

RULEMAKING ISSUE
(Notation Vote)

February 5, 2010

SECY-10-0018

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

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

PURPOSE:

To request Commission approval to publish a proposed rule, in the *Federal Register*, revising the definitions of “construction” and “commencement of construction” in Title 10 of the Code of Federal Regulations (CFR) Parts 30, 36, 40, and 70, and making conforming changes, as necessary, in 10 CFR Parts 39, 51, and 150. The proposed rule would resolve inconsistencies in the NRC’s regulations that currently exist between various Parts of Title 10 with respect to the terms “construction” and “commencement of construction,” and would enable applicants for materials licenses to engage in non-safety or non-security related site preparation activities not related to radiological health and safety or common defense and security considerations without being in violation of the NRC’s licensing requirements. Such activities may include 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.

SUMMARY AND BACKGROUND:

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

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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.

During the December 11th briefing, concern was expressed regarding a Part 40 applicant's inability to engage in site preparation activities due to the broad prohibition against construction that is in 10 CFR 40.32(e). In particular, the climate in some regions of the country limits the window of opportunity materials license applicants have to perform site preparation and construction activities. Following the uranium recovery activities 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 decision directing staff to initiate a rulemaking.

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 has concluded that the proposed license should be issued. For the purposes of this section, the term "commencement of construction" is defined broadly as meaning any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site. Under § 40.32(e), "commencement of construction" is not intended to mean site exploration, roads necessary for site exploration, borings to determine foundation conditions, or other preconstruction monitoring or testing to establish background information related to the suitability of the site or the protection of environmental values.

Under the existing regulations, if a Part 40 applicant wants to engage in site preparation activities beyond site exploration, the only option available to the applicant is to request an exemption from the restriction in § 40.32(e) in accordance with 10 CFR 40.14. Staff indicated that the review time for an exemption request is approximately three to four months. Several participants at the December 11th briefing noted that the development of a process that would resemble a limited work authorization for Part 40 licenses would be more efficient in the long run than reliance on the stop-gap measure provided by ad hoc exemption requests. During the briefing, the Commission indicated that regulation through exemption was not its preferred method of regulating its licensees, and the SRM issued on January 8, 2009, directed that staff determine whether a limited work authorization provision would be appropriate for in-situ uranium facilities within the context of a proposed rulemaking to revise § 40.32(e).

DISCUSSION:

The Office of General Counsel (OGC) has reviewed 10 CFR 40.32(e) to determine whether limited work authorization provisions are appropriate for in-situ uranium facilities. In considering the matter, OGC first reviewed the history and origin of the definition of "commencement of construction" in 10 CFR 40.32. OGC also considered the number, scope, and nature of the recent requests the NRC has received from applicants and licensees for exemptions from the requirements of 10 CFR 40.32. Finally, OGC looked to the NRC's most recent examination of the construction definition and limited work authorizations within the context of a rulemaking pertaining to Part 50 (and Part 52) licenses for nuclear power plants.

The Atomic Energy Commission (AEC) initially codified the prohibition against construction that currently exists in 10 CFR 40.32(e) in 1972 as part of a comprehensive rulemaking that made

uniform the definitions for “commencement of construction” and the requirement that the environmental review be concluded prior to the commencement of construction of the materials facilities under Parts 30, 40, 50, and 70. 37 Fed. Reg. 5745 (Mar. 21, 1972). The amendments to Parts 30, 40, 50, and 70 were initiated to make the agency’s regulations,

[C]onsistent with the direction of the Congress, as expressed in section 102 of the National Environmental Policy Act of 1969, that, to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in that Act.

37 Fed. Reg. at 5746

The limitation on construction remained unchanged until the passage of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), which amended the Atomic Energy Act of 1954 (AEA) as it pertained to uranium mills and byproduct material. At that time, the NRC amended its regulations in Parts 30, 40, 70, and 150 to require that an environmental review be completed by the NRC prior to commencement of construction of a mill which produces byproduct material. 45 Fed. Reg. 65521 (Oct. 3, 1980). However, more importantly, the NRC determined that this requirement should be uniform among all plants and facilities in which byproduct, source, and special nuclear material are used and possessed. Accordingly, the NRC made the conforming changes in Parts 30, 40, 70, and 150. The construction prohibition in these sections remains largely unchanged today.

