

RULEMAKING ISSUE NOTATION VOTE

October 21, 2010

SECY-10-0137

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROPOSED RULE: REQUIREMENTS FOR ACCESS AUTHORIZATION
AND PHYSICAL PROTECTION DURING NUCLEAR POWER PLANT
CONSTRUCTION (RIN 3150-AI65)

PURPOSE:

The purpose of this paper is to request Commission approval to publish for public comment a proposed rulemaking that would add requirements related to access authorization and physical protection during construction of new nuclear power plants. This proposed rule would amend Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, "Domestic Licensing of Production and Utilization Facilities," 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," and 10 CFR Part 73, "Physical Protection of Plants and Materials."

SUMMARY:

The U.S. Nuclear Regulatory Commission (NRC) staff seeks Commission approval of proposed amendments to 10 CFR Part 73 to add a new § 73.52, "Construction Site Access Authorization and Physical Protection," related to nuclear power plant construction security activities under a construction permit (CP) or a combined license (COL). The staff is proposing to add

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requirements for the implementation of access authorization and physical protection measures; access authorization controls; physical inspections; lockdown measures and procedures for securing the security- and safety-related structures, systems, and components (SSCs); and performance of high-quality security sweeps before the plant's transition into its operational phase. These changes would affect holders of a CP under 10 CFR Part 50 and holders of a COL under 10 CFR Part 52 with nuclear power plants under construction.

BACKGROUND:

Current NRC regulations do not include requirements for access authorization or physical protection at nuclear power plant construction sites before the receipt of nuclear fuel under 10 CFR Part 50 or notice of the Commission's finding under 10 CFR 52.103(g) that the acceptance criteria in the combined license are met. Although licensees may provide industrial or commercial security during construction to reduce commercial risk, the lack of required security measures before receipt of fuel is inconsistent with the potential security risk stemming from malicious activities that could occur during the construction of new nuclear power plants. This omission could result in an inadequate level of assurance of a licensee's ability during construction to deter or detect malicious activities that could adversely affect the safe construction and subsequent operation of security- and safety-related systems and components.

In September 2006, the NRC staff provided the Commission with an information paper describing plans to work with the nuclear power reactor industry to develop appropriate access authorization and physical protection measures for nuclear power plants under construction. These plans included the development of measures designed to deter or detect potential adversaries from gaining site-specific information and to deter malicious acts that could compromise security- and safety-related equipment and components during operation.

After submitting the September 2006 memorandum, the NRC staff held working-level meetings with the industry's New Plants Security Task Force and discussed many issues associated with security at new reactor construction sites. These meetings culminated in the development of Revision 2 of Appendix F, "Security Measures During New Reactor Construction," to Nuclear Energy Institute (NEI) 03-12 (generic power reactor security plan template), issued September 2007. Appendix F presents security measures for the construction phase of a new nuclear power plant, independent of whether the plant is to be constructed within an existing nuclear power plant's owner-controlled area or on an undeveloped or greenfield site, for applicants who voluntarily choose to incorporate these guidelines into their security plans.

In November 2007, the NRC staff requested in SECY-07-0211 that the Commission approve the establishment of construction site personnel access authorization and physical security requirements for holders of a CP under 10 CFR Part 50, of a COL under 10 CFR Part 52, or a limited work authorization.

In January 2008, the Commission issued a staff requirements memorandum (SRM) to SECY-07-0211, approving the NRC staff's proposal to establish physical security and access authorization requirements for new nuclear power reactor sites under construction, consistent with NEI 03-12, Appendix F, Revision 2. In addition, the Commission authorized the NRC staff to continue working with industry to develop alternative measures in lieu of fingerprint submission and to resolve open items related to physical protection. The Commission also

stated that the NRC staff should leave the option of fingerprinting open, as a last resort if alternative measures could not be developed, and should request public comment on the issue of fingerprint submission.

