



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

(FSME-10-092, October, Program, 10 CFR 30, 36, 39, 40, 51, 70, 150)

October 29, 2010

ALL AGREEMENT STATES, MICHIGAN

OPPORTUNITY TO COMMENT ON PROPOSED RULE TO AMEND 10 CFR PARTS 30, 36, 39, 40, 51, 70 AND 150 – LICENSES, CERTIFICATIONS, AND APPROVALS FOR MATERIAL LICENSEES; REOPENING OF COMMENT PERIOD (FSME-10-092)

Purpose: To notify the Agreement States that a proposed rule to amend requirements in Title 10 of the Code of Federal Regulation (CFR) Parts 30, 36, 39, 40, 51, 70, and 150 was published in the Federal Register for comment.*

Background: On January 8, 2009, the Commission issued a Staff Requirements Memorandum (ML090080206) 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 provisions are appropriate for uranium in-situ recovery facilities. 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 U.S. Nuclear Regulatory Commission (NRC) authorization from commencing construction of that plant or facility in which the activity will be conducted before the NRC's decision to issue the proposed license. Similar prohibitions on construction also exist with respect to 10 CFR Parts 30, 36, and 70. Although the exemption process has 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 that this manner of regulation was inappropriate for long-term resolution of the issue.

Discussion: The NRC is proposing to amend its regulations in Parts 30, 36, 39, 40, 51, 70, and 150 of 10 CFR, to revise the provisions applicable to the licensing and approval processes for byproduct, source and special nuclear material licensee and irradiators. The proposed change would clarify the definitions of "construction" and "commencement of construction" with respect to materials licensing actions instituted under the NRC's regulations. In addition, this action also contains a correction to a typographical error. The NRC is undertaking this rulemaking action to conform its regulations to the scope of its regulatory authority under the Atomic Energy Act of 1954, as amended, to improve the effectiveness and efficiency of the licensing and approval processes for future applications, as well as resolve certain inconsistencies that currently exist within the NRC's regulations with respect to the use and definition of the terms "construction" or "commencement of construction" for certain materials licensees.

* This information request has previously been approved by OMB 3150-0029 and was resubmitted to OMB for review of continued approval of information collection. The estimated burden per response to comply with this voluntary collection is approximately 8 hours. Send comments regarding the burden estimate to the Records and FOIA/Privacy Services Branch (T-5F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet e-mail to infocollects@nrc.gov, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202 (3150- 0029), Office of Management and Budget, Washington, DC 20503. If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the *Federal Register* on September 3, 1997 (62 FR 46517), this rule involves regulations that have been assigned compatibility categories "C," "D," "H&S," and "NRC." Section-specific compatibility designations are found in the "Agreement State Compatibility" section of the *Federal Register* notice.

The proposed rule was initially published in the *Federal Register* (75 FR 43865) on July 27, 2010. **The comment period for the proposed rule is reopened and will remain open until November 29, 2010.** The reopened comment period is published in the *Federal Register* (75 FR60341). The rule is posted at <http://www.regulations.gov> under Docket ID NRC-2010-0075. Please send your comments to the contact individual listed in the enclosure.

If you have any questions regarding this communication, please contact me at 301-415-3340 or the individual named below.

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/RA/

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Enclosures:

1. *Federal Register* Notice (75 FR 43865)
2. *Federal Register* Notice (75 FR 60341)

NUCLEAR REGULATORY COMMISSION

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

RIN 3150-AI79
NRC-2010-0075

Licenses, Certifications, and Approvals for Material Licensees

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

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 under the NRC’s regulations. In addition, this action also contains a correction to a typographical error. The NRC is undertaking this rulemaking action to conform its regulations to the scope of its regulatory authority under the Atomic Energy Act of 1954, as amended (AEA), 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 : Please include Docket ID NRC-2010-0075 in the subject line of your comments. For instructions on submitting comments see Section I of this document, for accessing documents related to this action, see Section V in the SUPPLEMENTARY INFORMATION section of this document. You may submit comments by any one of the following methods.

Federal Rulemaking Web Site: Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2010-0075. Address questions about NRC dockets to Carol Gallagher, telephone 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 301-415-1966.

Hand Deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852 between 7:30 a.m. and 4:15 p.m. during Federal workdays (Telephone 301-415-1966).

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

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:

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I. Submitting Comments

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site <http://www.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.