Since December 2008, the Commission has received several requests for exemption from the construction prohibitions and definitions that are in 10 CFR 30.4, 30.33(a)(5), 40.4, 40.32(e), 70.4, and 70.23(a)(7). The majority of these requests have been submitted on behalf of applicants and licensees for enrichment facilities. The scope and nature of these requests have been limited to site preparation activities such as clearing of land, site grading, and construction of access roadways, utilities, parking lots, and administrative buildings.

Recently, the Commission had an opportunity to consider the issue of pre-construction site preparation work performed by Part 50 (and Part 52) licensees and applicants at nuclear power plants. In 2007, the NRC issued a final rule amending the regulations applicable to limited work authorizations for nuclear power plants (LWA rulemaking). 72 Fed. Reg. 57416 (Oct. 9, 2007); corrected at 73 Fed. Reg. 22786 (Apr. 28, 2008). As part of that rulemaking, the NRC modified the scope of activities that are considered construction and 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. A LWA allows a Part 50 (or Part 52) applicant to engage in certain site preparation activities that would otherwise be considered construction prior to the NRC’s issuance of a construction permit or combined license. The LWA activities could be either safety-related or non safety-related. After noting that the AEA does not require an applicant to obtain permission before undertaking site preparation activities that do not implicate radiological health and safety or common defense and security, the NRC developed a definition of construction that excluded certain preparatory activities.

The 2007 LWA rulemaking revised the definition of construction in 10 CFR 50.10 to expressly exclude certain activities and examined the nature and extent of the NRC’s responsibilities under the National Environmental Policy Act of 1969, as amended (NEPA) in light of the

exclusions of these activities. The NRC determined that its NEPA obligations and responsibilities arise only when the NRC undertakes a “Federal” action. 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007). With respect to the site-preparation activities excluded from the LWA definition of construction, the NRC noted that such activities do not have a reasonable nexus to radiological health and safety or the common defense and security, and as such, were “non-Federal actions.” Accordingly, these site preparation activities are not subject to the requirements of NEPA as a result of NRC’s AEA authority. Given the foregoing, the NRC amended its NEPA regulations in 10 CFR Part 51 to include a definition of construction that was consistent with the § 50.10 definition. The NRC’s determination that certain site preparation activities did not constitute construction affected the scope of the agency’s review of such activities for NEPA purposes. The NRC concluded that because these site preparation activities lacked a reasonable radiological nexus to radiological health and safety or common defense and security, and did not require NRC approval or oversight, these activities were non-Federal activities within the context of NEPA (they were not an environmental effect of the federal action being reviewed). The NRC further determined that the effects of these non-Federal activities would only be considered in the agency’s environmental review to that extent necessary to establish an environmental baseline against which the incremental effect of the NRC’s subsequent major Federal action (i.e., issuance of a license) would be measured. See 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007).

While the NRC recognized the need for uniformity in approving conforming amendments when it modified the “commencement of construction” provisions to identify what constituted construction in 1980, no conforming amendments were made to the materials licensing regulations when the LWA rule was finalized and the definition of construction for reactors was modified in 2007. As a result of the LWA rulemaking, the terms “construction” and “commencement of construction” do not have a consistent meaning within all of the NRC’s regulations.

In approaching the instant rulemaking, OGC believes that a consistent NRC policy would provide for a more efficient and effective licensing process. Historically, the NRC has maintained a certain degree of consistency among Parts 30, 40, 50, 51, 52, and 70 of its regulations. The LWA rulemaking caused the NRC’s regulations to become misaligned in that it only modified Parts 50, 51, and 52. As such, Parts 50, 51, and 52 now identify certain activities related to the licensing of nuclear power reactors that do not constitute construction requiring NRC review under its regulatory or NEPA responsibilities. Through the instant proposed rulemaking, OGC recommends that the definition of “construction” adopted by the NRC for Part 51 in 2007 be applied not only to materials licenses in Part 40, but uniformly in Parts 30, 36, and 70, as well.

In the UMTRCA-related rulemaking, the NRC found that construction activities at 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] 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). Consequently, the NRC’s regulations did not authorize LWA’s for such facilities. In light of these concerns, which continue to be applicable to such facilities today, OGC is not recommending that the agency allow a LWA, which would allow materials applicants to engage in construction activities that may impact radiological health and safety or common defense and security, would be necessary or appropriate within the context of materials licensing.