After the January 2008, SRM, the Office of Nuclear Security and Incident Response (NSIR) staff held many working-level meetings with the industry's New Plants Security Task Force to discuss security measures associated with new reactor construction and to resolve the remaining items related to physical security (e.g., personnel and vehicle search, package searches) at nuclear power plant construction sites.

In August 2008, NEI submitted a letter to the Director, NSIR, requesting NRC staff review and endorsement of NEI 03-12, Appendix F, Revision 3. The NSIR staff found the document generally acceptable in terms of access authorization and physical security measures. However, the staff did not agree with NEI about a process for inspecting personnel, vehicles, and material during plant construction.

The NRC staff responded to the August 20, 2008, NEI request in a letter dated November 13, 2008. In this letter, the NRC staff informed NEI that the NRC staff has deferred the review of NEI 03-12, Appendix F and was proceeding to rulemaking.

In August 2009, the NRC found the regulatory basis for proposed rulemaking adequate to begin the proposed rulemaking. The Office of New Reactors assigned a rulemaking project manager, formed a rulemaking working group, and formed a steering committee to provide direction and guidance to the working group.

In an effort to conduct a rulemaking that is transparent and open to stakeholder participation, the staff held a public workshop on March 31, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML101090147), to discuss draft proposed rule text made available to the public. The staff considered feedback given by external stakeholders during this meeting in its further development of the proposed rule. On August 27, 2010, the staff held a second public workshop to discuss the status and schedule of the proposed rulemaking (ADAMS Accession No. ML102440075). The workshop objective was to facilitate improved stakeholder understanding of the substance of the draft proposed rule. NEI and industry workshop participants expressed their appreciation for holding this workshop and providing the opportunity to reflect upon the draft proposed rule.

DISCUSSION:

The requirements for the physical protection measures and the access authorization program for granting individuals unescorted access to protected areas of operating nuclear power plants appear in 10 CFR 73.55, "Requirements for Physical Protection of Licensed Activities in Nuclear Power Reactors against Radiological Sabotage." These regulations apply upon the receipt of nuclear fuel onsite within the protected area.

The staff discussed the basis for requiring the implementation of new reactor construction site access authorization controls and physical security measures with industry representatives. Staff considerations included the March 30, 2005, letters to the U.S. Senate and the U.S. House of Representatives in which Chairman Diaz asked, on behalf of the Commission, for legislation to enhance nuclear safety and security by "making it a Federal crime to sabotage commercial

nuclear facilities, fuel, and Commission-designated material or property not previously covered by the sabotage section of the AEA (section 236), and extending [this] coverage to the construction period for all facilities addressed by that section.” The NRC’s Legislative Memorandum attached to that letter stated: “Sabotage during the later stages of construction, particularly during pre-operational testing, is of special concern because of the possibility that it might not be discovered prior to operation, since most of the inspections that could have led to the discovery of the sabotage would have already taken place. Thus, the Commission believes that enacting criminal sanctions to help deter such sabotage is warranted to protect more adequately the public health and safety and the common defense and security.”

Congress enacted the Commission’s proposed changes by including in the EAct an amendment to the AEA that makes the act of committing sabotage against a nuclear power plant under construction a felony. Section 655 of the EAct amended Section 236a of the AEA to read: “Any person who knowingly destroys or causes physical damage to...any production, utilization, waste storage, waste treatment, waste disposal, uranium enrichment, uranium conversion, or nuclear fuel fabrication facility subject to licensing or certification under this Act during construction of the facility, if the destruction or damage caused or attempted to be caused could adversely affect public health and safety during the operation of the facility...or attempts or conspires to do such act, shall be fined not more than \$10,000 or imprisoned for not more than 20 years, or both, and if death results to any person, shall be imprisoned for any term of years or for life.” Congress, aware of the security threat, passed an amendment to the AEA enacting criminal sanctions to help deter this threat because of their belief that new nuclear power plant construction required additional security to protect more adequately the public health and safety and the common defense and security. The NRC supported a number of the act’s provisions and had long requested the provisions on sabotage (Section 655), among others. “These provisions will make an industry that is already well protected even safer from the threats of terrorism and radiological sabotage,” said NRC Chairman Diaz after the bill was signed.” (ADAMS Accession No. ML052200503)

Discussions with terrorist experts confirmed that both domestic and international terrorist groups have targeted, or have expressed the intent to target, nuclear facilities in the United States. These terrorist groups have demonstrated the capacity to perform acts of sabotage and violence capable of destroying property. Some groups are on record as strongly opposing the expansion of the nuclear power industry in the United States.