II. 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 a January 8, 2009, Staff Requirements Memorandum (ADAMS Accession No. ML090080206) 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 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, either a specific license to conduct such activities under Part 40, or an exemption from § 40.32(e). Although the staff indicated that exemptions from 10 CFR 40.32(e) have been utilized in the past to allow site preparation activities prior to licensing, and that appropriate exemptions continue to be an available alternative for applicants, the Commission noted during the December 11, 2008, briefing that this manner of regulation was inappropriate for long-term resolution of the issue. Following the briefing, the Commission received a letter from the Nuclear Energy Institute (NEI) dated March 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).

III. Discussion

On October 9, 2007 (72 FR 57416; corrected at 73 FR 22786 (April 28, 2008)), 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). (ADAMS Accession Nos. ML071210205 and

ML081050554). As part of that rulemaking, the Commission revised 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 an LWA; and changed the review and approval process for LWA requests. The NRC's revised 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 (October 9, 2007; 72 FR 57416), the NRC recognized that the AEA does not authorize the NRC to require an applicant to obtain permission before undertaking site preparation activities, of the type listed above, that do not implicate radiological health and safety or common defense and security considerations.

The Atomic Energy Commission (AEC) (the NRC's predecessor agency) prohibited pre-licensing construction of nuclear power plants in the agency's initial 1960 definition of construction for production and utilization facilities (25 FR 8712; September 9, 1960). On March 21, 1972 (37 FR 5745), 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. The AEC'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.

The NRC's regulations for materials licenses do not provide for pre-licensing construction activities of the type allowed Parts 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 FR 17573; September 2, 1971). The intent behind this requirement was to allow the AEC 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 FR 9786; May 28, 1971). This regulation was only applicable to plutonium processing and fuel fabrication applicants.

Thereafter, on December 1, 1971 (36 FR 22848), 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. 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 materials licenses under these parts be filed at least 9 months prior to commencement of construction of plants or facilities in which the licensed activates will be

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).

conducted; and added as a condition of issuance of the requested license that the AEC staff had made a favorable environmental review determination prior to commencement of construction of such plants or facilities. The AEC subsequently revised these regulations (38 FR 5745; March 21, 1972) 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.

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 FR 65521; October 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 October 9, 2007 (72 FR 57416, 57427) 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. Specifically, the NRC noted that NEPA, 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 FR 61330, 61332; (October 17, 2006); see also 72 FR 57416, 57427 (October 9, 2007). In light of the foregoing, the NRC amended its definition of construction in § 50.10 and its NEPA

regulations in 10 CFR Part 51 to include a definition of construction that was consistent with the § 50.10 definition and the NRC's authority under the AEA. Given the NRC's determination that 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 given the agency's position on the scope of its AEA authority, the NRC believes that the regulatory provisions themselves should be reconciled, furthering regulatory efficiency and economy. Accordingly, the NRC proposes to implement conforming amendments in 10 CFR Parts 30, 36, 40, and 70 that would establish a consistent definition of "construction" or "commencement of construction." Within the proposed definition of commencement of construction for 10 CFR Parts 30, 36, 40, and 70, the NRC has

included any activity that has a reasonable nexus to the radiological health and safety or the common defense and security with the purpose of ensuring that the types of site preparation activities instituted pursuant to the revised 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. 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 an LWA process, similar to that promulgated for 10 CFR Parts 50 and 52 licensees, should be developed for materials applicants and licensees. However, upon review, it is not clear at this time that an LWA process applicable to materials licenses is appropriate, or even necessary. 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 an LWA process that allows some safety or security-related construction to occur in advance of the license, or whether an 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 Parts 30, 40, and 70 facilities,² there is some question as to whether an LWA process is appropriate in the context of materials licensing, which would

² See UMTRCA Rulemaking, 45 FR 65521, 65529 (October 3, 1980).

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] environmental impacts, the propriety of which cannot be ascertained until [the Part 51] environmental appraisals are completed and documented.” (45 FR 65521, 65529; October 3, 1980). Accordingly, the NRC is not including in the proposed rule language an LWA process for 10 CFR Parts 30, 36, 40, or 70 licensees and applicants, and to the extent that an applicant for a 10 CFR Parts 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 an 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 revisions proposed in this rulemaking would have the effect of providing a definition of “construction” that is consistent throughout the NRC’s regulations and within 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 revised by this rulemaking. The instructive provisions in Part 51 would continue to remain applicable.

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 issued March 17, 1987 (52 FR 8225), by the NRC to specify radiation safety requirements for the use of licensed material in well-logging operations. 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 reference to § 70.33 in the current version of § 39.13(a) is the result of a typographical error, and the NRC is proposing to correct § 39.13(a) so that the reference for the general requirements for special nuclear material licenses will refer to § 70.23.