Moreover, it is unclear whether the licensing process for materials licenses would be enhanced by a LWA process that allows 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 in situ recovery (formerly known as in situ leach recovery) facilities or uranium enrichment facilities. A review of the exemption requests received by the Commission indicates that most requests would have been rendered unnecessary merely by an alignment of the definition for construction with the definition in Part 51. Accordingly, OGC proposes that the Commission revise and conform the terms “construction” or “commencement of construction” as they appear in Parts 30, 36, 40, and 70 to the definitions used in Parts 50, 51, and 52 implemented by the LWA rulemaking, modified to reference non-nuclear power plant licensees. Additionally, conforming changes should also be made in 10 CFR 51.45(c) and 150.13(b)(3)(iv), and a typographical correction made in 10 CFR 39.13(a). Nonetheless, OGC recommends that comments be solicited on the issue of whether a LWA process would be appropriate for all, or some, materials licenses.

Finally, an unrelated error in the NRC’s regulations warrants correction and should be addressed in the proposed rulemaking. In reviewing the regulations pertaining to materials licenses, OGC discovered a typographical error in 10 CFR § 39.13(a). Part 39 was promulgated in 1987 by the NRC to specify radiation safety requirements for the use of licensed material in well-logging operations. See 52 Fed. Reg. 8225 (March 17, 1987). Section 39.13(a) directs applicants for a specific license for well logging to satisfy the general requirements in § 30.33 for byproduct material, § 40.32 for source material, and § 70.33 for special nuclear material. However, § 70.33 pertains to renewal of licenses and not to general requirements for special nuclear material licensing. The general requirements regulation for special nuclear material licenses is in § 70.23. OGC believes that the reference to § 70.33 in the current version of § 39.13(a) is the result of a typographical error, and is proposing a corrective amendment so that the reference for the general requirements for special nuclear material licenses will refer to § 70.23.

RESOURCES:

Currently, exemption requests submitted by applicants for materials licenses are reviewed on an *ad hoc* basis. The Offices of Federal and State Materials and Environmental Management Programs (FSME) and Nuclear Material Safety and Safeguards (NMSS) indicate that the staff resources used for each exemption request averages approximately 200 hours (100 hours for the technical review and 100 hours for the environmental review). In comparison, OGC projects that this rulemaking, in which OGC has been designated the lead, would require a one-time resource allocation in FY 2011 of approximately 0.1 full-time equivalent position (FTE) which has been requested through the FY 2011 Planning, Budget, and Performance Management Process. In addition, FSME has requested 0.1 FTE in their FY 2011 budget to review, consult, and provide input to OGC. This activity would be in addition to work on guidance documents that are already planned or started, and assumes that some of the previously planned work will be subsumed by the changes required by the rule.

COORDINATION:

FSME and NMSS reviewed the proposed rule language and have provided comments. OGC also consulted the OCFO, which has no objections.

RECOMMENDATION:

That the Commission approve for publication, in the *Federal Register*, the proposed amendments to Parts 30, 36, 39, 40, 51, 70, and 150 for public comment.

/RA/

Stephen G. Burns
General Counsel

Enclosure: Federal Register Notice

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 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.

DATES: Submit comments by (**insert date 60 days from date of publication**). Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC-2010-xxxx in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC website and on the Federal rulemaking website Regulations.gov. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Website: Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2010-xxxx. Address questions about NRC dockets to Carol Gallagher 301-492-3668; e-mail Carol.Gallagher@nrc.gov.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301-415-1677.

Hand-deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm Federal workdays. (Telephone 301-415-1677)

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

You may submit comments on the information collections by the methods indicated in the Paperwork Reduction Act Statement.

You can access publicly available documents related to this proposed rule using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr.resource@nrc.gov.

Federal Rulemaking Website: Public comments and supporting materials related to this proposed rule can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2010-XXXX.

FOR FURTHER INFORMATION CONTACT: Ms. Tracey Stokes, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: (301) 415-1064; e-mail: tracey.stokes@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

II. Discussion

III. Discussion of Proposed Amendments by Section

IV. Availability of Documents

V. Agreement State Compatibility

VI. Plain Language

VII. Voluntary Consensus Standards

VIII. Environmental Impact – Categorical Exclusion

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I. Background

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 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.¹ The LWA process remained largely unchanged until the 2007 LWA rulemaking.

