

July 28, 2011

MEMORANDUM FOR: Stephen G. Burns  
General Counsel

FROM: Annette L. Vietti-Cook, Secretary **/RA/**

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 8:55 A.M.,  
THURSDAY, JULY 28, 2011, COMMISSIONERS' CONFERENCE  
ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND  
(OPEN TO PUBLIC ATTENDANCE)

I. SECY-11-0039 – Final Rule: Definition of Construction in 10 CFR Parts 30, 36, 39, 40, 51, 70, And 150

The Commission approved a final rule amending the definitions of “construction” and “commencement of construction” for materials licensees in Title 10 of the Code of Federal Regulations Parts 30, 36, 40, and 70, with conforming changes, as necessary, in 10 CFR Parts 39, 51, and 150. The amendment resolves 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.”..

Following incorporation of the attached changes, the Federal Register notice should be reviewed by the Rulemaking, Directives, and Editing Branch in the Office of Administration and forwarded to the Office of the Secretary for signature and publication.  
(EDO) (SECY Suspense: 8/29/11)

The staff should ensure that the impacts from pre-construction activities receive the proper level of evaluation and discussion as cumulative impacts in NEPA reviews for new facilities.

The staff should build on its previous experiences with oversight of construction under the Limited Work Authorization rule for new reactor construction and develop generic guidance that would provide criteria for applicants to use in evaluating whether a particular construction activity has a nexus to radiological health and safety, and thus falls under the jurisdiction of the NRC for licensing purposes. In addition, though the rule clearly lists out activities that are not considered “construction” for purposes of the rule, the staff’s guidance should also provide examples of activities that fall under each of the excepted activities.

The generic guidance should address some important considerations for potential applicants that were emphasized in the response to comments. For example, site preparation activities that are not considered to be “construction,” while not under NRC authority, may be subject to regulatory authority of another Federal, State or local agency which may require a NEPA or state environmental review. The staff also noted in responses to comments that the NRC’s

responsibilities under the National Historic Preservation Act (NHPA) must be satisfied before a license is issued. The generic guidance should notify and provide additional guidance to potential applicants about the potential need for interaction with other Federal, State, or local agencies and responsibilities under the NHPA.

Attachment: Comments and Changes to be Incorporated in the Final Rule Prior to Publication

cc: Chairman Jaczko  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff  
EDO  
CFO  
OCAA  
OCA  
OIG  
OPA  
Office Directors, Regions, ACRS, ASLBP (via E-Mail)  
PDR

## Comments and Changes to be Incorporated in the Final Rule Prior to Publication

1. On page 9, 1st full paragraph, revise the last line to read ‘ ... that the NRC does not believe ....’
2. On page 12, last paragraph, revise line 4 to read ‘ ... result from the actual ....’
3. On page 13, revise line 2 from the top to read ‘ ... as appropriate (for example Class III underground injection control permit may require State or EPA approval, and a stormwater discharge permit may require State approval).’
4. On page 14, next to last paragraph, revise line 1 to read ‘ ... commenters questions whether the ....’
5. On page 15, 2<sup>nd</sup> paragraph, revise line 16 to read ‘ ... finding that it unnecessary ....’
6. On pages 15 and 16, the response to the commenter’s concern regarding the Commission’s 2003 *Nuclear Fuel Services* decision does not appear to address the crux of the comment. The overarching concern is grounded in whether the NRC has the statutory authority under the Atomic Energy Act and National Environmental Policy Act to promulgate proposed §§ 30.33, 40.32, and 70.23. OGC should revisit this comment response and expand upon it to encompass the commenter’s statutory argument. Other parts of the *Federal Register* Notice address the question of the NRC’s authority pursuant to the AEA, so this comment response should, at the very least, cross-reference to the more fulsome explanation contained in Section III, Discussion.
7. On page 17, next to last paragraph, add a period at the end of line 4.
8. On page 19, 3<sup>rd</sup> paragraph, revise lines 1 through 4 to read ‘ ... monitoring wells that have the specific purpose of measuring radiological attributes is a construction activity. For example, installation of monitoring wells that are only intended to be used to collect background data or perform background aquifer testing would might be permissible.’
9. On page 19, 3<sup>rd</sup> paragraph, revise line 5 to read ‘ ... would not be permissible ....’
10. On page 24, 1st full paragraph, revise line 2 to read ‘ ... the NRC’s the authority ....’
11. On page 24, 2<sup>nd</sup> full paragraph, revise line 1 to read ‘ ... also questions whether ....’
12. On page 26, revise line 2 from the top to read ‘ ... in its statements of considerations.’
13. On page 27, 1st full paragraph, revise line 13 to read ‘ ... report submitted by with an application ....’
14. On page 29, revise line 1 from the top to eliminate the extra space in the word “of.”
15. On page 43, paragraph (5), revise line 4 to read ‘ ... Programs or his/her designee, before ....’
16. On page 43, paragraph (5), add the following sentence at the end: Commencement of construction as defined in Section 30.4 may include non-construction activities if the activity has a reasonable nexus to radiological safety and security.

17. On page 47, 1st full paragraph, add the following sentence at the end: Commencement of construction as defined in Section 36.2 may include non-construction activities if the activity has a reasonable nexus to radiological safety and security.
18. On page 49, 2<sup>nd</sup> full paragraph, revise lines 1 and 2 to read ‘ ... of wells associated association with ~~in-situ recovery~~ radiological operations (e.g., production, injection, or monitoring wells networks associated with in-situ recovery or other facilities), the installation ....’
19. On page 51, last paragraph, revise line 5 to read ‘ ... Programs or his/her designee, before ....’
20. On page 51, last full paragraph, add the following sentence at the end: Commencement of construction as defined in Section 40.4 may include non-construction activities if the activity has a reasonable nexus to radiological safety and security.
21. On page 56, last paragraph, revise line 6 to read ‘ ... have been or will be undertaken ....’
22. On page 59, paragraph (4), revise line 1 to read ‘ ... access control measures that are ....’
23. On page 60, paragraph (7), revise line 4 to read ‘ ... his/her designee ....’
24. On page 61, at the end of the paragraph at the top of the page add the following sentence: Commencement of construction as defined in Section 70.4 may include non-construction activities if the activity has a reasonable nexus to radiological safety and security.
25. On page 62, paragraph (B), revise line 3 to read ‘ ... this part that have a are reasonable nexus ....’
26. On page 63, paragraph (7), revise line 1 to read ‘ ... facilities (e.g., as paved ....’