which have "independent utility" are not "connected actions." *Utahns for Better Transportation, et al. v. U.S. Dep't of Transp., et*

al., 305 F.3d 1152, 1183 (10th Cir. 2002). Whether two actions have independent utility depends on "whether each of two projects would have taken place with or without the other . . ." *Wilderness Workshop, et al. v. U.S. Bureau of Land Mgmt., et al.*, 531 F.3d 1220, 1229 (10th Cir. 2008). In this rule, site preparation activities are independent of facility construction. As such, site preparation activities do not violate NEPA's prohibition against segmentation.

While the effects of any non-Federal site preparation activities undertaken by a materials license applicant will not be considered effects of the NRC's licensing action, the effects of the site preparation activities would be considered as part of the NRC's cumulative impact analysis performed during the environmental review of the licensing action. Cumulative impacts are defined as the "impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 CFR 1508.7. In accordance with its guidance on this issue, the NRC staff's cumulative impacts analysis will identify and describe effects of past, proposed, and reasonably foreseeable future actions to the extent that they are relevant and useful in determining the magnitude and significance of the effects of the proposed NRC licensing action. See NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs." Similar to the LWA Rulemaking, the NRC is revising § 51.60 to require that the environmental report submitted ^{with (?)} by an application for a materials license or an amendment to a materials license include a description of the site preparation activities undertaken at the proposed site; a description of the impacts of such site preparation activities; and an analysis of the cumulative impacts of the site preparation activities on the proposed licensing action.

With respect to the comments regarding other environmental protection statutes, the NRC remains committed to fulfilling its obligations under these statutes during its review of any license action. It is important to note, however, that each of the statutes applies specifically to the NRC only to the extent that an activity comes within the NRC's licensing authority or is a "Federal undertaking" by the NRC. For the same reasons given above, site preparation

X "commencement of construction." "Commencement of construction" provisions for Part 36 licenses are already contained in § 36.15. ✓

Section 36.15, Commencement of construction.

The amendment in § 36.15 revises the term "start of construction" to "commencement of construction" and deletes the definition of "construction." The definitions of "commencement of construction" and "construction" are now defined in § 36.2.

Section 39.13, Specific licenses for well-logging.

Section 39.13 is amended to change the reference to § 70.33 to § 70.23.

Section 40.4, Definitions.

Section 40.4 is amended by adding definitions for the terms "construction" and "commencement of construction."

Section 40.32, General requirements for issuance of specific licenses.

The amendment to § 40.32(e) deletes the definition of "commencement of construction" contained in the last two sentences of the paragraph. "Commencement of construction" is now defined in § 40.4.

Section 51.4, Definitions.

(9) Taking any other action that has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.

* * * * *

3. In § 30.33, paragraph (a)(5) is revised to read as follows:

§ 30.33 General requirements for issuance of specific licenses.

(a) * * *

(5) In the case of an application for a license to receive and possess byproduct material for the conduct of any activity which the NRC determines will significantly affect the quality of the environment, the Director, Office of Federal and State Materials and Environmental Management Programs or ^{his/her} ~~his~~ designee, before commencement of construction ^X of the plant or facility in which the activity will be conducted, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. Commencement of construction prior to such conclusion shall be grounds for denial of a license to receive and possess byproduct material in such plant or facility.

* * * * *

§ 40.4 Definitions.

* * * * *

Commencement of construction means taking any action defined as "construction" or any other activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to:

- (1) Radiological health and safety; or
- (2) Common defense and security.

* * * * *

Construction means the installation of wellsⁱⁿ (association with in-situ recovery operations (e.g., production, injection, or monitoring wells), the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to radiological safety or security.

The term "construction" does not include:

- (1) Changes for temporary use of the land for public recreational purposes;
- (2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;

* * * * *

12. Section 40.32, paragraph (e) is revised to read as follows:

§ 40.32 General requirements for issuance of specific licenses.

* * * * *

(e) In the case of an application for a license for a uranium enrichment facility, or for a license to possess and use source and byproduct material for uranium milling, production of uranium hexafluoride, or for the conduct of any other activity which the NRC determines will significantly affect the quality of the environment, the Director, Office of Federal and State Materials and Environmental Management Programs or ^{his/her} ~~his~~ designee, before commencement of construction, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. Commencement of construction prior to this conclusion is grounds for denial of a license to possess and use source and byproduct material in the plant or facility.

* * * * *

PART 51 – ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

13. The authority citation for part 51 continues to read as follows:

the regulations in this part that are related to radiological safety or security. The term "construction" does not include:

- (1) Changes for temporary use of the land for public recreational purposes;
- (2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;
- (3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;
- X (4) Erection of fences and other access control ^{measures} that are not related to the safe use of, or security of, radiological materials subject to this part; X
- (5) Excavation;
- (6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;
- (7) Building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);

(8) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or

(9) Taking any other action that has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.