¹ 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 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.

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 licenses under these parts be filed at least 9 months prior to commencement of construction of plants or facilities in which the licensed activities 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

proposed amendments, provided that such activities were conducted so as to minimize their environmental impact, and to conform the time for filing applications for plutonium process and fuel fabrication plants to 9 months prior to commencement of construction. 37 Fed. Reg. 5745 (Mar. 21, 1972).

In response to the requirements imposed by the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), the NRC again amended Part 40 to require that a final environmental assessment be completed by the NRC prior to commencement of construction of a mill that produces byproduct material. 45 Fed. Reg. 65521 (Oct. 3, 1980). In reaching this decision, the NRC noted that,

[M]illing results in the production of large quantities of byproduct material as tailings per year. When construction of a mill commences, nearly irrevocable commitments are made regarding tailings disposal. Given that each mill tailings pile constitutes a low-level waste burial site containing long-lived radioactive materials, the Commission believes that prudence requires that specific methods of tailings disposal, mill decontamination, site reclamation, surety arrangements, and arrangements to allow for transfer of site and tailings ownership be worked out and approved before a license is granted.

Id. at 65529. The NRC concluded that commencement of construction of other types of plants and facilities in which byproduct, source, and special nuclear materials are used and possessed 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. 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 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 healthy 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

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,² 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]

² 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

consistent with the underlying concept that these site preparation activities do not result from Federal approval of activities within the responsibility of the NRC under the AEA and, therefore, they will have relevance to the NRC action only to the extent that the impacts of those activities influence an analysis of any subsequent licensing action's cumulative environmental impacts.

The NRC is also proposing a typographical correction to the regulations in 10 CFR 39.13(a). Part 39 was promulgated in 1987 by the NRC to specify radiation safety requirements for the use of licensed material in well-logging operations. See 52 Fed. Reg. 8225 (March 17, 1987). Section 39.13(a) directs applicants for a specific license for well logging to satisfy the general requirements in § 30.33 for byproduct material, § 40.32 for source material, and § 70.33 for special nuclear material. However, § 70.33 pertains to renewal of licenses and not to general requirements for special nuclear material licensing. The general requirements regulation for special nuclear material licenses is in § 70.23. The NRC believes that the reference to § 70.33 in the current version of § 39.13(a) is the result of a typographical error, and is proposing a corrective amendment so that the reference for the general requirements for special nuclear material licenses will refer to § 70.23.

III. Discussion of Proposed Amendments by Section

§ 30.4 Definitions.

In 2007, the NRC added a definition for the term "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 site preparation 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 determination is equally applicable to the

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

Part 36 license shall satisfy both the general requirements in § 30.33 and the requirements in Part 36. Section 30.33(a)(5) contains the provision regarding commencement of construction. Section 36.15 of the existing regulations also addresses a Part 36 applicant's or licensee's obligations with respect to the commencement of construction. The prohibition on the commencement of construction imposed by § 36.15 varies from that required by § 30.33(a)(5), so that the current language in § 36.13(a) creates a conflict. The proposed amendment would resolve the matter to make it clear that the Part 36 requirements are applicable to the Part 36 licensee.

§ 36.15 Commencement of construction.

This section would be revised to add a new definition for “construction” and to modify references from “start of construction” to “commencement of construction” to create consistency in the terminology used in the NRC’s regulations. Additionally, given the proposed insertion of a new definition for “commencement of construction” in § 36.2, the definition of “construction” in this section would be deleted.

§ 39.13(a) Specific licenses for well-logging.

This section would be revised to correct a typographical error. The section contains an incorrect reference to § 70.33. The correct reference is to § 70.23.

§ 40.4 Definitions.

In 2007, the NRC added a definition for the term “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 determination is equally applicable to the licensing actions in Part 40, 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 definition of "construction" in 10 CFR 51.4.

§ 40.32(e) 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.

§ 51.4 Definitions.

The existing definition in this section for the term "construction" was added to address Part 50 nuclear power reactor licenses, and allows for possible pre-license construction through a limited work authorization that is available to Part 50 applicants, but contains language that is not, by its terms, limited to Part 50 licensees. A comparable limited work authorization is not being proposed for materials licenses. The result is that commencement of construction provisions in Parts 30, 40, and 70 refer the staff to Part 51 for an environmental review based on activities not included in the Part 51 definition of construction. To resolve these inconsistencies, the definition of "construction" would be modified to distinguish between a Part 50 licensing action and a materials licensing action. This section would be revised to add a new paragraph defining "construction" for materials licenses.