IV. Discussion of Proposed Amendments by Section

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 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.

Section 30.33 General requirements for issuance of specific licenses.

In this section, paragraph (a)(5) would be revised to delete the definition of "commencement of construction" contained in the last two sentences of the paragraph.

Section 36.2 Definitions.

In 2007, the NRC revised 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 definitions for "construction" and "commencement of construction" to be consistent with the definition adopted by the NRC in 10 CFR 51.4.

Section 36.13 Specific licenses for irradiators.

In this section, paragraph (a) 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.

Section 36.15 Commencement of construction.

This section would be revised 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 revised definition for “commencement of construction” in § 36.2, the definition of “construction” in this section would be deleted.

Section 39.13 Specific licenses for well-logging.

In this section, paragraph (a) would be revised to correct a typographical error. The reference to § 70.33 would be revised to read § 70.23.

Section 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 definition for “construction” and conform the definition for “commencement of construction” to be consistent with the definition of “construction” in 10 CFR 51.4.

Section 40.32 General requirements for issuance of specific licenses.

In this section, paragraph (e) would be revised to delete the definition of “commencement of construction” contained in the last two sentences of the paragraph.

Section 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 revised to distinguish between a Part 50 licensing action and a materials licensing action. This section would be revised to add a paragraph defining “construction” for materials licenses.

Section 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 definition for “construction” and conform the definition for “commencement of construction” to be consistent with the definition of “construction” in 10 CFR 51.4.

Section 70.23 Requirements for the approval of applications.

In this section, paragraph (a)(7) would be revised to delete the definition of “commencement of construction” contained in the last two sentences of the paragraph.

Section 150.31 Requirements for Agreement State regulation of byproduct material.

In this section, paragraph (b)(3)(iv) 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.

V. Availability of Documents

You can access publicly available documents related to this document, including the following documents, 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, Room O-1F21, 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, or 301-415-4737, or by e-mail to PDR.Resource@nrc.gov.

Federal Rulemaking Web Site: Public comments and supporting materials related to this proposed rule can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2010-0075.

Document	PDR	Web	ADAMS	NRC Staff
Staff Requirements Memorandum – Briefing on Uranium Recovery, January 9, 2009	X	X	ML090080206	X
Letter from the Nuclear Energy Institute dated March 3, 2009	X	X	ML090710372	X
Limited Work Authorizations for Nuclear Power Plants; Final Rule; Correction, April 28, 2008 (73 FR 22786) (Docket ID NRC-2008-0222)	X	X	ML081050554	X
Limited Work Authorizations for Nuclear Power Plants; Final Rule, October 9, 2007 (72 FR 57416) (Docket ID NRC-2008-0222)	X	X	ML071210205	X

VI. Agreement State Compatibility

Under the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” which became effective on September 3, 1997 (62 FR 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 AEA 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

NRC Regulation Section	Change	Section Title	Compatibility Category	
			Existing	New
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
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

NRC Regulation Section	Change	Section Title	Compatibility Category	
			Existing	New
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
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

NRC Regulation Section	Change	Section Title	Compatibility Category	
			Existing	New
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
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

VII. 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 FR 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.

VIII. 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. 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 that 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.

IX. Environmental Impact – Categorical Exclusion

The NRC has determined that the changes made in this rule to Parts 30, 36, 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.

X. Paperwork Reduction Act Statement

This proposed rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing information collection requirements were approved by the Office of Management and

Budget, control numbers 3150-0017, 3150-0158, 3150-0130, 3150-0020, 3150-0021, 3150-0009, and 3150-0032.

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.

XI. Regulatory Analysis

A draft regulatory analysis has not been prepared for this regulation. This rule amends the NRC's 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, revised 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.

XII. 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 a 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).

XIII. 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, 40, 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 in alphabetical order to read as follows:

§ 30.4 Definitions.

* * * * *

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

- (1) Radiological health and safety; or
- (2) 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 related to radiological safety or security. The term “construction” does not include:

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

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

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

(5) Excavation;

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

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

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

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

(i) Radiological health and safety, or

(ii) Common defense and security.

* * * * *

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

§ 30.33 General requirements for issuance of specific licenses.

(a) * * *

(5) In the case of an application for a license to receive and possess byproduct material for the conduct of any activity which the NRC determines will significantly affect the quality of the environment, the Director, Office of Federal and State Materials and Environmental Management 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, definitions for the terms “commencement of construction” and “construction” are added in alphabetical order 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 a reasonable nexus to:

- (1) Radiological health and safety; or
- (2) 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 related to radiological safety or security. The term “construction” does not include:

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

of the site, the environmental impacts of construction or operation, or the protection of environmental values;

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

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

(5) Excavation;

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

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

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

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

(i) Radiological health and safety, or

(ii) Common defense and security.