* * * * *

18. In § 70.23, paragraph (a)(7) is revised to read as follows:

§ 70.23 Requirements for the approval of applications.

(a) * * *

(7) Where the proposed activity is processing and fuel fabrication, scrap recovery, conversion of uranium hexafluoride, uranium enrichment facility construction and operation, or any other activity which the NRC determines will significantly affect the quality of the environment, the Director of Nuclear Material Safety and Safeguards or ^{his/her} his designee, before commencement of construction of the plant or facility in which the activity will be conducted, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect

(3) * * *

(iv) Prohibit commencement of construction with respect to such material prior to complying with the provisions of paragraph (b)(3)(C)(iii) of this section. As used in this paragraph:

(A) The term *commencement of construction* means taking any action defined as "construction" or any other activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to radiological health and safety.

(B) The term *construction* means the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that ^{have a} ~~are~~ reasonable nexus to radiological safety or security. The term "construction" does not include:

(1) Changes for temporary use of the land for public recreational purposes;

(2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;

(3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;

(4) Erection of fences and other access control measures that are not related to the safe use of or security of radiological materials subject to this part;

(5) Excavation;

(6) Erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;

X (7) Building of service facilities (e.g., ^e paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines); X

(8) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or

(9) Taking any other action which has no reasonable nexus to radiological health and safety.

* * * * *

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Apostolakis
SUBJECT: SECY-11-0039 – FINAL RULE: DEFINITION OF
CONSTRUCTION IN 10 CFR PARTS 30, 36, 39, 40, 51,
70, AND 150

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached None X



SIGNATURE

4/18/11
DATE

Entered on "STARS" Yes X No

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MAGWOOD
SUBJECT: SECY-11-0039 – FINAL RULE: DEFINITION OF
CONSTRUCTION IN 10 CFR PARTS 30, 36, 39, 40, 51,
70, AND 150

Approved Disapproved Abstain

Not Participating

COMMENTS: Below Attached None



SIGNATURE

6 May 2011

DATE

Entered on "STARS" Yes No

**Commissioner Magwood's Comment on SECY-11-0039,
"Final Rule: Definition of Construction in 10 CFR Parts 30, 36, 39,40,51,70, and 150"**

I approve, subject to the attached edits, publication in the *Federal Register* of the proposed amendments to revise the definition of construction in 10 CFR Parts 30, 36, 39, 40, 51, 70, and 150. I commend the staff for drafting a comprehensive and well-written final rule. The amended rule adheres to NRC's principles of regulatory reliability and clarity by providing a consistent basis for the requirements under various parts of Title 10 with respect to the terms "construction" and "commencement of construction."

Stakeholders concerned about the prospect that preconstruction activities not regulated by the NRC could result in an irreversible environmental insult should be assured that the Commission's approval of the proposed amendments is made in the light that the NRC is not the only—and in some cases is not the principal—regulator overseeing the development of uranium recovery and other facilities. A long list of Federal and state agencies must grant their approval before most site preparation, exploration, or preconstruction activities can proceed. To stay true to the NRC's charter, it is appropriate that this agency rely on the mandate and expertise of these other organizations and maintain our focus on evaluating activities and projects that affect radiological safety or the common defense and security.



William D. Magwood, IV 5/6/11
Date

NRC's authority. This rule makes clear that any activity related to the radiological public health and safety or common defense and security is subject to NRC review and regulations. Driving of piles is not specifically identified as a site preparation activity that can be conducted without an NRC license. The Statement of Considerations on the LWA Rulemaking clarifies that the driving of piles for reactor licensees has a reasonable nexus to radiological health and safety, and/or common defense and security; and therefore would be considered construction subject to NRC authority for reactor licensees. (72 FR at 57428; October 9, 2007). Whether the driving of piles is a site preparation activity for materials licensees (that is, whether the driving of piles has a reasonable nexus to radiological health and safety or common defense and security) would have to be determined on a case-by-case basis with consideration of which activities would be subject to the materials license.

Comment: One commenter states that the NRC should exert jurisdiction over site preparation activities. The commenter concludes that if the NRC does not monitor and evaluate these actions, then no one will.