§ 70.4 Definitions.

In 2007, the NRC added a definition for the term “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 determination is equally applicable to the licensing actions in Part 70, 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 definition of “construction” in 10 CFR 51.4.

§ 70.23(a)(7) Requirements for the approval of applications.

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

§ 150.31(b)(3)(iv) Requirements for Agreement State regulation of byproduct material.

This section would be revised to modify and conform the definition for “commencement of construction” to that proposed in Parts 30, 40, and 70, such that the Agreement State meaning is consistent with that of the NRC.

IV. Availability of Documents

The NRC is making the documents identified below available to interested persons through one or more of the following methods as indicated.

Public Document Room (PDR). The NRC Public Document Room is located at 11555 Rockville Pike, Rockville, Maryland.

Rulemaking Web site (Web). The NRC’s interactive rulemaking Web site is located at <http://ruleforum.llnl.gov>. These documents may be viewed and downloaded electronically via this Web site.

NRC’s Public Electronic Reading Room (EDPR). The NRC’s electronic public reading room is located at www.nrc.gov/reading-rm.html.

The NRC staff contact. Tracey L. Stokes, Mail Stop O-15D21, Washington, DC 20555, 301-415-1064.

Document	PDR	Web	ADAMS	NRC Staff
Staff Requirements Memorandum M081211 – Briefing on Uranium Recovery, January 9, 2009	X	X	ML090080206	X
Letter from the Nuclear Energy Institute dated May 3, 2009	X	X	ML090710371	X
Limited Work Authorizations for Nuclear Power Plants; Final Rule; Correction, April 28, 2008 (73 Fed. Reg. 22786)	X	X	ML081050554	X
Limited Work Authorizations for Nuclear Power Plants; Final Rule, October 9, 2007 (72 Fed. Reg. 57416)	X	X	ML071210205	X

V. Agreement State Compatibility

Under the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” which became effective on September 3, 1997 (62 Fed. Reg. 46517), NRC program

elements (including regulations) are placed into compatibility categories A, B, C, D, NRC or adequacy category, Health and Safety (H&S). Category A includes program elements that are basic radiation protection standards or related definitions, signs, labels 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.

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:

Draft Compatibility Table for Proposed Rule

NRC Regulation Section	Change	Section Title	Compatibility Category	
			Existing	New
30.4	Amend	Definition – Commencement of Construction – paragraph 1.	D	D
30.4	New	Definition – Commencement of Construction – paragraph 2.	–	NRC
30.4	New	Definition – Construction – paragraphs 1 – 8 and 9(i).	–	D
30.4	New	Definition – Construction – paragraph 9(ii).	–	NRC
30.33(a)(5)	Amend	General requirements for issuance of specific licenses.	D	D
36.2	New	Definition – Commencement of Construction – paragraph 1.	–	D
36.2	New	Definition – Commencement of Construction – paragraph 2.	–	NRC
36.2	New	Definition – Construction – paragraphs 1 – 8 and 9(i).	–	D
36.2	New	Definition – Construction – paragraph 9(ii).	–	NRC
36.13(a)	Amend	Specific licenses for irradiators.	H&S	H&S
36.15	Amend	Commencement of construction.	D	D
39.13(a)	Amend	Specific licenses for well-logging.	H&S	H&S

NRC Regulation Section	Change	Section Title	Compatibility Category	
			Existing	New
40.4	Amend	Definition – Commencement of Construction – paragraph 1.	C - States with authority to regulate uranium mill activities (11e.(2) byproduct material) D - States without authority	C - States with authority to regulate uranium mill activities (11e.(2) byproduct material) D - States without authority
40.4	New	Definition – Commencement of Construction – paragraph 2.	–	NRC
40.4	New	Definition – Construction – paragraphs 1 – 8 and 9(i).	–	C - States with authority to regulate uranium mill activities (11e.(2) byproduct material) D - States without authority
40.4	New	Definition – Construction – paragraph 9(ii).	–	NRC
40.32(e)	Amend	General requirements for issuance of specific licenses.	H&S – States with authority to regulate uranium mill activities (11e.(2) byproduct material) NRC – States without authority	H&S – States with authority to regulate uranium mill activities (11e.(2) byproduct material) NRC – States without authority