The primary concern relative to the performance of malicious activities during the new reactor construction period is the ability of potential adversaries to introduce undetected defects into security- or safety-related SSCs or to pre-position construction site restricted items (e.g., unauthorized firearms, explosives, or incendiary devices) that could be used for malicious purposes after the plant is operational.

The staff recognizes that these concerns are partially addressed by many of the required activities conducted by licensees during the plant construction period (e.g., robust designs, safety-related quality assurance programs, pre-operational testing, etc.). NRC oversight activities at construction sites would provide some additional degree of assurance that malicious acts would be detected or deterred. Further, the staff recognizes that industry plans to provide certain industrial security measures at their construction sites to protect their commercial interests. Notwithstanding the above, implementation of these proposed security measures will

result in a robust security program specifically designed to deter and detect malicious acts during new nuclear power plant construction. In addition, implementation of these proposed security measures will enhance NRC and public confidence in the adequacy of the security program at new nuclear power plant sites.

The proposed amendments would result in changes to the following regulations:

- 10 CFR 50.34, "Contents of Applications; Technical Information"
- 10 CFR 50.54, "Conditions of Licenses"
- 10 CFR 52.79, "Contents of Applications; Technical Information in Final Safety Analysis Report"
- 10 CFR 73.1, "Purpose and Scope"
- 10 CFR 73.52, "Construction Site Access Authorization and Physical Protection"
- 10 CFR 73.58, "Safety/Security Interface Requirements for Nuclear Power Reactors"

These proposed regulations would require licensees to implement physical protection measures, access authorization controls, physical inspections, the performance of high-quality security sweeps, and lockdown measures and procedures for securing the security- and safety-related SSCs before the nuclear power plant transitions to its operational phase. Licensees would be required to implement access authorization and physical security measures before the scheduled onsite in-place setting, installation, or erection of security- or safety-related SSCs in the areas in which they will be permanently operated.

The rule would also require licensees to perform the following security inspection activities before implementing the required lockdown procedures:

- Conduct lockdown measures and procedures for securing the security- and safety-related SSCs before the plant enters its operational phase.
- Perform high-quality security sweeps before the licensed material arrives and the nuclear power plant transitions to its operational phase.

Once this rule becomes effective, each CP and COL holder would be required to submit a construction security plan and the proposed schedule for implementing the construction security program for NRC review and approval. To allow for the planning of NRC inspections, licensees would need to notify the agency by letter at least 60 days before the construction security plan becomes effective.

The following sections describe each of the proposed security features included in the proposed rule.

Construction Security Plan

The proposed amendments would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to develop and submit construction security plans to the NRC for approval. The construction security plan would describe how the program meets the construction security requirements proposed under 10 CFR 73.52 and describe the transition plan to the physical security plan required under 10 CFR 73.55, "Requirements for Physical Protection of Licensed Activities in Nuclear Power Reactors against Radiological Sabotage." These proposed requirements would be incorporated into 10 CFR 50.34 for CP holders and 10 CFR 52.79 for COL holders.

The proposed amendments would ensure that the effectiveness of the construction security plan would be maintained, changes to the approved construction security plan would be properly evaluated, and any change that reduces the effectiveness of the plan would be reviewed by the NRC before implementation. These proposed amendments would be incorporated into 10 CFR 50.54(ii).

This proposed provision would also require changes to docketed applications for new nuclear power reactors. These applications would be in various phases of NRC staff review—as far along as the final hearing phase—when the Commission promulgates a final rule. The staff has determined that any adverse effects of these changes on COL applications, as well as on existing holders of CPs or COLs, can be managed through close communication with these applicants and holders, and through timely submission and implementation of their construction security plan. There are several possible options for addressing the situation in which the final rule becomes effective just before a decision on COL issuance. The first is to encourage applicants to voluntarily submit its construction security plan and implementation schedule before the effective date of the rule. Alternatively, the final rule effective date can be set to minimize impact on near-term COLs, or a COL applicant can request an extension for compliance with the rule and upon a demonstration of good cause within the request, the extension request could be granted. The least attractive option is for the applicant to submit an application amendment in advance of its COL issuance, which may cause a potential delay in the licensing decision. However, these various options need not be resolved until the final rule stage.

Reviewing Officials

As noted below, the holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 would be required to verify the identity of individuals before granting them access to areas with security- or safety-related SSCs. The proposed amendments would require holders of CPs or COLs to designate one or more individuals to review and evaluate all data collected about an individual to determine whether that individual is trustworthy and reliable.

Worker Access Screening

The proposed amendments would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to verify the identity of individuals before granting them access to areas with security- and safety-related SSCs. The proposed amendments would require holders of CPs or COLs to determine with high assurance that the individual is who he or she

claims to be before granting construction site access, and semiannually thereafter. Information compiled to determine high assurance would include information presented by the individual as well as other data, such as the results of a demographic check performed by the licensee. The demographic check would require, at a minimum, validating an individual's identity by evaluating accumulated information developed from other background investigation sources (e.g., previous employment records, personal references).

The regulation would require licensees to access information from reliable sources to verify that the personal identifying information provided by the individual is authentic and accurate. Licensees could achieve this verification through a variety of means, including, but not limited to, accessing information from databases that are maintained by the Federal Government, or evaluating accumulated information, such as comparing a social security number provided by the individual to the social security number included in the person's employment history questionnaire. Verification could also be achieved through other sources that would allow the reviewing official to evaluate the authenticity of the information provided and have high assurance that the person is who he or she claims to be. These proposed amendments would be incorporated into 10 CFR 73.52(d)(1)(ii).

Construction Worker Observation Policy

The proposed amendment would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to develop and implement a construction worker observation policy. This policy would apply to all individuals on site during new nuclear plant construction with unfettered access to site areas containing installed security- or safety-related systems and components. This proposed requirement supplements the requirements of the observation program under 10 CFR Part 26, "Fitness for Duty Programs." Deterring, detecting, and evaluating behavior changes to determine whether they may lead to acts detrimental to public health and safety is important. The behavioral observation element of the fitness-for-duty program required under 10 CFR 26.33, "Behavioral Observation," addresses this objective from a focus on impairment of drugs or alcohol. This proposed amendment would focus on detecting and communicating behavior changes that, if left unattended, could lead to detrimental acts that may have an adverse impact on the safety and security of the construction site or public health and safety or the common defense and security once the plant has transitioned into the operational phase. These proposed amendments would be incorporated into 10 CFR 73.52(d)(1)(ii).

Site Badge Program

The proposed amendments would create a new provision, 10 CFR 73.52(d)(1)(ii), that would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to establish a construction site badge program. Construction personnel or visitors would have to display badges at all times while onsite to identify themselves as personnel granted construction site access or visitor status.

Visitor Register

The proposed amendments would create a new provision, 10 CFR 73.52(d)(1)(ii)(C), that would require all visitors to be registered and be issued a visitor badge before entry into the controlled access construction area. Licensees must provide visitor escorts to oversee visitor actions and

to deter and detect any behavior not readily acceptable as normal behavior in common, everyday work practices.

Barrier

The proposed amendments would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to erect barriers that would clearly separate the controlled access construction area containing security- and safety-related SSCs from the surrounding area and would serve as a channeling barrier to facilitate control of access. These proposed amendments would be incorporated into 10 CFR 73.52(d)(2)(i)(C).

Construction Site Security Force

The proposed amendments would establish a construction site security organization to implement the construction security program. These proposed amendments would be incorporated into 10 CFR 73.52(d)(2)(i)(D).

Construction Access Portal Inspections

The proposed amendments would require inspection of a subset of the personnel, vehicles, and construction material passing through an access portal to deter and detect the introduction of construction site restricted items. The construction security plan would document the inspection criteria used for randomness, frequency, and percent of personnel, vehicles, and construction material searched. These proposed amendments would be incorporated into 10 CFR 73.52(d)(2)(iii).

Security Sweeps and Lockdown

The proposed amendments would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to meet physical security performance requirements for sweeping and securing plant areas containing security- and safety-related SSCs. These high-quality security sweeps would provide assurance that security- and safety-related SSCs, and the immediate areas are free of construction site restricted items. Once the sweeps have been completed, these areas would be designated secure areas and would have to remain so until the operational security program required under 10 CFR 73.55 is implemented.

Notification Letters

The proposed amendments would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to provide written notification at least 60 days before the construction security plan becomes effective and before the scheduled implementation of lockdown procedures, including the commencement of security sweeps. The two proposed one-time reporting requirements would allow the NRC inspection staff to discuss the licensee plans and determine if the staff wants to observe any of the upcoming activities for the purpose of making a future staff determination or planning security inspection activities. These proposed amendments would be incorporated into 10 CFR 73.52(f)(1).

Reporting of Detected Malicious Acts

The proposed amendments would require holders of CPs under 10 CFR Part 50 and holders of COLs under 10 CFR Part 52 to notify the NRC within 24 hours after identification of an event and determination that a malicious act has occurred. This ensures that the Commission would receive timely notification about malicious acts at nuclear power plant construction sites and that the Commission can initiate the appropriate NRC response, notify other licensees as appropriate, and respond to inquiries from the public, media outlets, and its Federal partners. Additionally, this provision would allow the NRC staff to further evaluate, trend, and share this information with the Commission's Federal, State, and local government partners, including, but not limited to, the Department of Homeland Security, the Federal Bureau of Investigations, and local law enforcement. These proposed requirements would be incorporated into 10 CFR 73.52(f)(4).

Additional Items for Commission Consideration

In January 2008, the Commission issued a staff requirements memorandum (SRM) to SECY-07-0211, approving the NRC staff's proposal to establish physical security and access authorization requirements for new nuclear power reactor sites under construction, consistent with NEI 03-12, Appendix F, Revision 2. In addition, the Commission authorized the NRC staff to continue working with industry to develop alternative measures in lieu of fingerprint submission and to resolve open items related to physical protection. The Commission also stated that the NRC staff should leave the option of fingerprinting open, if alternative measures could not be developed, and should request public comment on the issue of fingerprint submission. At this time, alternative measures to fingerprinting have been discussed openly during public meetings. Although no other biometric means provide the scientific accuracy of true identification that recordable fingerprints do, the NRC's fingerprinting authority is limited by Section 652 of the EPAct, amended by Section 149 of the AEA, to individuals who have "unescorted access to...radioactive material or other property subject to regulation by the Commission that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks." Should the Commission make this determination, then by statute all personnel who have unfettered access to the designated property must be fingerprinted. As an alternative, the proposed rule relies upon demographic data (name, date of birth, address, etc.) to establish true identity. The demographic data for all construction site personnel would be submitted to the Terrorist Screening Center prior to their being employed at a construction site. The staff believes this will help identify any personnel associated with terrorist activities. These results will be reviewed by a licensee reviewing official.

The staff believes that it is constructive and worthwhile for the Commission to request public comment on whether additional investigatory elements should be required for worker access to nuclear power plant construction sites. The detailed questions provided in the enclosed draft proposed rule request public comment on whether requiring fingerprint-based criminal record checks consistent with the definition of background check in 10 CFR 73.2, "Definitions," would provide the reviewing official with important information to make an informed decision on the trustworthiness and reliability of the individual before granting construction site access. This section also requests input on access controls, other programs and controls that could be relied upon, the appropriate transition points for program initiation, and the estimated cost to implement the proposed construction security plan. On the basis of stakeholder feedback, the

NRC would decide whether to revise the access authorization and physical protection requirements in the final rulemaking.

The staff considered the need for a cyber security component in the proposed 10 CFR 73.52, "Construction Site Access Authorization and Physical Protection," rulemaking and concluded that the applicant would already be required to implement the protective measures and oversight requirements for cyber security under 10 CFR 73.54, "Protection of Digital Computer and Communication Systems and Networks." Each CP or COL applicant must submit a cyber security plan. The requirements outlined in 10 CFR 73.54 must be completed prior to the loading of fuel in the protected area of a nuclear power plant as required under 10 CFR 73.55. The staff believes that the applicants' implementation of the requirements under 10 CFR 73.55 and 10 CFR 73.54 would address cyber security risks and vulnerabilities.

Guidance Documents

The NRC staff will publish draft guidance documents for public comment in conjunction with the publication of the proposed rule. The NRC will consider comments on the proposed guidance in the development of the final guidance documents. The staff intends to keep nuclear power reactor license applicants, holders of CPs under 10 CFR Part 50, and holders of COLs under 10 CFR Part 52 informed during the development of the associated implementation guidance by providing notice of any public meetings and by posting draft implementing guidance on the NRC Web site.

COMMITMENT:

The staff plans to publish this proposed rule in the *Federal Register* in January 2011. After consideration of public comments, the staff plans to submit the final rule to the Commission for consideration in October 2011. The staff plans to issue the final guidance document at or about the time the rule is made effective.

RECOMMENDATIONS:

The staff recommends that the Commission take the following actions:

1. Approve for publication in the *Federal Register* the enclosed notice of proposed rulemaking (Enclosure 1).
2. Take note of the following:
 - a. The proposed rule will be published in the *Federal Register* for a 75-day comment period (Enclosure 1).
 - b. A draft regulatory and backfit analysis has been prepared for this proposed rulemaking (Enclosure 2).
 - c. A draft environmental assessment and finding of no significant impact has been prepared (Enclosure 3).
 - d. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act (5 U.S.C. 605(b)).

- e. The appropriate Congressional committees will be informed.
- f. The Office of Public Affairs will issue a press release when the proposed rulemaking is filed with the Office of the Federal Register.
- g. Review by the Office of Management and Budget (OMB) is required. The staff will submit a clearance package to OMB electronically on or immediately after the date the proposed rule is published in the *Federal Register*.

RESOURCES:

Estimated resource needs of 1.7 FTE and \$238,000 in contractor support are included in the FY 2011 President’s budget as identified below. FY 2012 resources are included in the budget request.

OFFICE	FY 2011	FY 2012
Office of New Reactors	0.8 FTE and \$160K	0.2 FTE and \$160K
Office of Nuclear Security and Incident Response	0.5 FTE and \$78K	0.5 FTE and \$30K
Office of Nuclear Reactor Regulation	0.1 FTE	
Office of the General Counsel	0.1 FTE	0.05 FTE
Office of Administration	0.1 FTE	
Office of Information Services	0.1 FTE	
Total	1.7 FTE and \$238K	0.75 FTE and \$190K

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections. The Office of the Advisory Committee on Reactor Safeguards has deferred its review of this rulemaking until the final rule stage. The rule suggests changes in information collection requirements that must be submitted to OMB on or immediately after the date the proposed rule is published in the *Federal Register*.

/RA by Martin J. Virgilio for/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Draft Regulatory and Backfit Analysis
3. Draft Environmental Assessment

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections. The Office of the Advisory Committee on Reactor Safeguards has deferred its review of this rulemaking until the final rule stage. The rule suggests changes in information collection requirements that must be submitted to OMB on or immediately after the date the proposed rule is published in the *Federal Register*.

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Enclosures:

1. *Federal Register* Notice
2. Regulatory and Backfit Analysis
3. Environmental Assessment

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