Response: The NRC is unable to extend its jurisdiction beyond the authority granted in the AEA. As discussed in Section III, Discussion, the AEA expressly limits the NRC's authority to matters concerning the radiological public health and safety and common defense and security and non-radiological hazards to the extent such hazards result for the actual processing or possession of by-product material, and the Commission has determined that this authority does not extend to site preparation activities having no nexus to radiological health and safety or common defense and security. As previously stated, the private site preparation activities that occur, while not subject to NRC authority, may be subject to the regulatory authority of another Federal, State or local agency through either a permitting or licensing process. It is during these other processes that concerns pertaining to the site preparation activities undertaken by potential materials license applicants could be considered by other Federal, State or local entities, including the potential triggering of NEPA or state environmental review requirements as appropriate (for example Class III underground injection control (UIC) permits: state environmental agency or EPA, Storm-water discharge permit: state environmental agency, Mine permit: state environmental agency, Air permit: state environmental agency, plan of operations permit: BLM, County development permit: County zoning agency, certificate of approval or acceptance: county government).

Response: Any site preparation activities that an applicant chooses to engage in are done so at the applicant's own risk. The NRC retains complete discretion to deny a license application or to impose licensing conditions, as needed. Previously expended resources do not enter into the NRC's decision as to whether or not a license application meets regulatory requirements.

Comment: One commenter states that the proposed regulations fail to state whether the installation of monitoring wells, a significant component of uranium recovery facilities, including in situ leach facilities, is a "construction" activity or is exempted from the definition of "construction."

Response: Installation of monitoring wells that ~~have the specific purpose of measuring radiological attributes is a construction activity. For example, installation of monitoring wells that~~ are only intended to be used to collect background data or perform background aquifer testing ~~would~~ might be permissible. However, monitoring wells that are part of an ISR wellfield monitoring network would not be permissible because such facilities are necessary to ensure the radiological health and safety of the public and that the licensed facility is operating within standards determined by the NRC; therefore, these wells have a reasonable nexus to radiological health and safety and do not qualify as a site preparation activity.

By virtue of the exemption process that exists in part 40, the NRC has had the opportunity to identify some activities that have a reasonable nexus to radiological health and safety and would therefore constitute construction. For instance, most recently in response to an exemption request submitted by Lost Creek ISR, LLC (ADAMS Accession No. ML09140438) the NRC has previously determined that certain activities are "construction," including construction of the processing plant, which serves to concentrate, precipitate, and dry yellowcake; and construction of any structure or system to manage waste, such as deep disposal wells (ADAMS Accession No. ML093350365).

- (9) Taking any other action that has no reasonable nexus to:
 - (i) Radiological health and safety, or
 - (ii) Common defense and security.

* * * * *

3. In § 30.33, paragraph (a)(5) is revised to read as follows:

§ 30.33 General requirements for issuance of specific licenses.

(a) * * *

(5) In the case of an application for a license to receive and possess byproduct material for the conduct of any activity which the NRC determines will significantly affect the quality of the environment, the Director, Office of Federal and State Materials and Environmental Management Programs or his designee, before commencement of construction of the plant or facility in which the activity will be conducted, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. Commencement of construction prior to such conclusion shall be grounds for denial of a license to receive and possess byproduct material in such plant or facility. Commencement of construction as defined in Section 30.4 may include non-construction activities.

§ 36.15 Commencement of construction.

Commencement of construction of a new irradiator may not occur prior to the submission to the NRC of both an application for a license for the irradiator and the fee required by § 170.31 of this chapter. Any activities undertaken prior to the issuance of a license are entirely at the risk of the applicant and have no bearing on the issuance of a license with respect to the requirements of the Atomic Energy Act of 1954 (Act), as amended, and rules, regulations, and orders issued under the Act. Commencement of construction as defined in Section 36.2 may include non-construction activities.

PART 39 - LICENSES AND RADIATION SAFETY REQUIREMENTS FOR WELL LOGGING

8. The authority citation for part 39 continues to read as follows:

AUTHORITY: Secs. 53, 57, 62, 63, 65, 69, 81, 82, 161, 182, 183, 186, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

9. In § 39.13, paragraph (a) is revised to read as follows:

§ 40.4 Definitions.

* * * * *

Commencement of construction means taking any action defined as “construction” or any other activity at the site of a facility subject to the regulations in this part that has a reasonable nexus to:

- (1) Radiological health and safety; or
- (2) Common defense and security.

* * * * *

Construction means the installation of wells associated ~~with in-situ recovery~~ radiological operations (e.g., production, injection, or monitoring well networks associated with in-situ recovery or other facilities), the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to radiological safety or security.

The term “construction” does not include:

- (1) Changes for temporary use of the land for public recreational purposes;
- (2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;

* * * * *

12. Section 40.32, paragraph (e) is revised to read as follows:

§ 40.32 General requirements for issuance of specific licenses.