* * * * *

6. In § 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 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 of this chapter. Any activities undertaken prior to the issuance of a license are entirely at the risk of the applicant and have no bearing on the issuance of a license with respect to the requirements of the Atomic Energy Act of 1954 (Act), as amended, and rules, regulations, and orders issued under the Act.

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 Specific licenses for well logging.

* * * * *

(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 in alphabetical order 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 a reasonable nexus to:

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

* * * * *

Construction means the installation of production wells, the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to radiological safety or security. The term “construction” does not include:

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

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

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

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

(i) Radiological health and safety, or

(ii) Common defense and security.

* * * * *

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

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

(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 10 CFR Parts 30, 36, 40, and 70, that 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 that 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 as amended by Pub. L. 102-486, sec. 2902, 106 Stat. 3123 (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 in alphabetical order 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 a reasonable nexus to:

- (1) Radiological health and safety; or
- (2) 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 related to radiological safety or security. The term “construction” does not include:

- (1) Changes for temporary use of the land for public recreational purposes;
- (2) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;
- (3) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;
- (4) Erection of fences and other access control that are not related to the safe use of, or security of, radiological materials subject to this part;

(5) Excavation;

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

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

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

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

(i) Radiological health and safety, or

(ii) Common defense and security.

* * * * *

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

§ 70.23 Requirements for the approval of applications.

(a) * * *

(7) Where the proposed activity is processing and fuel fabrication, scrap recovery, conversion of uranium hexafluoride, uranium enrichment facility construction and operation, or

any other activity which the NRC determines will significantly affect the quality of the environment, the Director of Nuclear Material Safety and Safeguards or his 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. In § 150.31, paragraph (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 related to radiological safety or security.

The term “construction” does not include:

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

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

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

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

(5) Excavation;

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

(7) Building of service facilities (e.g., 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 radiological health and safety.

* * * * *

Dated at Rockville, Maryland, this 21st day of July, 2010.

For the Nuclear Regulatory Commission.

R/A

Annette Vietti-Cook,
Secretary of the Commission.

NUCLEAR REGULATORY COMMISSION

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

**RIN 3150-AI79
NRC-2010-0075**

Licenses, Certifications, and Approvals for Material Licensees;

Reopening of Comment Period

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule; Reopening of comment period.

SUMMARY: The Nuclear Regulatory Commission (NRC) is reopening the public comment period for the proposed rule that was published on July 27, 2010 (75 FR 43865). The proposed rule would amend the regulations by revising the provisions applicable to the licensing and approval processes for byproduct, source and special nuclear material licenses, and irradiators to clarify the definitions of “construction” and “commencement of construction”. The comment period for this proposed rule, which closed on September 27, 2010, is reopened and will remain open until November 29, 2010.

DATES: The comment period has been reopened and now closes on November 29, 2010. 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 : Please include Docket ID NRC-2010-0075 in the subject line of your comments. For instructions on submitting comments see the SUPPLEMENTARY

INFORMATION section of this document. You may submit comments by any one of the following methods.

Federal Rulemaking Web Site: Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2010-0075. Address questions about NRC dockets to Carol Gallagher, telephone 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 301-415-1966.

Hand Deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852 between 7:30 a.m. and 4:15 p.m. during Federal workdays (Telephone 301-415-1966).

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

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:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site <http://www.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.

You can access publicly available documents related to this document 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, Room O-1F21, 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, or 301-415-4737, or by e-mail to PDR.Resource@nrc.gov.

Federal Rulemaking Web site: Public comments and supporting materials related to this proposed rule can be found at <http://www.regulations.gov> by searching on Docket ID: NRC-NRC-2010-0075.

Extension Request

On September 15, 2010, and September 21, 2010, the Nuclear Energy Institute and the National Mining Association, respectively, requested extension of the public comment period until November 29, 2010. In their requests, the stakeholders indicated that given a shorter than normal comment period, the magnitude of the potential impact of the proposed amendment on a variety of licensees and applicants, and the need for stakeholders to carefully review the

proposed amendment in order to provide constructive comments, an extension was necessary.

No objections to the requested extension have been received.

Dated at Rockville, Maryland, this 24th day of September, 2010.

For the Nuclear Regulatory Commission.

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission.