



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0801

June 22, 2010

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-10-0018

TITLE: PROPOSED RULEMAKING TO REVISE THE DEFINITION  
OF CONSTRUCTION IN 10 CFR PARTS 30, 36, 39, 40, 51,  
70, AND 150 (M081211 - STAFF REQUIREMENTS)

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of June 22, 2010.

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 "Andrew L. Bates", written over a horizontal line.

Andrew L. Bates  
Acting 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-10-0018

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X				X	6/4/10
COMR. SVINICKI	X				X	5/12/10
COMR. APOSTOLAKIS	X					5/14/10
COMR. MAGWOOD	X				X	5/28/10
COMR. OSTENDORFF	X				X	5/26/10

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and some provided additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on June 22, 2010.

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Jaczko

SUBJECT: SECY-10-0018 – PROPOSED RULEMAKING TO  
REVISE THE DEFINITION OF CONSTRUCTION IN  
10 CFR PARTS 30, 36, 39, 40, 51, 70, AND 150  
(M081211 – STAFF REQUIREMENTS)

Approved  X  Disapproved       Abstain      

Not Participating      

COMMENTS: Below       Attached  X  None      

  
\_\_\_\_\_  
SIGNATURE

9/4/08   
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  x  No

**Chairman Jaczko's Comments on SECY-10-0018**  
**"Proposed Rulemaking to Revise the Definition of Construction in**  
**10 CFR Parts 30, 36, 39, 40, 51, 70, and 150"**

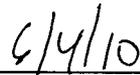
I approve the staff's recommendation to publish, in the Federal Register, the proposed revision to the definition of construction. I agree with Commissioner Ostendorff that it is not always clear what construction activities fall under or are excluded from NRC's authority and that this will have to be carefully considered as the agency moves forward with implementation.

This definition is premised upon the scope of the Commission's regulatory authority, which under the Atomic Energy Act only extends to activities for which a reasonable nexus to radiological health and safety can be established. It makes sense to use this definition to determine which construction activities are subject to NRC regulation and oversight. It does not make sense to use this definition to determine how the impacts are evaluated and disclosed under the National Environmental Policy Act (NEPA). Our NEPA obligations require us to disclose the impacts of the proposed action, whether or not they are under our regulatory authority. It is my understanding that all impacts of pre-construction activities are being treated as cumulative impacts, and therefore subject to a less rigorous review and disclosure, regardless of how directly they are related to the construction of the facility.

Other Federal agencies, such as the Corps of Engineers, do not limit the scope of direct impacts in this way and this has complicated our interactions with them as cooperating agencies. It is my understanding that the Council on Environmental Quality has expressed concern about our approach. When this proposed rule is published, the staff should specifically request comment on the proper approach for evaluating the environmental impacts of pre-construction activities. Staff should also specifically request comment from the Council on Environmental Quality and the Environmental Protection Agency.



\_\_\_\_\_  
Gregory B. Jaczko



\_\_\_\_\_  
Date

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER SVINICKI  
SUBJECT: SECY-10-0018 – PROPOSED RULEMAKING TO  
REVISE THE DEFINITION OF CONSTRUCTION IN  
10 CFR PARTS 30, 36, 39, 40, 51, 70, AND 150  
(M081211 – STAFF REQUIREMENTS)

Approved XX Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below XX Attached XX None \_\_\_\_\_

I approve the *Federal Register* notice for the proposed rule, subject to the attached edits. This is an important modification to our regulations to resolve inconsistencies related to construction which exist between various Parts of Title 10.

  
SIGNATURE

5/12/10  
DATE

Entered on "STARS" Yes X No \_\_\_\_\_

## I. Background

X  
On December 11, 2008, following a briefing on uranium recovery activities by the NRC staff and representatives from the U.S. Environmental Protection Agency, the U.S. Department of the Interior, Bureau of Land Management, the Navajo Nation, Acoma Pueblo, Wyoming Department of Environmental Quality, New Mexico Environment Department, Navajo Allottees, National Mining Association, International Forum on Sustainable Options for Uranium Production, and the Natural Resources Defense Council, the Commission issued Staff Requirements Memorandum M081211 directing staff to provide the Commission with a proposed rulemaking to revise 10 CFR 40.32, "General requirements for issuance of specific licenses," to determine whether limited work authorization (LWA) provisions are appropriate for uranium in-situ recovery facilities (ADAMS Accession No. ML090080206).

During the briefing, a concern was noted regarding the inability of Part 40 licensees and applicants to engage in site preparation activities (e.g., clearing land, site grading and erosion control, and construction of main access roadways, non-security related guardhouses, utilities, parking lots, or administrative buildings not used to process, handle or store classified information) given the broad prohibition against construction in § 40.32(e). Currently, 10 CFR 40.32(e) prohibits an applicant for a license for a uranium enrichment facility or for a license to possess and use source and byproduct materials for uranium milling, production of uranium hexafluoride, or for any other activity requiring NRC authorization from commencing construction of the plant or facility in which the activity will be conducted before the NRC's decision to issue the proposed license. For the purposes of this section, the term "commencement of construction" is defined generally as meaning any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site. Section 40.32(e) clarifies that "commencement of construction" is not intended to mean site

exploration, construction of roads necessary for site exploration, borings to determine foundation conditions, or other pre-construction monitoring or testing to establish background information related to the suitability of the site or the protection of environmental values. Similar prohibitions on construction exist with respect to 10 CFR Parts 30, 36, and 70.

Currently, a Part 40 licensee or applicant may only engage in site preparation activities beyond site exploration if the applicant or licensee requests, and is granted, an exemption from § 40.32(e). Although the staff indicated that exemptions from 10 CFR 40.32(e) have been utilized in the past to allow site preparation activities prior to licensing, and that appropriate exemptions continue to be an available alternative for applicants, the Commission noted during the December 11, 2008, briefing that this manner of regulation was inappropriate for long-term resolution of the issue. Following the briefing, the Commission received a letter from the Nuclear Energy Institute (NEI) dated May 3, 2009, in which NEI expressed its support of the Commission's memorandum directing staff to initiate a rulemaking regarding 10 CFR 40.32 (ADAMS Accession No. ML090710372).

## II. Discussion

On October 9, 2007, the NRC issued a final rule amending the regulation defining "construction" for utilization and production facilities and amending the requirements applicable to limited work authorizations (LWAs) for nuclear power plants (LWA rulemaking). 72 Fed. Reg. 57416 (Oct. 9, 2007); corrected at 73 Fed. Reg. 22786 (Apr. 28, 2008) (ADAMS Accession Nos. ML071210205 and ML081050554). As part of that rulemaking, the Commission modified the scope of activities that are considered construction for which a construction permit, combined license, or LWA is necessary; specified the scope of construction activities that may be performed under a LWA; and changed the review and approval process for LWA requests. The

NRC's modified definition for "construction" expressly excludes site exploration; preparation of the site for construction of a facility (e.g., clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas); erection of fences and other access control measures; excavations; erection of support buildings for use in connection with the construction of the facility; building of service facilities; procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; as well as some activities that are nuclear power reactor specific. In undertaking the LWA rulemaking, the NRC recognized that the Atomic Energy Act of 1954, as amended (AEA) does not require an applicant to obtain permission before undertaking site preparation activities, of the type listed above, that do not implicate radiological health and safety or common defense and security considerations. 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007).

The Atomic Energy Commission (AEC) (the NRC's predecessor agency) prohibited pre-licensing construction of nuclear power plants ~~arises~~<sup>g</sup> in the agency's initial 1960 definition of construction for production and utilization facilities. 25 Fed. Reg. 8712 (Sept. 9, 1960). In 1972, the AEC expanded its definition of construction and developed the LWA process, whereby applicants for nuclear power plant licenses were permitted to engage in site preparation activities, including excavation and other on-site activities before a construction permit was issued. 37 Fed. Reg. 5745 (Mar. 21, 1972). The agency's 1972 rulemaking was a direct result of the enactment of the National Environmental Policy Act of 1969 (NEPA), and the Commission's implementation of that statute.<sup>1</sup> The LWA process remained largely unchanged until the 2007 LWA rulemaking. X

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<sup>1</sup> See *Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4)*, CLI-74-22, 7 AEC 939, 943 (1974). See also *Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1)*, CLI-77-1, 5 NRC 1, 5 (1977).

The NRC's regulations for materials licenses do not provide for pre-licensing construction activities of the type allowed Part 50 and <sup># space</sup>52 applicants. Prior to 1971, the AEC prohibited the construction of materials facilities prior to the agency's decision to issue a license. Initially the AEC required that any application for a Part 70 plutonium processing and fuel fabrication plant be filed at least six months prior to the beginning of plant construction. 36 Fed. Reg. 17573 (Sept. 2, 1971). The intent behind this requirement was to allow the agency an opportunity to conduct a pre-construction review to determine whether the applicant's design basis for the principal structures, systems and components, and its quality assurance program provided reasonable assurance of protection against natural phenomena and the consequences of potential accidents. 36 Fed. Reg. 9786 (May 28, 1971). But this regulation was only applicable to plutonium processing and fuel fabrication applicants. X