* * * * *

(e) In the case of an application for a license for a uranium enrichment facility, or for a license to possess and use source and byproduct material for uranium milling, production of uranium hexafluoride, or for the conduct of any other activity which the NRC determines will significantly affect the quality of the environment, the Director, Office of Federal and State Materials and Environmental Management Programs or his designee, before commencement of construction, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. Commencement of construction prior to this conclusion is grounds for denial of a license to possess and use source and byproduct material in the plant or facility. Commencement of construction as defined in Section 40.4 may include non-construction activities.

* * * * *

PART 51 – ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

15. Section 51.45, paragraph (c) is revised to read as follows:

§ 51.45 Environmental Report.

* * * * *

(c) Analysis. The environmental report must include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects. An environmental report required for materials licenses under § 51.60 must also include a description of those site preparation activities excluded from the definition of construction under § 51.4 which have been or will be undertaken at the proposed site (i.e., those activities listed in paragraphs 2(i) and 2(ii) in the definition of construction contained in § 51.4); a description of the impacts of such excluded site preparation activities; and an analysis of the cumulative impacts of the proposed action when added to the impacts of such excluded site preparation activities on the human environment. An environmental report prepared at the early site permit stage under § 51.50(b), limited work authorization stage under § 51.49, construction permit stage under § 51.50(a), or combined license stage under § 51.50(c) must include a description of impacts of the preconstruction activities performed by the applicant at the proposed site (i.e., those activities listed in paragraph (1)(ii) in the definition of "construction" contained in § 51.4), necessary to support the construction and operation of the facility which is the subject of the early site permit, limited work authorization, construction permit, or combined license application. The environmental report must also contain an analysis of the cumulative impacts of the activities to be authorized by the limited work authorization, construction permit, or combined license in light of the preconstruction impacts described in the environmental report. Except for an environmental report prepared at the early site permit stage, or an environmental report prepared at the license renewal stage under § 51.53(c), the analysis in the

environmental values. Commencement of construction prior to this conclusion is grounds for denial to possess and use special nuclear material in the plant or facility. Commencement of construction as defined in Section 70.4 may include non-construction activities.

* * * * *

PART 150 - EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

19. The authority citation for part 150 continues to read as follows:

AUTHORITY: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073).

Section 150.15 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

20. In § 150.31, paragraph (b)(3)(iv) is revised to read as follows:

§ 150.31 Requirements for Agreement State regulation of byproduct material.

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER OSTENDORFF
SUBJECT: SECY-11-0039 – FINAL RULE: DEFINITION OF
CONSTRUCTION IN 10 CFR PARTS 30, 36, 39, 40, 51,
70, AND 150

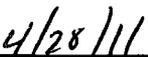
Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached None _____



SIGNATURE



DATE

Entered on "STARS" Yes No _____

Commissioner Ostendorff's comments on SECY-11-0039, "Final Rule-Definition of Construction in 10 CFR Parts 30, 36, 39, 40, 51, 70 and 150"

I approve publication of a final rule in the Federal Register that will amend the definitions of construction and commencement of construction for materials licensees in Title 10 of the Code of Federal regulations Parts 30, 36, 40, and 70, with conforming changes, as necessary in 10 CFR Parts 39, 51, and 150. I continue to believe that the rule has a clear legal basis and will increase the efficiency of the agency's materials licensing activities.

Though I am satisfied with the final rule, I believe there are two areas of the rule that would benefit from additional NRC guidance. First, I would note that several commenters questioned whether it was clearly understood which activities are or are not considered "construction." While I understand that it is not practical to try to anticipate and define with specificity every conceivable activity that might have a nexus to radiological safety, I believe it is important, consistent with the NRC's Principles of Good Regulation, that the agency's positions be readily understood and easily applied. Thus, the staff should build on its previous experiences with oversight of construction under the Limited Work Authorization rule for new reactor construction and develop generic guidance that would provide criteria for applicants to use in evaluating whether a particular construction activity has a nexus to radiological health and safety, and thus falls under the jurisdiction of the NRC for licensing purposes. In addition, though the rule clearly lists out activities that are not considered "construction" for purposes of the rule, I suggest that the staff's guidance might also provide examples of activities that fall under each of the excepted activities.

Second, the generic guidance should address some important considerations for potential applicants that were emphasized in the response to comments. For example, site preparation activities that are not considered to be "construction," while not under NRC authority, may be subject to regulatory authority of another Federal, State or local agency which may require a NEPA or state environmental review. The staff also noted in responses to comments that the NRC's responsibilities under the National Historic Preservation Act (NHPA) must be satisfied before a license is issued. The generic guidance should notify and provide additional guidance to potential applicants about the potential need for interaction with other Federal, State, or local agencies and responsibilities under the NHPA.