NRC Regulation Section	Change	Section Title	Compatibility Category	
			Existing	New
51.4	Amend	Definitions.	NRC	NRC
70.4	Amend	Definition – Commencement of Construction – paragraph 1.	D	D
70.4	New	Definition – Commencement of Construction – paragraph 2.	–	NRC
70.4	New	Definition – Construction – paragraphs 1 – 8 and 9(i).	–	D
70.4	New	Definition – Construction – paragraph 9(ii).	–	NRC
70.23(a)(7)	Amend	Requirements for the approval of applications.	NRC	NRC
150.31(b)(3)(iv)	Amend	Requirements for Agreement State regulation of byproduct material.	C - States with authority to regulate uranium mill activities (11e.(2) byproduct material) D - States without authority	C - States with authority to regulate uranium mill activities (11e.(2) byproduct material) D - States without authority
150.31(b)(3)(iv) (A)	New	Requirements for Agreement State regulation of byproduct material.	–	C - States with authority to regulate uranium mill activities (11e.(2) byproduct material) D - States without authority

NRC Regulation Section	Change	Section Title	Compatibility Category	
			Existing	New
150.31(b)(3)(iv) (B)	New	Requirements for Agreement State regulation of byproduct material.	-	C - States with authority to regulate uranium mill activities (11e.(2) byproduct material) D - States without authority

VI. Plain Language

The Presidential memorandum dated June 1, 1998, entitled “Plain Language in Government Writing” directed that the Government’s writing be in plain language. This memorandum was published on June 10, 1998 (63 Fed. Reg. 31883). In complying with this directive, the NRC made editorial changes to improve the organization and readability of the existing language of the paragraphs being revised. These types of changes are not discussed further in this document. The NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the **ADDRESSES** heading of the preamble to this proposed rule.

VII. Voluntary Consensus Standards

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 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).

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

X. Regulatory Analysis

A draft regulatory analysis has not been prepared for this regulation. This rule amends the NRC regulations to conform the definitions of “construction” and “commencement of construction” as they appear in Parts 30, 36, 40, 70, and 150 to the Parts 50, 51, and 52 definitions implemented by the LWA rulemaking, modified to reference non-nuclear power plant licensees. This amendment does not impose any new burden or reporting requirements on the licensee or NRC for compliance. Also, this rule does not involve an exercise of NRC discretion and, therefore does not necessitate preparation of a regulatory analysis.

XI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if promulgated, have significant economic impact on a substantial number of small entities. This proposed rule affects only material licensees. The companies that apply for a license in accordance with the regulations affected by this proposed rule do not fall within the scope of the definition of “small entities” set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

XII. Backfit Analysis

The NRC's backfit provisions are found in the regulations at §§ 50.109, 52.39, 52.63, 52.83, 52.98, 52.145, 52.171, 70.76, 72.62, and 76.76. The requirements contained in this proposed rule do not involve any provisions that would impose backfits on nuclear power plant licensees as defined in 10 CFR Parts 50 or 52, or on licensees for gaseous diffusion plants, independent spent fuel storage installations or special nuclear material as defined in 10 CFR Parts 70, 72 and 76, respectively, and as such a backfit analysis is not required. Therefore, a backfit analysis need not be prepared for this proposed rule to address these classes of entities. With respect to Parts 30, 36, 39, and 40 licensees, the NRC has determined that there are no provisions for backfit in these parts, and as such, a backfit analysis need not be prepared for this proposed rule to address these licensees.

List of Subjects

10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 36

Byproduct material, Criminal penalties, Nuclear materials, Reporting and recordkeeping requirements, Scientific equipment, Security measures.

10 CFR Part 39

Byproduct material, Criminal penalties, Nuclear materials, Oil and gas exploration - well logging, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Source material, Special nuclear material.

10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material accounting and control, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 150

Criminal penalties, Hazardous materials transportation, Intergovernmental relations, Nuclear materials, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C.

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:

- (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

(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

Environmental Management Program or his designee, before commencement of construction of the plant or facility in which the activity will be conducted, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. Commencement of construction prior to such conclusion shall be grounds for denial of a license to receive and possess byproduct material in such plant or facility.