Thereafter, on December 1, 1971, the AEC published notice of its intent to redefine the term "commencement of construction" as that term was then applied to Part 50 production and utilization facilities subject to then Appendix D of Part 50. 36 Fed. Reg. 22848 (Dec. 1, 1971). By the same notice, the AEC indicated that it was also considering the adoption of similar amendments to Parts 30, 40, and 70 that would provide for NRC environmental review prior to commencement of construction of materials licensee plants and facilities. The proposed amendments introduced to Parts 30, 40, and 70 a new definition of "commencement of construction;" required that applications for material <sup>S</sup> licenses under these parts be filed at least 9 months prior to commencement of construction of plants or facilities in which the licensed activates will be conducted; and added as a condition of issuance of the requested license that the agency staff had made a favorable environmental review determination prior to commencement of construction of such plants or facilities. The AEC subsequently modified these proposed regulations and provided a mechanism for AEC exemptions to allow the continuation of site preparation and construction activities begun prior to the effective date of the X

The 2007 LWA rulemaking examined the nature and extent of the NRC's responsibilities under NEPA, and based upon that evaluation the NRC revised the definition of construction in 10 CFR 50.10 to expressly exclude certain activities. The NRC determined that its NEPA obligations and responsibilities arise only when the Commission undertakes a Federal action within the agency's statutory responsibility. 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007). Specifically, the NRC noted that NEPA, essentially<sup>g</sup> a procedural statute, does not expand the NRC's jurisdiction beyond the scope of the AEA. *Id.* The NRC further determined that,

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[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.

71 Fed. Reg. 61330, 61332 (Oct. 17, 2006); see also 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007). In light of the foregoing, the NRC amended its definition of construction in § 50.10 and its NEPA regulations in 10 CFR Part 51 to include a definition of construction that was consistent with the § 50.10 definition. Given the NRC's determination that site preparation activities did not constitute construction, the NRC provided that the effects of these activities would only be considered in order to establish a baseline against which the incremental effect of the

subsequent major Federal action (i.e., the Commission's issuance of a license) would be measured.

Since the completion of the LWA rulemaking, which added to Part 51 a definition of "construction," the NRC's definition of what constitutes construction for material licenses in Parts 30, 36, 40, 70, and 150 has been inconsistent with the definition the NRC established in Parts 50, 51, and 52. Activities that do not constitute construction under 10 CFR Parts 50, 51, and 52, are currently classified as construction under 10 CFR Parts 30, 36, 40, 70, and 150. Accordingly, the site preparation activity from which a materials license applicant or licensee is currently prohibited from engaging, are the same activities that the NRC determined in the LWA Rulemaking were not within the scope of the agency's licensing review. As was indicated during the Commission's December 2008 briefing, materials applicants and licensees, as well as the NRC's staff, have struggled with the inconsistency that currently exists within the NRC's regulations.

Staff and materials license applicants have been reconciling the contrary regulatory definitions through the exemption process, but the NRC believes that regulatory efficiency and economy would dictate that the regulatory provisions themselves be reconciled. Accordingly, the NRC proposes to implement conforming amendments in 10 CFR Parts 30, 36, 40, and 70 that would establish a <sup>consistent</sup> uniform definition of "construction" or "commencement of construction." Within the proposed definition of commencement of construction for Parts 30, 36, 40, and 70, the NRC has included any activity that has a reasonable nexus to the radiological health and safety or the common defense and security with the purpose of ensuring that the types of site preparation activities instituted pursuant to the modified regulation do not consist of activities that are related to radiological safety, radiological controls, physical protection or information security. For example, in § 51.4, the exclusion of fences and other access control measures

*but given the agency's position on the scope of its AEA authority, the NRC believes that the regulatory provisions themselves should be reconciled, furthering regulatory efficiency and economy.*

from the definition of construction does not pertain to those fences and controls intended to secure and protect radiological materials, but rather to those fences and controls intended to protect the integrity of the site during the preparation activities. By this notice, the NRC requests comments on its proposal to align the terms "construction" and "commencement of construction" within major licensing parts of its regulations.

The NRC is aware that some interested entities have suggested that a LWA process, similar to that promulgated for 10 CFR Part 50 and 52 licensees, should be developed for materials applicants and licensees. However, upon review, it is not clear that a LWA process applicable to materials licenses is appropriate, or even necessary, at this time. A review of recent requests for exemption from the construction prohibition shows that most requests would have been rendered unnecessary by a materials construction definition that conforms to Part 51. It is unclear whether the licensing process for materials licenses would be enhanced by a LWA process that allows some safety or security-related construction to occur in advance of the license, or whether a LWA process might be more appropriate for larger materials facilities, such as uranium in situ recovery facilities or uranium enrichment facilities.

Furthermore, given the NRC's explicit statement in 1980 of the breadth of issues that should be resolved prior to constructing Part 30, 40, and 70 facilities,<sup>2</sup> there is some question as to whether a LWA process is appropriate in the context of materials licensing, which would permit safety or security-related construction to occur prior to a conclusion that a license should be issued. In the UMTRCA-related rulemaking, the NRC found that construction activities at plants and facilities in which source or byproduct materials are possessed and used for the production of uranium hexafluoride and commercial waste disposal by land burial should not precede the environmental review as they "are likely to result in [irrevocable and/or irretrievable]

<sup>2</sup> See UMTRCA Rulemaking, 45 Fed. Reg. 65521, 65529 (Oct. 3, 1980).

environmental impacts, the propriety of which cannot be ascertained until [the Part 51] environmental appraisals are completed and documented." 45 Fed. Reg. 65521, 65529 (Oct. 3, 1980). Accordingly, the NRC is not including in the proposed rule language a LWA process for 10 CFR Part 30, 36, 40, or 70 licensees and applicants, and to the extent that an applicant for a 10 CFR Part 30, 36, 40, or 70 license wishes to perform site activities that are related to radiological health and safety or preservation of the common defense and security, the applicant would be prohibited from doing so under the proposed rule until the NRC has completed its environmental review and concluded that a license should be issued. Nevertheless, the NRC invites comments on the utility of a LWA process for 10 CFR Parts 30, 36, 40, and 70, including whether such a process would be appropriate for all, or merely some, materials licenses.

The modifications proposed in this rulemaking would have the effect of providing a definition of "construction" that is consistent throughout the regulations, including being the scope of the NRC's environmental review conducted under the Part 51 definition of "construction." Exemptions would no longer be necessary for certain site preparation activities currently undertaken by materials license applicants. Currently, the NRC's regulations in Part 51 require that an applicant for a materials license, license amendment or license renewal submit an environmental report with its application. The NRC's regulations further dictate the nature and scope of the NRC's environmental assessment. Those provisions are not being modified by this rulemaking. The instructive provisions in Part 51 would continue to remain applicable.

As is the case currently, to the extent that a potential applicant, an applicant, or a licensee engages in activities that the NRC has indicated do not constitute construction subject to NRC regulation, the entity does so at its own risk, as such activity does not presume that the NRC will conclude that a license should be issued upon completion of its review. This is

X licensing actions in Part 30, which are subject to the NEPA implementing regulations in Part 51, including the Part 51 definition for "construction." Accordingly, this section would be revised to add a new definition for "construction" and conform the definition for "commencement of construction" to be consistent with the concepts used to define "construction" in 10 CFR 51.4, recognizing those activities the Commission has already determined do not affect, as a general matter, radiological health and safety or common defense and security.

§ 30.33(a)(5) General requirements for issuance of specific licenses.

This section would be revised to delete the definition of "commencement of construction" contained in the last two sentences of the paragraph.

§ 36.2 Definitions.

In 2007, the NRC modified the definition for the term "commencement of construction" in 10 CFR Part 51, "Environmental protection regulations for domestic licensing and related regulatory functions," to exclude certain site preparation activities from the definition. The NRC's decision to exclude these activities from the definition of construction was based upon the NRC's determination that these activities lacked a reasonable nexus to radiological health and safety or common defense and security considerations. This section would be revised to add a new definition for "construction" and modify the definition for "commencement of construction" to be consistent with the definition adopted by the NRC in 10 CFR 51.4.

§ 36.13(a) Specific licenses for irradiators.

This section would be revised to exclude § 30.33(a)(5) as a requirement for an applicant to receive a specific license under this part. Currently § 36.13(a) provides that an applicant for a

elements (including regulations) are placed into compatibility categories A, B, C, D, NRC<sup>^</sup> or adequacy category, Health and Safety (H&S). Category A includes program elements that are basic radiation protection standards or related definitions, signs, labels<sup>^</sup> or terms necessary for a common understanding of radiation protection principles and should be essentially identical to those of NRC. Category B includes program elements that have significant direct transboundary implications and should be essentially identical to those of the NRC. X X

Compatibility Category C are those program elements that do not meet the criteria of Category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. Compatibility Category D are those program elements that do not meet any of the criteria of Category A, B, or C, and do not need to be adopted by Agreement States. Compatibility Category NRC are those program elements that address areas of regulation that cannot be relinquished to Agreement States pursuant to the Atomic Energy Act, as amended, or provisions of Title 10 of the Code of Federal Regulations and should not be adopted by Agreement States. Category H&S are program elements that are not required for compatibility, but have a particular health and safety role (e.g., adequacy) in the regulation of agreement material and the State should adopt the essential objectives of the NRC program elements.

The NRC has analyzed the proposed rule in accordance with the procedure established within Part III, "Categorization Process for NRC Program Elements," of Handbook 5.9 to Management Directive 5.9, "Adequacy and Compatibility of Agreement State Programs" (a copy of which may be viewed at <http://www.nrc.gov/reading-rm/doc-collections/management-directives/>). The proposed revisions are categorized as follows:

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this proposed rule, the NRC is proposing to redefine the scope of activities constituting "construction" for materials licenses. The NRC is not aware of any voluntary consensus standards address<sup>ing</sup> the proposed subject matter of this proposed rule. The NRC will consider using a voluntary consensus standard if an appropriate standard is identified. If a voluntary consensus standard is identified for consideration, the submittal should explain why the standard should be used.

#### VIII. Environmental Impact – Categorical Exclusion

The NRC has determined that the changes made in this rule to Parts 30, 39, 40, 51, 70, and 150 fall within the types of actions described in categorical exclusions 10 CFR 51.22(c)(1), (c)(2), and (c)(3)(i). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this regulation.

With respect to Part 36, under the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in subpart A of 10 CFR Part 51, the NRC has determined not to prepare an environmental impact statement for this proposed rule because the NRC has concluded that this proposed rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment. The revisions to Part 36 clarify the concept of construction so that it is consistent with the NRC's regulations that implement NEPA. As noted previously, actions that could be commenced under this proposed rule are currently being approved under individual exemption requests and Part 51 already provides that these actions, now permitted by exemption (proposed to be permitted by regulation) are not to be considered

as construction for purposes of NRC's environmental analyses. None of the proposed revisions affect occupational exposure requirements. Consequently the NRC has concluded that this action has no impact on occupational exposure. The proposed changes to Part 36 impact the licensing of construction of irradiators. 10 CFR 51.22 (c)(14) already provides a categorical exclusion for licensing of irradiators. Thus, the NRC has determined that there is no significant environmental impact on the public from the revisions contained in this proposed rule.

**[NOTE: The final categorical exclusion rulemaking is before the Commission and will add part 36 to the list of subparts of 10 CFR that have such an exclusion for rule modifications. Should that rule be finalized before this proposed rule goes out for comment, Part 36 would be added to the first paragraph in this section and the last three paragraphs would be deleted.]**

The determination of this environmental assessment is that there will be no significant impact to the public from this action. However, the general public should note that the NRC welcomes public participation. Comments on any aspect of the Environmental Assessment may be submitted to the NRC as indicated under the **ADDRESSES** heading.

The NRC has sent a copy of the Environmental Assessment and this proposed rule to every State Liaison Officer and requested their comments on the Environmental Assessment. The Environmental Assessment may be examined at the NRC Public Document, Room O-1F23, 11555 Rockville Pike, Rockville, MD 20852. The Environmental Assessment may also be viewed and downloaded electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> by searching for Docket Number ID NRC-2010-xxxx.

#### **IX. Paperwork Reduction Act Statement**

This proposed rule does not contain new or amended information collections that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq).

553; the NRC is proposing to adopt the following amendments to 10 CFR parts 30, 36, 39, 51, 70, and 150.

**PART 30 - RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL**

1. The authority citation for Part 30 continues to read as follows:

AUTHORITY: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 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); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 549 (2005).

Section 30.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102-486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In § 30.4, the definition for the term "commencement of construction" is revised, and the term "construction" is added, to read as follows:

**§ 30.4 Definitions.**

\* \* \* \* \*

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

*a reasonable nexus to*

X (1) ~~A reasonable nexus to~~ radiological health and safety; or

X (2) ~~A reasonable nexus to the~~ Common defense and security.

\* \* \* \* \*

X *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 are safety or security related. 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 (such as, 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, such as 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 <sup>that</sup> ~~which~~ has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.

\* \* \* \* \*

3. Section 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

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

(1) ~~A reasonable nexus to~~ <sup>a reasonable nexus to</sup> Radiological health and safety; or

(2) ~~A reasonable nexus to the~~ <sup>a reasonable nexus to</sup> Common defense and security.

\* \* \* \* \*

*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 are safety or security related. 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 (such as, 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, such as 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

X (9) Taking any other action <sup>that</sup> ~~which~~ has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.

\* \* \* \* \*

6. Section 36.13, paragraph (a) is revised to read as follows:

**§ 36.13 Specific licenses for irradiators.**

(a) The applicant shall satisfy the general requirements specified in §§ 30.33(a)(1)-(4) and 30.33(b) of this chapter and the requirements contained in this part.

7. Section 36.15 is re-titled and revised to read as follows:

\* \* \* \* \*

*Commencement of construction* means taking any action defined as "construction" or any site preparation activity at the site of a facility subject to the regulations in this part that has;

a reasonable nexus to

(1) ~~A reasonable nexus to~~ radiological health and safety; or

(2) ~~A reasonable nexus to the~~ common defense and security.

\* \* \* \* \*

*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 are safety or security related. 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 (such as, 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, such as 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

X (9) Taking any other action <sup>that</sup> ~~which~~ has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.

\* \* \* \* \*

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

**§ 40.32 General requirements for issuance of specific licenses.**

\* \* \* \* \*

which may also be used to house a facility (e.g., the construction of a college laboratory building with space for installation of a training reactor).

X (2) For materials licenses, taking any site-preparation activity at the site of a facility subject to the regulations in Parts 30, 36, 40, and 70, <sup>that</sup> ~~which~~ has a reasonable nexus to radiological health and safety or the common defense and security; provided, however, that construction does not mean:

- X (i) Those actions or activities listed in paragraphs (1)(ii)(a) – (h) of this definition; or
- (ii) Taking any other action <sup>that</sup> ~~which~~ has no reasonable nexus to radiological health and safety or the common defense and security.

\* \* \* \* \*

## PART 70 – DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

15. The authority citation for part 70 continues to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282, 2297f); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846). Sec. 193, 104 Stat. 2835 as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243); 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 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161).

Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).  
Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also  
issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and  
70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.81  
also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.82 also  
issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

16. In § 70.4 the definition for the term "commencement of construction" is revised,  
and the term "construction" is added, to read as follows:

**§ 70.4 Definitions.**

\* \* \* \* \*

*Commencement of construction* means taking any action defined as "construction" or

X any site-preparation activity at the site of a facility subject to the regulations in this part that has:

a reasonable nexus to

X (1) ~~A reasonable nexus to~~ radiological health and safety; or

X (2) ~~A reasonable nexus to the~~ common defense and security.

\* \* \* \* \*

*Construction* means the installation of foundations, or in-place assembly, erection,

X fabrication, or testing for any structure, system or component of a facility or activity subject to  
the regulations in this part that are safety or security related. 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 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 (such as, 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, such as 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 <sup>that</sup> ~~which~~ has no reasonable nexus to:

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

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

X (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 are safety or security related. The term "construction" does not include:

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

(ii) 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;

(iii) 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;

(iv) 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;

(v) Excavation;

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: Commissioner Apostolakis  
SUBJECT: SECY-10-0018 – PROPOSED RULEMAKING TO  
REVISE THE DEFINITION OF CONSTRUCTION IN  
10 CFR PARTS 30, 36, 39, 40, 51, 70, AND 150  
(M081211 – STAFF REQUIREMENTS)

Approved  X  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_ Attached \_\_\_ None  X



\_\_\_\_\_  
SIGNATURE

May 14, 2010  
DATE

Entered on "STARS" Yes  x  No \_\_\_\_\_

**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** COMMISSIONER MAGWOOD  
**SUBJECT:** SECY-10-0018 – PROPOSED RULEMAKING TO  
REVISE THE DEFINITION OF CONSTRUCTION IN  
10 CFR PARTS 30, 36, 39, 40, 51, 70, AND 150  
(M081211 – STAFF REQUIREMENTS)

Approved  Disapproved  Abstain

Not Participating

COMMENTS: Below  Attached  None

  
\_\_\_\_\_  
SIGNATURE

5 - 28 - 10  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No

## COMMISSIONER MAGWOOD's Comments on SECY-10-0018

I approve the 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, subject to the attached edits. I also support the revisions provided by Commissioner Svinicki and Commissioner Ostendorff.

The proposed rulemaking is a long-overdue step toward bringing the agency's approach to overseeing the development of fuel cycle and other materials facilities into step with our approach to the development of reactor facilities. The existing approach to regulating the construction of facilities impacted by the proposed amendments places burdens on applicants that do not provide benefits to radiological health and safety, common defense and security, or environmental protection but do add to the difficulty of building these facilities in the United States. The staff proposal provides a very good explanation of the types of activities that would be permitted under the proposed amendments and, appropriately in my view, excludes any preparatory work at in-situ leaching facilities that would have radiological health and safety implications, particularly installation of production wells.

I encourage the staff to review stakeholder comments closely in order to identify any unintended consequences that might arise from implementation of the proposed amendments.

Patricia M. Buler for 5/28/10  
William D. Magwood, IV      Date

- (1) A reasonable nexus to radiological health and safety; or
- (2) A reasonable nexus to the common defense and security.

\* \* \* \* \*

*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 are ~~safety or security related~~ related to radiological safety or security. The term "construction" does not include:

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

Field

(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;

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

- (1) A reasonable nexus to radiological health and safety; or
- (2) A reasonable nexus to the common defense and security.

\* \* \* \* \*

*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 are ~~safety or security related~~ 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;
- (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;

Field

\* \* \* \* \*

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

- (1) A reasonable nexus to radiological health and safety; or
- (2) A reasonable nexus to the common defense and security.

\* \* \* \* \*

*Construction* means the installation of production 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 ~~safety or security related~~ 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;

Field Code Changed

Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.81 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.82 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

16. In § 70.4 the definition for the term "commencement of construction" is revised, and the term "construction" is added, to read as follows:

**§ 70.4 Definitions.**

\* \* \* \* \*

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

- (1) A reasonable nexus to radiological health and safety; or
- (2) A reasonable nexus to the common defense and security.

\* \* \* \* \*

*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 are ~~safety or security related~~ related to radiological safety or security. The term "construction" does not include:

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

(A) The term *commencement of construction* means taking any action defined as "construction" or any site-preparation activity at the site of a facility subject to the regulations in this part that has:

- (i) A reasonable nexus to radiological health and safety, or
- (ii) A reasonable nexus to the common defense and security.

(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 are ~~safety or security related~~ related to radiological safety or security. The term "construction" does not include:

- (i) Changes for temporary use of the land for public recreational purposes;
- (ii) 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;
- (iii) 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;

Field

**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** COMMISSIONER OSTENDORFF  
**SUBJECT:** SECY-10-0018 – PROPOSED RULEMAKING TO  
REVISE THE DEFINITION OF CONSTRUCTION IN  
10 CFR PARTS 30, 36, 39, 40, 51, 70, AND 150  
(M081211 – STAFF REQUIREMENTS)

Approved  X  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below  X  Attached  X  None \_\_\_\_\_

I approve publication of the proposed rule, subject to the attached edits. I also approve Commissioner Svinicki's edits reflected in her vote.

  
\_\_\_\_\_  
SIGNATURE

5/26/10  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  X  No \_\_\_\_\_

**Commissioner Ostendorff's Comments on SECY-10-0018**  
**Proposed Rulemaking to Revise the Definition of Construction in 10 CFR Parts 30, 36, 39,**  
**40, 51, 70, and 150.**

I appreciate the work done by the Office of the General Counsel to develop this proposed rule. The practical result of this rulemaking will be an efficient regulatory scheme for the licensing of materials facilities that will be subject to the rule. I believe that the rulemaking will eliminate unnecessary regulatory burdens, and provide much-needed consistency to our regulations. However, I feel it is important to emphasize one point. The Commission explained in the 2007 LWA rule that its legal authority under the Atomic Energy Act only extends to activities for which a reasonable nexus to radiological health and safety can be established. I have reviewed the NRC's legal analysis in that rulemaking, and firmly agree with its conclusions. Therefore, in my view, the result of this rulemaking is one that is legally compelled by the limits of our organic statute, and not just a matter of improving regulatory efficiency and clarity. However, I recognize that these are complicated matters, and in practice, it may not always be clear what construction activities fall under or are excluded from the NRC's authority. Therefore, I think it is important to solicit comments from our stakeholders on the specific application and implications of the definitions in this proposed rule to the construction of these facilities. But in obtaining stakeholder input, we should not lose site of the statutory limitations on this agency's authority.

Finally, I note that the proposed rule indicates its compliance with the President's 1998 memorandum on "Plain Language in Government Writing." In addition, the NRC's own Principles of Good Regulation state that "Regulations should be coherent, logical, and practical. ... Agency positions should be readily understood and easily applied." However, I would observe that some of the main provisions of this proposed rule, namely sections 30.33(a)(5), 40.32(e), and 70.23(a)(7), are not, in my opinion, especially clear. I would therefore encourage the staff, after obtaining stakeholder comment on the proposed rule, to consider redrafting and reorganizing these sections to improve the clarity of these sections to meet the President's Plain Language goals and this agency's own Principles of Good Regulation.

WCO COMMENTS

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 36, 39, 40, 51, 70, and 150

RIN xxxx-xxxx  
[NRC-2010-xxxx]

Licenses, Certifications, and Approvals for Material Licensees

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule; correcting amendment.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations by revising the provisions applicable to the licensing and approval processes for byproduct, source and special nuclear material licenses, and irradiators. The proposed changes would clarify the definitions of "construction" and "commencement of construction" with respect to materials licensing actions instituted pursuant to 10 CFR Parts 30, 36, 40, and 70, and make conforming changes, as necessary, in 10 CFR Parts 51 and 150. In addition, this action also contains a correction to a typographical error in the final regulation for 10 CFR Part 39, which was published in the *Federal Register* of Tuesday, March 17, 1987 (52 Fed. Reg. 8225), and amended the NRC's regulations to specify license requirements for the use of licensed radioactive materials in well logging. The NRC is undertaking this rulemaking action to conform its regulations to the scope of its regulatory authority under the Atomic Energy Act of 1954, as amended, to improve the effectiveness and efficiency of the licensing and approval processes for future applications, as well as resolve certain inconsistencies that currently exist within the NRC's regulations with respect to the use and definition of the terms "construction" or "commencement of construction" for certain materials licensees.

exploration, construction of roads necessary for site exploration, borings to determine foundation conditions, or other pre-construction monitoring or testing to establish background information related to the suitability of the site or the protection of environmental values. Similar prohibitions on construction exist with respect to 10 CFR Parts 30, 36, and 70.

Currently, a Part 40 licensee or applicant may only engage in site preparation activities beyond site exploration if the applicant or licensee requests, and is granted, either a specific license to conduct such activities under Part 40, or an exemption from § 40.32(e). Although the staff indicated that exemptions from 10 CFR 40.32(e) have been utilized in the past to allow site preparation activities prior to licensing, and that appropriate exemptions continue to be an available alternative for applicants, the Commission noted during the December 11, 2008, briefing that this manner of regulation was inappropriate for long term resolution of the issue. Following the briefing, the Commission received a letter from the Nuclear Energy Institute (NEI) dated May 3, 2009, in which NEI expressed its support of the Commission's memorandum directing staff to initiate a rulemaking regarding 10 CFR 40.32 (ADAMS Accession No. ML090710372).

## **II. Discussion**

On October 9, 2007, the NRC issued a final rule amending the regulation defining "construction" for utilization and production facilities and amending the requirements applicable to limited work authorizations (LWAs) for nuclear power plants (LWA rulemaking). 72 Fed. Reg. 57416 (Oct. 9, 2007); corrected at 73 Fed. Reg. 22786 (Apr. 28, 2008) (ADAMS Accession Nos. ML071210205 and ML081050554). As part of that rulemaking, the Commission modified the scope of activities that are considered construction for which a construction permit, combined license, or LWA is necessary; specified the scope of construction activities that may be

performed under a LWA; and changed the review and approval process for LWA requests. The NRC's modified definition for "construction" expressly excludes site exploration; preparation of the site for construction of a facility (e.g., clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas); erection of fences and other access control measures; excavations; erection of support buildings for use in connection with the construction of the facility; building of service facilities; procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; as well as some activities that are nuclear power reactor specific. In undertaking the LWA rulemaking, the NRC recognized that the Atomic Energy Act of 1954, as amended (AEA) does not authorize the NRC to require an applicant to obtain permission before undertaking site preparation activities, of the type listed above, that do not implicate radiological health and safety or common defense and security considerations. 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007).

The Atomic Energy Commission (AEC) (the NRC's predecessor agency) prohibited pre-licensing construction of nuclear power plants arises in the agency's initial 1960 definition of construction for production and utilization facilities. 25 Fed. Reg. 8712 (Sept. 9, 1960). In 1972, the AEC expanded its definition of construction and developed the LWA process, whereby applicants for nuclear power plant licenses were permitted to engage in site preparation activities, including excavation and other on-site activities before a construction permit was issued. 37 Fed. Reg. 5745 (Mar. 21, 1972). The agency's 1972 rulemaking was a direct result of the enactment of the National Environmental Policy Act of 1969 (NEPA), and the Commission's implementation of that statute.<sup>1</sup> The LWA process remained largely unchanged until the 2007 LWA rulemaking.

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<sup>1</sup> See *Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4)*, CLI-

would also result in similar commitments of resources, and accordingly, the NRC amended Parts 30 and 70 to conform to the amendments effectuated in Part 40.

The 2007 LWA rulemaking examined the nature and extent of the NRC's responsibilities under NEPA, and based upon that evaluation the NRC revised the definition of construction in 10 CFR 50.10 to expressly exclude certain activities. The NRC determined that its NEPA obligations and responsibilities arise only when the Commission undertakes a Federal action within the agency's statutory responsibility. 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007). Specifically, the NRC noted that NEPA, essentially a procedural statute, does not expand the NRC's jurisdiction beyond the scope of the AEA. *Id.* The NRC further determined that,

[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.

71 Fed. Reg. 61330, 61332 (Oct. 17, 2006); *see also* 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007).

In light of the foregoing, the NRC amended its definition of construction in § 50.10 and its NEPA regulations in 10 CFR Part 51 to include a definition of construction that was consistent with the § 50.10 definition and the NRC's authority under the AEA. Given the NRC's determination that

(6) Erection of support buildings (such as, 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, such as 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 which has no reasonable nexus to:

(i) Radiological health and safety, or

(ii) Common defense and security.

\* \* \* \* \*

3. Section 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

Comment [A1]: In preparation of the final rule and in consideration of public comments, staff should revise this paragraph for better clarity consistent with the NRC's Principles of Good Regulation, and the President's memorandum on Plain Language in Government Writing.

(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.

**Comment [A2]:** In preparation of the final rule and in consideration of public comments, staff should revise this paragraph for better clarity consistent with the NRC's Principles of Good Regulation, and the President's memorandum on Plain Language in Government Writing.

\* \* \* \* \*

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

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

AUTHORITY: Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953, (42 U.S.C. 2201, 2297f); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95-604, Title II, 92 Stat. 3033-3041; and sec. 193, Pub. L. 101-575, 104 Stat. 2835 (42 U.S.C. 2243).

(i) Radiological health and safety, or

(ii) Common defense and security.

\* \* \* \* \*

17. Section 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 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 this conclusion is grounds for denial to possess and use special nuclear material in the plant or facility.

\* \* \* \* \*

Comment (A3): In preparation of the final rule and in consideration of public comments, staff should revise this paragraph for better clarity consistent with the NRC's Principles of Good Regulation, and the President's memorandum on Plain Language in Government Writing.