

PRM-50-82



NUCLEAR ENERGY INSTITUTE

Adrian P. Heymer
SENIOR DIRECTOR, NEW PLANT DEPLOYMENT
NUCLEAR GENERATION DIVISION

May 25, 2006

Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Mail Stop 0-16C1
Washington, DC 20555-0001

DOCKETED
USNRC

October 4, 2006 (8:49am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATTN: Rulemaking and Adjudications Staff

SUBJECT: Pre-Licensing Construction Activity and Limited Work
Authorization Issues relating to NRC Proposed Rule,
"Licenses, Certifications and Approvals for Nuclear Power Plants,"
71 Fed. Reg. 12,782 (Mar. 13, 2006) (RIN 3150-AG24)

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute (NEI)¹ is pleased to submit the enclosed partial comments addressing certain aspects of the above-captioned Nuclear Regulatory Commission (NRC) rulemaking. That rulemaking includes proposed amendments relating to the NRC's existing process for issuance of limited work authorizations (LWAs) and site activities that may be conducted prior to issuance of a construction permit or combined operating license (COL). However, these proposed amendments would not revise the LWA process in a manner that would enhance its usefulness for prospective COL applicants. We therefore ask the NRC to modify its LWA process consistent with the industry proposals discussed in this letter.

In the business environment in which the nuclear industry operates, new plant applicants must seek to minimize the time interval between an applicant's decision to proceed with a COL application and the start of commercial operation. To do so, the industry must be able to take advantage of modern construction practices. The industry estimates that, based on innovative and successful overseas construction projects, non-safety related preconstruction activities currently categorized by the NRC as "LWA-1" activities will need to be initiated up to two

¹ The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

years prior to commencement of "construction," as defined in 10 § CFR 50.10(b) (i.e., the start of safety-related concrete foundation pours).

The NRC's current LWA process constrains the industry's ability to utilize the modern construction practices. The current LWA process, even if amended as proposed in the Part 52 rulemaking, could needlessly add 18 months to estimated construction schedules for new plants if an early site permit (ESP) is not being referenced in a COL application. Even if an applicant holds an ESP with an LWA, commencement of safety-related preconstruction activities will not be permitted until the COL hearing is complete. Optimally, preconstruction activities for new nuclear plants should not wait until the final environmental impact statement (EIS) and the licensing hearing for the COL application are complete.

The resulting delay can challenge prospective applicants' business case assessments for building new nuclear power plants because those plants are not likely to be on-line by the time baseload power is needed. In our view, therefore, a fundamental change to the NRC's LWA process is needed.

LWA-1 Authorization Recommendations

The existing NRC LWA-1 requirements and the rulemaking proposals are inconsistent and confusing. To resolve these issues, the industry's recommendations would align the LWA provisions with the NRC's role under National Environmental Policy Act (NEPA) case law that post-dates the existing Section 50.10(c). More specifically, we believe the definition of "construction" reflected in 10 C.F.R. § 50.10(b) reflects the correct interpretation of the Commission's licensing responsibility under the Atomic Energy Act of 1954, as amended (AEA), and is entirely consistent with the agency's NEPA obligations. Conversely, we believe that the restrictions on the "commencement of construction" in § 50.10(c) and the prohibitions on pre-licensing activities in § 50.10(e)(1) are excessive and unnecessary under the relevant statutes, and should be changed.

Accordingly, the industry recommends that the NRC re-structure the LWA provisions to allow pre-construction activities currently contemplated by 10 C.F.R. § 50.10(b) and § 50.10(e)(1) without a prior ESP, an LWA, or other NRC authorization. These activities include site excavation; site preparation for construction of the facility; clearing of land for temporary equipment and equipment laydown and storage areas; and construction of non-nuclear facilities, such as waste treatment facilities, water treatment facilities, concrete plants, fabrication facilities and warehouses. Applicants would have to satisfy applicable state and local permits and authorizations before such activities take place. Note that these LWA-1 activities are not safety-related.

LWA-2 Authorization Recommendations

NRC regulations provide for a second set of limited work authorizations (beyond those in § 50.10(e)(1)-(2)) relating to preconstruction activities that have a nexus to nuclear safety. These LWA-2 authorizations create a process for obtaining permission to perform certain safety-related activities prior to the "start of construction." Significantly, however, an LWA-2 cannot be issued until the NRC Staff issues a final EIS and the presiding officer makes environmental findings under § 51.105 that there is reasonable assurance that the site is suitable from a radiological health and safety perspective, and finds that there are no unresolved safety issues related to the LWA-2 activities being proposed.

The industry recommends that the NRC revise its regulations to allow LWA-2 activities to start on a more accelerated schedule. Applicants would submit a partial Environmental Report (ER) addressing the potential LWA-2-related impacts. The NRC Staff would review the partial ER and document its conclusions on LWA-2 issues. Based on this limited environmental review, the Atomic Safety and Licensing Board would conduct a limited hearing and issue a partial initial decision on the LWA-2 activities. Issuance of an LWA-2 based on focused environmental findings would be acceptable under NEPA. Indeed, the Commission has employed similar processes on prior occasions.

The industry's proposals to amend the regulatory framework governing LWAs are being driven by the need for improved efficiencies in both construction and licensing. Our recommended changes are designed to enable projects to move ahead in the most efficient manner consistent with statutory requirements.

NEI is submitting these partial comments separately because they address significant legal, licensing and policy matters that likely will require further industry-NRC interactions. The industry's general proposals relating to LWAs were discussed with the NRC Staff during an April 18, 2006, public meeting, at which the NRC indicated its receptivity to considering suggestions for improving the LWA process if accompanied by the relevant legal bases for the proposed enhancements. We now request that NRC consider the industry's recommendations. To the extent the NRC determines that these LWA issues cannot be addressed in the current rulemaking, we ask that the Commission initiate an expedited rulemaking. Our objective is to have in place a more timely and efficient LWA process to enable the first COL applicants to develop applications that include proposed use of LWAs.

Ms. Annette L. Vietti-Cook

May 25, 2006

Page 4

NRC senior management and Commission involvement on these issues likely will be warranted, and the industry stands ready to support any meetings or other interactions. If you have any questions about the industry's perspective on the LWA issues discussed in this letter or the enclosure, please contact me at (202) 739-8094; aph@nei.org or Anne Cottingham (202) 739-8139; awc@nei.org.

Sincerely,



Adrian P. Heymer

Enclosure

c: The Honorable Nils J. Diaz, Chairman, NRC
 The Honorable Edward McGaffigan, Jr., Commissioner, NRC
 The Honorable Jeffrey S. Merrifield, Commissioner, NRC
 The Honorable Peter B. Lyons, Commissioner, NRC
 The Honorable Gregory B. Jaczko, Commissioner, NRC
 Mr. Luis A. Reyes, Executive Director of Operations, NRC
 Ms. Karen D. Cyr, General Counsel, NRC
 Mr. James E. Dyer, Director, Office of Nuclear Reactor Regulation, NRC
 Mr. Gary M. Holahan, NRC

**Nuclear Energy Institute
Partial Comments on March 13, 2006,
10 CFR Part 52 Notice of Proposed Rulemaking:**

**Proposal for Conducting Pre-Licensing Activities
and Enhancing Limited Work Authorizations**

May 2006

TABLE OF CONTENTS

I.	THE COMMISSION'S REGULATIONS AND PRECEDENT PERMIT CERTAIN PRE-LICENSING ACTIVITIES.....	3
A.	Definition of "Construction" in 10 CFR § 50.10(b).....	3
B.	Definition of "Commencement of Construction" in 10 CFR § 50.10(c)...	4
C.	Other Forms of Permission to Conduct Pre-Licensing Activities.....	5
1.	10 CFR § 50.12 Exemption.....	5
2.	Limited Work Authorizations under 10 CFR § 50.10(e).....	5
a.	LWA-1.....	6
b.	LWA-2.....	6
3.	Authorization for <i>de minimis</i> Activities.....	7
II.	THE COMMISSION SHOULD ELIMINATE PRIOR APPROVAL FOR PRE-CONSTRUCTION ACTIVITIES.....	7
A.	Industry's Proposal Is Consistent with the Atomic Energy Act.....	8
B.	Industry's Proposal Is Consistent with NEPA.....	9
1.	NEPA does not confer independent licensing or permitting authority over private activities not related to radiological health and safety.....	10
2.	There is no illegal segmentation.....	13
III.	THE COMMISSION SHOULD IMPROVE THE PROCESS FOR OBTAINING A LWA-2 CONSISTENT WITH THE CONGRESSIONAL GOALS OF DEVELOPING ADVANCED REACTORS.....	15

**Partial Comments on March 13, 2006,
10 CFR Part 52 Notice of Proposed Rulemaking:**

**Proposal for Conducting Pre-Licensing Activities and
Enhancing Limited Work Authorizations**

INTRODUCTION

As the anticipated dates for submittal of the first Combined Operating License (COL) applications approach, the industry has begun to focus on the licensing schedule to identify opportunities to further improve and eliminate unnecessary steps in the new plant licensing process. Given modern construction management techniques and the high cost of delay, prospective COL applicants are exploring ways to maintain an integrated, orderly, and cost-efficient schedule for completing an entire new plant project.

The NRC's regulations governing Limited Work Authorizations (LWAs) provide a potentially useful tool for reducing the time interval between outlay of capital for new nuclear capacity and cost recovery through commercial operation. Minimizing the lengthy licensing time for nuclear plants is critical to prospective COL applicants, as one means of optimizing the overall schedule and, in doing so, reducing the overall costs. The LWA process, promulgated by the Commission during the early years of the commercial nuclear industry contemplates that applicants may perform certain activities in parallel with the NRC's licensing process and before issuance of a COL, with no increased risk to the public health and safety.

As discussed below, however, changes to the regulatory framework of the NRC's LWA process are necessary to enable applicants to better coordinate the licensing and construction schedules for new nuclear plants. Absent these changes, the overall schedule could be prolonged for up to 24 months because "pre-construction" activities may not commence until the final environmental impact statement (EIS) has been issued and the licensing hearing for the COL has been held. (The NRC has estimated that such hearings may not be completed until approximately 42 months after the COL application has been filed.)

The specific "pre-construction" activities that new plant applicants may need to initiate will be both site-specific and technology-dependent to a certain extent. Similarly, the schedule impacts that will drive the need for pre-construction activities will likely vary from one site and reactor design to another. In general, however, the types of activities contemplated are consistent with those allowed under existing 10 CFR § 50.10.

Data from international construction projects indicates that a COL applicant will need to initiate certain activities now categorized by the NRC as "LWA-1" activities up to two or more years prior to commencement of "construction" as defined in Section 50.10(b) (e.g., safety-related foundation/concrete pours). This time estimate is not surprising given that LWA-1 pre-construction activities could include (as permitted with existing Section 50.10(b)) the following:

- Site exploration and excavation;
- Preparation of the site for construction of the facility, including the driving of piles and construction of roadways, railroad spurs, and transmission lines;
- Clearing of land for temporary equipment laydown areas;
- Construction of non-nuclear facilities (such as waste treatment facilities, water treatment facilities, certain intake structures, water source modifications such as dams, lakes, ponds);
- Construction of temporary buildings (such as construction equipment storage sheds) for use in connection with the construction of the facility;
- Early purchase of components and fabrication of equipment, which is consistent with modern constructions methods and practices to be followed for new nuclear plants and allowed by existing Section 50.10(b). (To the extent that such fabrication might be performed on-site, some site preparation would be necessary to accommodate it.)

Additionally, commencement of certain pre-construction activities in parallel with the NRC licensing process will mitigate schedule impacts occasioned by placement of a new nuclear facility on a site with a currently operating reactor. Coordination with the operating plant would be needed for:

- Installation of barriers or other features between the operating plant and the construction site;
- Modifications of facilities to be shared (e.g., emergency facilities, storage facilities, maintenance facilities);
- Work on systems supporting the existing unit that must be modified to accommodate new unit construction (e.g., switchyard work, underground electrical cable or water pipe rerouting, relocation of storage tanks).¹

¹ Activities affecting the existing unit that may need to be scheduled to coordinate with planned operating unit outages may also affect the new unit construction activity schedule. However, by using the flexibility offered by an LWA, the new plant applicant may be able to avoid adversely affecting the critical path schedule.

Specific activities that COL applicants might seek to perform under an "LWA-2" would similarly be project-specific and highly dependent on whether the COLA review/licensing schedule has been delayed beyond the current lengthy NRC estimates. A COLA applicant would have to balance the schedule delay cost impacts, the reasons for the delays, and the financial risks associated with proceeding with LWA-2 work. For example, some sites may require extensive post-excavation backfill work prior to pouring of concrete. Since the backfill is necessary for safety-related foundation support, an LWA-2 would be required.

This paper describes the current processes for obtaining NRC approval to conduct certain pre-licensing activities. It also identifies ways for the NRC to enhance those processes to promote timely and efficient completion of reactor construction, consistent with the Atomic Energy Act of 1954, as amended (AEA), the National Environmental Policy Act (NEPA), and the goals of the Energy Policy Act of 2005 (EPAAct 2005).

We recommend that the NRC modify its regulations to allow applicants to conduct the activities currently contemplated by 10 CFR § 50.10(b) and Section 50.10(e)(1) without requiring a prior permit, LWA or other NRC authorization. We believe the definition of "construction" reflected in current 10 CFR § 50.10(b) reflects the correct interpretation of the Commission's licensing responsibility under the AEA and is consistent with the agency's obligations under NEPA. Conversely, the restrictions on the "commencement of construction" in Section 50.10(c) and the prohibitions on pre-licensing activities in Section 50.10(e)(1) are unnecessary under the relevant statutes and can be deleted. The industry's proposal would align NRC regulations with an evolved understanding of an agency's role under NEPA case law that post-dates existing Section 50.10(c).

Industry further recommends that LWA-2 findings be accelerated based on a partial environmental submittal by the applicant, a partial environmental review by the Staff, and related findings by the NRC Atomic Safety and Licensing Board focused only on the impacts of specific proposed LWA-2 activities.

DISCUSSION

I. THE COMMISSION'S REGULATIONS AND PRECEDENT PERMIT CERTAIN PRE-LICENSING ACTIVITIES

A. Definition of "Construction" in 10 CFR § 50.10(b)

The AEA prohibits the manufacture, production, possession, or use of a commercial nuclear reactor until the Commission, after a hearing, issues a license authorizing such activities. See 42 U.S.C. §§ 2131, 2133, 2232, 2235, 2239. While the license requirement in Section 101 of the AEA does not specifically identify "construction" of a utilization facility as an activity requiring a license, Section 185 of the Act defines construction permits, operating licenses, and combined construction and operating licenses for utilization facilities. Accordingly, the Commission has applied the AEA to require a permit or other approval prior to undertaking construction activities. The relevant issue this raises is: what constitutes "construction" for which a prior NRC license is required?

Neither the AEA itself nor any legislative history attempts to define "construction" (or otherwise define the point at which the licensing requirement is triggered). See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3,

and 4), CLI-74-22, 7 AEC 939 (1974). Instead, the Commission takes the view that Congress entrusted the agency with the responsibility and discretion to determine the activities that actually constitute construction for which a prior license is required. *Id.* Therefore, the NRC promulgated regulations in 1960 to define the activities that would, or would not, be considered part of the construction of a reactor. 10 CFR § 50.10(b); 25 Fed. Reg. 8712 (Sept. 9, 1960).

The NRC concluded at that time that "construction" included pouring the foundation for, or the installation of, any portion of the permanent facility on the site. 10 CFR § 50.10(b). It went on to determine that "construction" of a commercial reactor did not include (1) site exploration, site excavation, preparation of the site for construction of the facility, including driving piles and constructing roadways, rail spurs, and transmission lines; (2) procurement or manufacture of components of the facility; or (3) construction of non-nuclear facilities and temporary buildings for use in connection with the construction of the facility. This conclusion remains today, embedded in Section 50.10(b).

In general, the intent was that there be no restriction on offsite activities of any kind or on the construction of onsite facilities which are not safety-related. *Tennessee Valley Authority* (Hartsville Nuclear Plant Units 1A, 2A, 1B and 2B), ALAB-380, 5 NRC 572, 575-576 and n.17 (1977). The NRC appropriately viewed its authority as restricted by the limits of Commission jurisdiction, which are "confined to scrutiny of and protection against hazards of radiation." *New Hampshire v. AEC*, 406 F.2d 170, 175 (1st. Cir 1969), *cert. denied*, 395 U.S. 962 (1969). Because the Section 50.10(b) activities are not "construction," they could be performed without any NRC authorization. This was the settled practice for over a decade.

B. Definition of "Commencement of Construction" in 10 CFR § 50.10(c)

Following the enactment of the NEPA and the D.C. Court of Appeals decision in the landmark *Calvert Cliffs* case, the NRC revised its regulations so that certain preliminary work could no longer be undertaken by the applicant without agency approval. *See* 36 Fed. Reg. 22848 (Dec. 1, 1971) (proposed rule); 37 Fed. Reg. 5745 (March 21, 1972) (final rule); *see also*, *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). The "newer" regulations state that, notwithstanding the activities permitted under Section 50.10(b), no person shall effect "commencement of construction" without a permit. 10 CFR § 50.10(c); *see also* 10 CFR § 51.101(a)(2). The subsection defines "commencement of construction" broadly to include "any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site." *Id.* Subsection (c) thus had the effect of precluding, subject to NRC approval, much of what had previously been permitted under subsection (b). The restrictions on the "commencement of construction" under Section 50.10(c) are at odds with Section 50.10(b).

C. Other Forms of Permission to Conduct Pre-Licensing Activities

The general prohibitions in Section 50.10(c) are not absolute. Several paths are currently available to an applicant seeking to perform activities prior to the issuance of a construction permit or COL.

1. 10 CFR § 50.12 Exemption

An applicant may seek an exemption from the requirements of Section 50.10(c) under 10 CFR § 50.12(b), and thereby obtain approval to perform specific onsite activities as defined in the exemption request. Generally, the NRC may grant an exemption where the agency determines that the action is authorized by law, will not present an undue risk to the public health and safety, is consistent with the common defense and security, and that special circumstances are present. See 10 CFR § 50.12(a). Further, for a specific exemption from Section 50.10(c), the NRC may grant the exemption upon a balancing of four factors: (1) whether the activities will give rise to a significant adverse impact on the environment and the nature and extent of such impact; (2) whether redress of adverse environmental impacts can reasonably be effected, if necessary; (3) whether the activities would foreclose subsequent adoption of alternatives; and (4) the effect of delay on the public interest, including power needs, availability of alternative sources to meet those needs on a timely basis, and delay costs to consumers. 10 CFR § 50.12(b). The regulations further specify that issuance of an exemption does not constitute a commitment to issue a license nor does it relieve the applicant from carrying out activities in manner that will minimize or reduce their environmental impact. *Id.*

The exemption criteria in Section 50.12(b) were established to assure that significant environmental harm would not result from pre-licensing activities and that the work would not influence the ultimate NEPA assessment of the cost/benefit balance for the license application. *Shearon Harris*, 7 AEC at 940. Further, the Commission stated that exemptions should only be issued in the most compelling of situations to serve the public interest and even then, only sparingly. *Id.* In practice, using the exemption process, the site-preparation work that could be performed without approval before enactment of Section 50.10(c) could now be performed, but only after the weighing and balancing of relevant environmental factors and with the permission of the Commission. *Id.*

2. Limited Work Authorizations under 10 CFR § 50.10(e)

The Commission remained concerned that the exemption procedures in 10 CFR § 50.12(b) could be problematic in certain circumstances, *e.g.*, where activities could have a substantial effect on the environment before the NRC performed the final balancing of environmental costs and benefits required under NEPA. See *Hartsville*, 5 NRC at 577. Consequently, the Commission amended Section 50.10 in 1974 by adding subsection (e), which permits the Director of Nuclear Reactor

Regulation (NRR) to issue a "limited work authorization" that allows specified work otherwise prohibited by Section 50.10(c). Typically, the authorization in Section 50.10(e)(1) and (2) is referred to as "LWA-1," while the authorization allowed under Section 50.10(e)(3) is referred to as an "LWA-2." In both situations, the activities taken pursuant to the limited work authorization are entirely at the applicant's risk and have no bearing on the agency's decision on the underlying application. 10 CFR § 50.10(e)(4). These activities may also be subject to a requirement that the applicant submit a site redress plan. See 10 CFR § 52.91.

a. LWA-1

An LWA-1 would permit the following activities: (1) preparation of the site for construction of the facility (including such activities as clearing, grading, construction of temporary roads and borrow areas); (2) installation of temporary construction support facilities (including warehouses, utilities, concrete mixing plants, and construction support buildings); (3) excavation for facility structures; (4) construction of service facilities (including roadways, rail spurs, fencing, transmission lines, and sewers); and (5) construction of structures, systems, and components (SSCs) which do not prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. 10 CFR § 50.10(e)(1). The LWA-1 cannot be performed until after the Staff has completed a Final Environmental Impact Statement (FEIS) on the "construction permit." *Id.*²

Further, the regulations state that an LWA-1 shall only be granted after the presiding officer in the proceeding on the application has (1) made the findings required by 10 CFR §§ 51.104(b) and 51.105, and (2) has determined that there is reasonable assurance that the proposed site is a suitable location for a reactor of the general size and type proposed from a radiological health and safety standpoint. 10 CFR § 50.10(e)(2).³

b. LWA-2

An LWA-2 would permit LWA-1 activities plus the installation of structural foundations, including any necessary subsurface preparation, for SSCs which prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. 10 CFR § 50.10(e)(3)(i). An LWA-2 may be granted only after the presiding officer has, in addition to making the findings required under § 50.10(e)(2), determined that there are no

² The language would appear to allow an LWA-1 after issuing an FEIS that addresses only construction, *i.e.*, an FEIS that excludes operational issues.

³ It is unclear what findings would be required for a COL under 10 CFR § 51.104(b), since that regulation only applies in a "proceeding in which a hearing is held and where the NRC Staff has determined that no environmental impact statement need be prepared for the proposed action."

unresolved safety issues relating to the additional activities. 10 CFR § 50.10(e)(3)(ii).

3. Authorization for *de minimis* Activities

Certain activities are permissible even without an exemption to Section 50.10(c) or an LWA (e.g., upgrading existing access roads, drilling exploratory borings, clearing trees, etc.). The NRC allows pre-LWA activities to be undertaken by an applicant if those activities would have a "trivial" environmental impact. *Kansas City Gas and Electric Co.* (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1, 12 (1977). The decisions on *de minimis* impacts stress that triviality in this context does not mean "zero" impact, but instead means impacts for which it can "safely be said that no conceivable harm would have been done to any of the interests sought to be protected by NEPA should the eventual outcome of the proceeding be a denial of the application."⁴

II. THE COMMISSION SHOULD ELIMINATE PRIOR APPROVAL FOR PRE-CONSTRUCTION ACTIVITIES

The definition of "construction" reflected in 10 CFR § 50.10(b) is based on the correct interpretation of the NRC's responsibility under the AEA and is consistent with the agency's NEPA obligations. Indeed, when viewed in light of current NEPA law, the prohibitions on pre-licensing activities in Sections 50.10(c) and 50.10(e)(1) are unnecessary. While the current regulations have been in place for some time, there has been little need to apply the LWA provisions since no new permit or license applications have been filed in recent years. However, changes are now needed to improve NRC regulations, while still meeting the requirements of the AEA and NEPA. The industry believes that applicants should be allowed to conduct the pre-construction activities contemplated by Sections 50.10(b) and 50.10(e)(1) without a prior NRC permit or an LWA.⁵ Such a process would better enable companies to meet their energy needs and would promote the goals of EPAct 2005.

⁴ *Puget Sound Power & Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), ALAB-446, 6 NRC 870, 871 (1977); see also, *Washington Public Power Supply System* (Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719, 723 (1977).

⁵ There are alternative proposals that might accomplish similar results. For example, the Commission could consider a programmatic or Generic Environmental Impact Statement similar to that used in license renewal, a "generic exemption" under 10 CFR § 50.12(b), an OGC opinion letter, or a narrowed interpretation of "site" in Section 50.10. Additionally, in its comments on the Notice of Proposed Rulemaking issued on March 13, 2006 to revise Part 52, NEI is identifying other possible changes in Section 50.10 to facilitate issuance of an LWA-1 and LWA-2. None of these alternatives, however, resolves the dilemma posed by the current regulations. No matter the path that the NRC chooses, time is of the essence to make LWAs available to COL applicants on a schedule that meets their commercial requirements. The NRC should therefore choose an approach that addresses the LWA problem as promptly as possible.

A. Industry's Proposal Is Consistent with the Atomic Energy Act

The industry's proposal is consistent with NRC jurisdiction imposed by the AEA. The NRC's predecessor, the Atomic Energy Commission, interpreted the agency's jurisdiction under the AEA as limited to protecting against radiological hazards. *See New Hampshire*, 406 F.2d at 175. Courts have agreed with the AEC, recognizing that the Commission has jurisdiction under the AEA only to the extent necessary to "provide adequate protection to the health and safety of the public" with respect to the special hazards of radiological impacts. *Id.*, at 174-175; *see also Gage v. AEC*, 479 F.2d 1214, 1221 n.19 (D.C. Cir. 1973) (The Commission lacks the authority to mandate that an applicant take certain actions that are unrelated to radiological considerations.). As discussed below, the definition of "construction" in 10 CFR § 50.10(b) is fully consistent with the requirements in Section 185 of the AEA. In contrast, the restrictions on "commencement of construction" in Section 50.10(c) appear to reflect an overly-broad interpretation of that NRC jurisdiction under the AEA.

While the AEA describes construction permits and COLs, 42 U.S.C. § 2235, the AEA does not prohibit "construction" directly. *See supra*, Section I.A. Instead, the AEA requires a license to "transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility." 42 U.S.C. § 2131. Under the AEA, a "utilization facility" means "any equipment or device ... determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such a manner as to affect the health and safety of the public." 42 U.S.C. § 2014cc. (emphasis added).

Consistent with this AEA definition, the pre-licensing activities in Section 50.10(b) are, by definition, limited to construction of facilities that are not a "utilization facility." The regulation allows an applicant to construct "non-nuclear facilities" and perform site exploration and site preparation for later construction. Section 50.10(b) also allows roads and railroads to facilitate subsequent utilization facility construction. These activities, *i.e.*, building roads, laying railroads, and clearing the site, are not safety-related and are not "devices" or "equipment" that can utilize special nuclear material. Similarly, the activities that are allowed in Section 50.10(e)(1) with prior Commission approval, *e.g.*, concrete mixing plants, sanitary sewerage plants, land clearing, etc., do not make use of special nuclear material. Rather, all those activities merely involve preparation of the site for eventual utilization facility construction. On their own, all could be carried out without any NRC approval under the AEA.

The Commission's interpretation of its licensing authority as originally enacted in Section 50.10(b) is consistent with the plain meaning of the AEA and would be entitled to appropriate deference. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The pre-licensing, pre-construction elements listed in Sections

50.10(b) and 50.10(e)(1) involve site-preparation and logistical support and, as such, do not involve making or forming devices or equipment capable of using special nuclear material that are prohibited without an NRC construction permit. The intent of Congress in the AEA is clear and unambiguous: "construction" can only mean activities related to assembling devices capable of utilizing special nuclear material.

The definition of "construction" reflected in Section 50.10(b) is also consistent with the Commission's jurisdiction under the AEA more generally. Certainly, construction of temporary roads, railroad spurs, or storage buildings — all activities permitted by Section 50.10(b), but restricted by Sections 50.10(c) and 50.10(e)(1) — lack any rational relationship to the radiological considerations that underpin AEA jurisdiction. See *New Hampshire*, 406 F.2d at 175. Any Commission bar on pre-licensing activities that goes beyond the agency's jurisdiction over radiological considerations would impermissibly obstruct traditional state and local powers over land use and land acquisition, and unconstitutionally interfere with private rights to the free use and enjoyment of land. This is especially true where the NRC's involvement is only triggered by an application that may be withdrawn at any time. See *Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972). Thus, the Commission's original interpretation of "construction of a utilization facility" referenced in Section 50.10(b) is reasonable and entitled to considerable deference. See *Chevron*, 467 U.S. at 844-845; see also, *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (degree of deference due to agency depends on, among other things, the consistency of the agency's position).

In contrast with the reasonable interpretation of "construction" in Section 50.10(b), 10 CFR § 50.10(c) establishes an inexplicably circular definition of "commencement of construction." Activities in the definition of "commencement of construction" include activities that are not "construction" under Section 50.10(b) and do not require a construction permit. Logically, however, if activities are not "construction" under Section 50.10(b), they should not be "commencement of construction" under Section 50.10(c). If an activity does not fall within the definition of construction under Section 50.10(b) and does not require a construction permit under Section 185 of the AEA, prior NRC approval of that activity should not be necessary under the AEA.

B. Industry's Proposal Is Consistent with NEPA

Industry's proposal is also fully consistent with the NRC's responsibilities under NEPA. As a procedural statute, NEPA cannot impose licensing or permitting requirements on a private applicant more stringent than those authorized by the safety provisions of the AEA. The NEI proposal allows the NRC to fulfill its NEPA obligations without unduly expanding NRC licensing requirements. In doing so, the proposal supports timely and efficient construction of new reactors.

1. **NEPA does not confer independent licensing or permitting authority over private activities not related to radiological health and safety**

NEPA requires federal agencies that are contemplating a major action to perform an assessment of the impacts of the proposed action and discuss alternatives to the proposed action. 42 U.S.C. § 4332. The goals of NEPA are realized through a set of procedures that require an agency to take a “hard look” at environmental consequences of federal decisions and provide for broad dissemination of relevant environmental information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Although these procedures almost certainly affect an agency’s decisions, it is “now well-settled” that NEPA does not mandate particular results, but simply prescribes the necessary process. *Id.*, at 350-51. As discussed below, the NRC’s current regulations which, in effect, impose substantive licensing requirements and related environmental obligations on activities that do not require a construction permit, are “inconsistent with NEPA’s reliance on procedural mechanisms” and the statute’s focus on federal actions. *Id.*, at 353. NEPA does not expand the scope of the NRC’s licensing and permitting authorities, as defined in the AEA.

The NRC initially promulgated 10 CFR § 50.10(c) in 1972, in response to its evolving understanding of NEPA’s requirements. (Section 50.10(b) was promulgated in 1960.) In the Statements of Consideration accompanying the regulations promulgating Section 50.10(c), the Commission stated that, in its view, site preparation constitutes a key point, from the standpoint of environmental impact, in connection with the licensing of nuclear facilities, and that its amendments to Section 50.10 would facilitate consideration and balancing of a broader range of realistic alternatives and provide a more significant mechanism for protecting the environment during the earlier stages of a project for which a license is being sought. 37 Fed. Reg. at 5746. That statement accurately describes the NRC’s responsibilities under NEPA to the extent that NEPA requires consideration and balancing of environmental impacts of the proposed action. The Commission, however, took its obligations under NEPA further than necessary. While the NRC is obligated under NEPA to consider non-radiological environmental impacts from construction and operation as part of its licensing process, NRC may not prohibit (or require prior NRC approval of) activities that do not entail construction under Section 50.10(b) and do not require a construction permit under AEA Section 185.⁶ In a series of decisions addressing the prohibitions on certain activities under 10 CFR § 50.10(c), the Commission opined that NEPA and *Calvert Cliffs* gave it “general environmental jurisdiction under NEPA” *in addition to its organic*

⁶ We are *not* suggesting that the NRC does not need to evaluate indirect or non-radiological impacts of federal actions. Those impacts will be reviewed in any EIS when a federal action becomes involved (*i.e.*, when the licensing requirement of the AEA is triggered). The point is that NEPA does not expand the licensing requirement.

jurisdiction under the AEA. *Hartsville*, 5 NRC at 576. Pursuant to its view of its expanded “jurisdiction under NEPA,” the Commission empowered itself to “impose license conditions to mitigate [environmental] impacts,” even if those impacts had no relationship to radiological health and safety. *Wolf Creek*, 5 NRC at 8-9.⁷ This plainly reflects an outdated view of NEPA. Intervening Supreme Court and other judicial decisions have decisively established that NEPA is a procedural statute. Consistent with a more contemporary view, NEPA does not expand the Commission’s authority to require a license or permit.

More specifically, the NRC’s ability to exercise authority over applicants is limited to the power granted to it by Congress through the AEA. NEPA does not expand the jurisdiction of or mandate action beyond the agency’s organic statute. *Gage*, 479 F.2d at 1221 n.19; *Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972). NEPA only requires *consideration* of a range of activities, some of which may fall within the purview of the agency’s jurisdiction, some that may not. NEPA does not impose requirements more stringent than those contained in the safety provisions of the AEA.⁸ While activities necessary to complete a nuclear facility, including site preparation, may involve activities or impacts that eventually come within the jurisdiction of the Commission under the AEA, intervention to prevent environmental harm from private, non-federal action goes beyond the AEA. *Gage*, 479 F.2d at 1221. NEPA simply does not confer independent licensing or permitting authority, *i.e.*, jurisdiction, over activities that do not require a construction permit or license under the AEA.⁹

Council on Environmental Quality (CEQ) regulations state that “[i]f any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action *within the agency’s jurisdiction* that would

⁷ The Commission has consistently maintained the distinction between AEA (radiological) requirements, NEPA (environmental) requirements, and mixed (AEA and NEPA) requirements. For example, in creating the limited work authorizations in § 50.10(e), the Commission stated that on-site construction of non-nuclear facilities was prohibited only because it could adversely affect the environment and therefore fell within the Commission’s perceived jurisdiction under NEPA. 39 Fed. Reg. 14506, 14507 (April 24, 1974). The Commission contrasted this jurisdiction with its jurisdiction over “site suitability issues, which are related to both environment and safety, and other safety issues directly related to any one-site [sic] work on safety related structures, systems and components.” *Id.*

⁸ *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n.10 (1985) citing *Public Service Electric & Gas Co.* (Hope Creek Generating Station, Units 1 & 2), ALAB-518, 9 NRC 14, 39 (1979); see also, *Methow Valley*, 490 U.S. at 347 (1989) (An agency may not impose mitigation measures through NEPA on actions that lie outside of its jurisdiction).

⁹ Compare *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004) (holding that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant action, the agency need not consider those effects under NEPA).

[have an adverse environmental impact or limit the choice of reasonable alternatives], then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.” 40 CFR § 1506(b) (emphasis added). If the activity does not require a construction permit, then NEPA does not require the Commission to prohibit the activity pending NRC review and approval.¹⁰ Pre-licensing site preparation activities are undertaken by private, not federal, entities and do not require separate NEPA review when taken on their own. While the Commission must assess the environmental impacts of its action, including the indirect impacts and impacts of connected, similar, and cumulative actions, the agency’s ability to require prior approval or coerce action only extends to those matters for which approval is required by the AEA.

In the cases where courts have enjoined private or state action pending a federal agency’s completion of an EIS, the critical and distinguishing factor has been that the underlying construction activity (e.g., “dredging or filling” in “waters of the United States”) fell within the jurisdiction of the federal agency under its organic statute. See, e.g., *Florida Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 404 F. Supp. 2d 1352 (S.D.Fla. 2005) (enjoining non-party county from constructing research park pending Corps compliance with NEPA because the county was required to obtain a valid permit from the Corps before it could “begin construction” of its project where Corps also asserted it had jurisdiction over related projects and plans); *Fritiofsen v. Alexander*, 772 F.2d 1225, 1242 (5th Cir. 1985) *abrogated on other grounds*, *Sabine River Authority v. U.S. Dep’t of the Interior*, 951 F.2d 669, 677 (5th Cir. 1992) (upholding continued injunction against private housing developer pending NEPA compliance by the Corps); *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988) (remanding to the Corps for a proper wetlands determination and enjoining any dredging and filling until a proper determination was made and the necessary permits were obtained); *Save Greers Ferry Lake, Inc. v. Dept. of Defense*, 255 F.3d 498, 501 (8th Cir. 2001) (invalidating permits for construction of boat docks where the Corps acted arbitrarily and capriciously in issuing a finding of no significant impact (FONSI)).

These cases are all consistent with the larger principle that an agency’s jurisdiction is limited to that granted by its organic statute. *Gage*, 479 F.2d at 1221 n.19; *Kitchen*, 464 F.2d at 801. The courts have not enjoined private action under NEPA where the activities fell wholly outside the permitting jurisdiction of a agency. See e.g., *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1996) (allowing continued construction by non-federal entity since a federal agency’s environmental

¹⁰ In addition, where a non-federal party voluntarily informs the NRC of its intended activities to ensure compliance with law and regulation and to facilitate the agencies monitoring activities for safety purposes, the agency’ review of the plan does not constitute a major federal action requiring an environmental impacts statement pursuant to NEPA. *New Jersey v. Long Island Power Authority*, 20 F.3d 284, 293 (1st Cir. 1995).

review of project was binding only on those aspects that were within the jurisdiction of the agency, even if the agency elected to analyze under NEPA those portions of the project that were beyond its control). In the context of a COL applicant performing pre-licensing activities, no federal permit is required under the AEA to clear land, construct roads, or build a rail spur, and NEPA does not confer independent jurisdiction to preclude those activities.¹¹ Accordingly, neither a license nor an LWA (or related environmental impact statement (EIS)) should be required before an applicant performs the activities permitted under Section 50.10(b).

2. **There is no illegal segmentation**

NEPA requires that an agency consider "connected actions," which CEQ regulations define as proposed actions that (i) automatically trigger other actions which may require environmental impact statements, (ii) cannot or will not proceed unless other actions are taken previously or simultaneously, or (iii) are interdependent parts of a larger action and depend on the larger action for their justification. See 40 CFR §§ 1508.7, 1508.8, and 1508.25; see *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079, 1087 (D.C.Cir.1973) (EIS required for overall project where individual parts of project are related logically or geographically). Courts have therefore held that an agency may not consider portions of a project separately to avoid acknowledging significant environmental impacts. See e.g. *West Chicago v. NRC*, 701 F.2d 262 (7th Cir. 1983) (illegal "piecemealing" or "segmentation" allows agency to avoid requirements of NEPA). However, in the case of a COL applicant performing pre-licensing activities, there can be no illegal segmentation since there is only a single, unsegmented, federal action and since, in any event, the federal and private actions are not "connected."

Where a COL applicant seeks to perform pre-licensing activities, there is but a single federal action — the granting or denial of the COL — whose impacts must be considered. Here, the NRC is not attempting to avoid consideration of environmental impacts of a federal action or deprive the public of information related to those impacts by dividing a larger project into smaller units. Instead, the activities permitted by Sections 50.10(b) and (e)(1) are purely private actions and, under the NEI proposal, would not require NRC approval. The requirement to prepare an EIS applies only to proposals actually before the agency, not those under consideration by private parties. *Duke Energy Corp.* (McGuire Nuclear Station,

¹¹ Certainly, the need to comply with other federal, state, or local environmental regulations is unaffected by the NEI proposal. See *Hydro Resources Inc.* (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998) (whether non-NRC permits are required is the responsibility of the bodies that issue such permits, e.g., the Environmental Protection Agency, state or local authorities, not the NRC). If the pre-licensing activities involved, for example, filling of a wetland, then, of course, the applicant would be required to comply with Corps of Engineers permitting requirements.

Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294-296 (2002). Moreover, even if the non-federal portion of the project is dependent on the federal portion for its utility, the entire project (*i.e.*, the federal and non-federal portions together) does not constitute a single federal action that must be analyzed simultaneously since the Commission has no jurisdiction over the private pre-licensing activities. *See California Trout v. Schaefer*, 58 F.3d 469, 473-474 (9th Cir. 1995). Accordingly, there is no segmentation of a project into two components when there is but a single, unsegmented, federal action under consideration.

Even if the NRC considers the private and federal actions together for NEPA purposes, there is no segmentation since the pre-licensing activities are not "connected" to the NRC's decision on a COL application. When addressing segmentation issues, the Commission looks at the extent of the "nexus" between the two proposals. *Duke Energy Corp.*, CLI-02-14, 55 NRC at 296-297. Here, there is an insufficient nexus between the pre-licensing activities and the COL approval. Construction of a road or clearing a site of trees does not "automatically" trigger NRC approval of a COL. Nor does it represent a "practical commitment" to actually construct a nuclear power facility.¹² While the pre-licensing activities may relate to activities that would be taken under a COL, there is no underlying reciprocity of action that would require their treatment as inextricably "connected" actions. *See e.g., South Carolina v. O'Leary*, 64 F.3d at 898-899 (holding that impermissible segmentation only exists where the component action has a "direct and substantial probability of influencing [the agency's] decision" on the larger project.); *City of Virginia Beach*, 951 F.2d at 605 (holding that non-federal construction can only be enjoined prior to federal approval of a project where the non-federal action has a direct and substantial probability of influencing the federal approval decision). Since a COL applicant would be undertaking redressible, pre-licensing actions at its own risk and without expenditure of federal funds, there is no chance of those private actions directly influencing the Commission's decision on whether the COL should be issued. Therefore, there can be no segmentation as there are no "connected actions."

NEPA also requires consideration of indirect effects of the federal action. Ultimately, for a COL application, NEPA may require an assessment of those indirect impacts, including the impacts of pre-licensing and pre-construction activities. It might be argued that the pre-licensing activities could affect the

¹² Similarly, the pre-licensing activities (*i.e.*, clearing land, constructing access roads, etc.) have an "independent utility" since those activities could be used to support alternative development of the site, including, for example, construction of a coal-fired power plant. *See Duke Energy*, CLI-02-14, 55 NRC at 296-297 *citing Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983). Thus, it is neither "unwise" or "irrational" to complete the pre-licensing activities apart from a COL since those activities merely preserve the option of later COL construction. *Webb*, 699 F.2d. at 161; *South Carolina v. O'Leary*, 64 F.3d 892, 899 (4th Cir. 1995).

ultimate NEPA weighing and balancing of environmental considerations or limit consideration of reasonable alternatives. However, as discussed above, this argument would not provide a basis for the NRC to prohibit purely private action that does not require a construction permit under the AEA. The pre-licensing and pre-construction impacts would simply be considered during the overall NEPA evaluation of the subsequent federal action. Moreover, even if NEPA could prevent such private action, as discussed below in conjunction with an LWA-2, the applicant's at-risk activities are remediable and, in all likelihood, would be addressed in the required site redress plan. Likewise, those pre-construction activities would still be subject to applicable state and local permits and the related review processes.

III. THE COMMISSION SHOULD IMPROVE THE PROCESS FOR OBTAINING A LWA-2 CONSISTENT WITH THE CONGRESSIONAL GOALS OF DEVELOPING ADVANCED REACTORS

NRC regulations provide for a second set of limited work authorizations beyond those in Section 50.10(e)(1)-(2). The LWA-2 authorizations create a process for obtaining permission to perform certain safety-related activities, in addition to the activities allowed under LWA-1. See 10 CFR § 50.10(e)(3).

As discussed above, an LWA-2 cannot be issued until the Staff has issued an FEIS and the presiding officer has made the following findings: (1) satisfactory environmental findings under Sections 51.104(b) and 51.105; (2) a finding that there is reasonable assurance that the site is suitable from a radiological health and safety perspective; and (3) a finding that there are no unresolved safety issues. 10 CFR § 50.10(e)(2)-(3). The required COL hearing is, therefore, a key hurdle to meeting both requirements of the regulations and the goals of COL applicants. NEI therefore proposes that LWA-2 findings be accelerated based on a partial environmental review (and related findings) focused only on the impacts of specific proposed LWA-2 activities.¹³

Issuance of an LWA-2 based on focused environmental findings would be acceptable under NEPA. Indeed, the Commission has successfully employed similar processes on prior occasions. With respect to the environmental findings necessary for a LWA, the NRC may clearly consider separately different segments of a proposed project. See *Tennessee Valley Authority (Clinch River Breeder Reactor Plant)*, CLI-82-23, 16 NRC 412, 424 (1982) (noting that separate consideration of different segments of a project is "well-established"). The NRC may also authorize an individual, sufficiently distinct, portion of an agency plan without awaiting the

¹³ Alternatively, the Commission could remove the requirement that the presiding officer make environmental findings for LWA-2 activities and authorize the Staff to make those findings instead. See *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 920 F.2d 50, 56 (D.C. Cir. 1990) ("While NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues.").

completion of a comprehensive environmental impact statement so long as the environmental treatment under NEPA of the individual portion is adequate and approval of the individual portion does not commit the agency to approval of other portions of the plan.¹⁴ Further, the NRC is not responsible for ensuring that the applicant has received the appropriate state, local, or federal permits needed to perform LWA activities. See *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 123, 129 (1978) (holding that applicants are not required to have every permit in hand before a LWA is granted).