* * * * *

PART 36 – LICENSES AND RADIATION SAFETY REQUIREMENTS FOR IRRADIATORS

4. The authority citation for Part 36 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).

5. In § 36.2 a new definition for the terms “commencement of construction” and “construction” are added to read as follows:

§ 36.2 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. 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 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:

§ 36.15 Commencement of construction.

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

PART 39 - LICENSES AND RADIATION SAFETY REQUIREMENTS FOR WELL LOGGING

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

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

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

§ 39.13 Purpose and scope.

(a) The applicant shall satisfy the general requirements specified in § 30.33 of this chapter for byproduct material, in § 40.32 of this chapter for source material, and in § 70.23 of this chapter for special nuclear material, as appropriate, and any special requirements contained in this part.

* * * * *

PART 40 – DOMESTIC LICENSING OF SOURCE MATERIAL

10. The authority citation for Part 40 continues to read as follows:

AUTHORITY: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95–604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97–415, 96 Stat. 2067 (42 U.S.C. 2022); 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. 109–59, 119 Stat. 594 (2005).

Section 40.7 also issued under Pub. L. 95– 601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).

Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152).

Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234).

Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

11. In § 40.4, the definition for the term “commencement of construction” is revised, and the term “construction” is added, to read as follows:

§ 40.4 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. 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 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.

* * * * *

(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.

* * * * *

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).

Sections 51.20, 51.30, 51.60, 51.80, and 51.97 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241, and sec. 148, Pub. L. 100-203, 101 Stat. 1330-223 (42 U.S.C. 10155, 10161, 10168).

Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141).

Sections 51.43, 51.67, and 51.109 also issued under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

14. In § 51.4 the definition for the term “construction” is revised to read as follows:

§ 51.4 Definitions.

* * * * *

Construction means:

(1) For production and utilization facilities, the activities in paragraph (i) of this definition, and does not mean the activities in paragraph (ii) of this definition.

(i) Activities constituting construction are the driving of piles, subsurface preparation, placement of backfill, concrete, or permanent retaining walls within an excavation, installation of foundations, or in-place assembly, erection, fabrication, or testing, which are for:

(a) Safety-related structures, systems, or components (SSCs) of a facility, as defined in 10 CFR 50.2;

(b) SSCs relied upon to mitigate accidents or transients or used in plant emergency operating procedures;

(c) SSCs whose failure could prevent safety-related SSCs from fulfilling their safety-related function;

(d) SSCs whose failure could cause a reactor scram or actuation of a safety-related system;

(e) SSCs necessary to comply with 10 CFR part 73;

(f) SSCs necessary to comply with 10 CFR 50.48 and criterion 3 of 10 CFR part 50, appendix A; and

(g) Onsite emergency facilities (i.e., technical support and operations support centers), necessary to comply with 10 CFR 50.47 and 10 CFR part 50, appendix E.

(ii) Construction does not include:

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

(b) 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;

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

(d) Erection of fences and other access control measures that are not safety or security related, and do not pertain to radiological controls;

(e) Excavation;

(f) 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;

(g) Building of service facilities, such as paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, transmission lines;

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

(i) Manufacture of a nuclear power reactor under a manufacturing license under subpart F of part 52 of this chapter to be installed at the proposed site and to be part of the proposed facility; or

(j) With respect to production or utilization facilities, other than testing facilities and nuclear power plants, required to be licensed under Section 104.a or Section 104.c of the Act, the erection of buildings which will be used for activities other than operation of a facility and

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).

(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, which has a reasonable nexus to radiological health and safety or the common defense and security; provided, however, that construction does not mean:

- (i) Those actions or activities listed in paragraphs (1)(ii)(a) – (h) of this definition; or
- (ii) Taking any other action 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 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. 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 which has no reasonable nexus to:

- (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.

* * * * *

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

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

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

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

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

19. Section 150.31(b)(3)(iv) is revised to read as follows:

§ 150.31 Requirements for Agreement State regulation of byproduct material.

* * * * *

(b) * * * * *

(3) * * * * *

(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.

(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;

(vi) 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;

(vii) 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;

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

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

Dated at Rockville, Maryland, this _____ day of _____, 2010.

For the Nuclear Regulatory Commission,

Annette Vietti-Cook,
Secretary of the Commission.