In the case of an LWA-2, all activities would be conducted at the risk of the applicant and a site redress plan would be required. 10 CFR § 50.10(e)(4); 10 CFR § 52.91(a). Any environmental impacts of pre-licensing activities performed pursuant to a LWA-2 can be redressed and would not involve an irretrievable commitment of resources. The Commission has previously concluded that site preparation activities may be addressed separately since they will not result in any irreversible or irretrievable commitment to the remaining segments of a reactor development project. *Clinch River*, 16 NRC at 424, citing *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). It noted that modern construction techniques are adequate to restore disturbed landscape and, if the site is zoned industrial, full redress may not even be necessary to minimize environmental impacts. *Id.* at 427. Nor will such activities limit consideration of alternatives since “[s]ite preparation activities are too small a fraction of overall project activities to significantly affect the Commissioner’s future consideration of alternatives sites or abandonment of the project.” *Id.* at 428, see also *Wolf Creek*, CLI-77-1, 5 NRC 1 (a Licensing Board may permit pre-LWA activity so long as any potential environmental damage can be redressed and the applicant will commit to restoration of the site if necessary).

Further, no design alternatives will be foreclosed because no permanent plant structures (*i.e.*, radiological safety-related structures) would be constructed under Section 50.10(b). See *Clinch River*, 16 NRC at 428. These attributes, *i.e.*, redressibility, no foreclosure of alternatives, etc., ensure that performing the pre-licensing activities allowed under Sections 50.10(b) and (e)(1) would not unduly influence the overall cost/benefit balance of the project required by NEPA. Indeed, sunk costs are not appropriately considered in an operating license cost-benefit balance.¹⁵

¹⁴ *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 265 (1982), *aff’d sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983); *Peshlakai v. Duncan*, 476 F. Supp. 1247, 1260 (D.D.C. 1979); *Conservation Law Foundation v. GSA*, 427 F. Supp. 1369, 1374 (D.R.I. 1977).

¹⁵ *Consumers Power Co.* (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 561, 586-87 (1982), citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 534 (1977).

With respect to any hearing on LWA-2 issues, the presiding officer may conduct separate hearings and issue separate partial decisions on issues pursuant to NEPA, on general site suitability issues specified by 10 CFR § 50.10(e), and on certain limited work authorization issues. *United States Dep't of Energy et al.* (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158, 161 (1983), *vacated as moot*, ALAB-755, 18 NRC 1337 (1983). Separate LWA and COL hearings are simply separate phases of the same proceeding. *United States Dep't of Energy et al.* (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 492 (1984). The Commission may therefore appropriately direct the presiding officer, where appropriate (or requested by an applicant), to consider bifurcating, and conducting separately, the COL and LWA-2 portions of a proceeding. Accordingly, the NRC should take the steps necessary to enhance the LWA-2 process.

CONCLUSION

Production of economical nuclear power can best be achieved through a stable and predictable regulatory process that is consistent with the demands of modern construction management practices and project financing. Site preparation, access, and logistical support are necessary to support those goals. Revising Commission regulations and LWAs consistent with its authority under the AEA and NEPA, as described above, is a key step towards enhancing the COL process and meeting the objectives of EAct 2005.

From: "HEYMER, Adrian" <aph@nei.org>
To: <secy@nrc.gov>
Date: Thu, May 25, 2006 4:37 PM
Subject: Pre-Licensing Construction Activity and LWA Issues Relating to NRC Proposed Rule, "Licenses, Certifications and Approvals for Nuclear Power Plants"

May 25, 2006

Annette L. Vietti-Cook

Secretary

U.S. Nuclear Regulatory Commission

Mail Stop 0-16C1

Washington, DC 20555-0001

ATTN: Rulemaking and Adjudications Staff

SUBJECT: Pre-Licensing Construction Activity and Limited Work Authorization Issues Relating to NRC Proposed Rule, "Licenses, Certifications and Approvals for Nuclear Power Plants," 71 Fed. Reg. 12,782 (Mar. 13, 2006) (RIN 3150-AG24)

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute (NEI) is pleased to submit the enclosed partial comments addressing certain aspects of the above-captioned Nuclear Regulatory Commission (NRC) rulemaking. That rulemaking includes proposed amendments relating to the NRC's existing process for issuance of limited work authorizations (LWAs) and site activities that may be conducted prior to issuance of a construction permit or combined operating license (COL). However, these proposed amendments would not revise the LWA process in a manner that would enhance its usefulness for prospective COL applicants. We therefore ask the NRC to modify its LWA process consistent with the industry proposals discussed in this letter.

Sincerely,

Adrian P. Heymer

Senior Director, New Plant Deployment

Nuclear Generation Division

Nuclear Energy Institute

(202) 739-8094

aph@nei.org

Enclosure

This electronic message transmission contains information from the Nuclear Energy Institute, Inc. The information is intended solely for the use of the addressee and its use by any other person is not authorized. If you are not the intended recipient, you have received this communication in error, and any review, use, disclosure, copying or distribution of the contents of this communication is strictly prohibited. If you have received this electronic transmission in error, please notify the sender immediately by telephone or by electronic mail and permanently delete the original message.

Mail Envelope Properties (44761568.EAA : 8 : 3754)

Subject: Pre-Licensing Construction Activity and LWA Issues Relating to NRC Proposed Rule, "Licenses, Certifications and Approvals for Nuclear Power Plants"
Creation Date Thu, May 25, 2006 4:36 PM
From: "HEYMER, Adrian" <aph@nei.org>

Created By: aph@nei.org

Recipients

nrc.gov

TWGWPO02.HQGWDO01
 SECY (SECY)

Post Office

TWGWPO02.HQGWDO01

Route

nrc.gov

Files	Size	Date & Time
MESSAGE	1943	Thursday, May 25, 2006 4:36 PM
TEXT.htm	8026	
05-25-06_NRC_LWA White Paper Cover Letter.pdf	74956	
05-25-06_NRC_LWA Policy Paper.pdf	237543	
Mime.822	441750	

Options

Expiration Date: None
Priority: Standard
ReplyRequested: No
Return Notification: None

Concealed Subject: No
Security: Standard

Junk Mail Handling Evaluation Results

Message is eligible for Junk Mail handling
 This message was not classified as Junk Mail

Junk Mail settings when this message was delivered

Junk Mail handling disabled by User
 Junk Mail handling disabled by Administrator
 Junk List is not enabled
 Junk Mail using personal address books is not enabled
 Block List is not enabled