

RULEMAKING ISSUE
(Notation Vote)

February 5, 2010

SECY-10-0018

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

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

PURPOSE:

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

SUMMARY AND BACKGROUND:

On December 11, 2008, following a briefing on uranium recovery activities by the NRC staff and representatives from the U.S Environmental Protection Agency, the U.S. Department of the Interior, Bureau of Land Management, the Navajo Nation, Acoma Pueblo, Wyoming Department of Environmental Quality, New Mexico Environment Department, Navajo Allottees, National Mining Association, International Forum on Sustainable Options for Uranium Production, and the Natural Resources Defense Council, the Commission issued Staff Requirements

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Memorandum M081211 directing staff to provide the Commission with a proposed rulemaking to revise 10 CFR 40.32, "General requirements for issuance of specific licenses," to determine whether limited work authorization (LWA) provisions are appropriate for uranium in-situ recovery facilities.

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During the December 11th briefing, concern was expressed regarding a Part 40 applicant's inability to engage in site preparation activities due to the broad prohibition against construction that is in 10 CFR 40.32(e). In particular, the climate in some regions of the country limits the window of opportunity materials license applicants have to perform site preparation and construction activities. Following the uranium recovery activities briefing, the Commission received a letter from the Nuclear Energy Institute (NEI) dated May 3, 2009, in which NEI expressed its support of the Commission's decision directing staff to initiate a rulemaking.

Currently, 10 CFR 40.32(e) prohibits an applicant for a license for a uranium enrichment facility or for a license to possess and use source and byproduct materials for uranium milling, production of uranium hexafluoride, or for any other activity requiring NRC authorization from commencing construction of the plant or facility in which the activity will be conducted before the NRC has concluded that the proposed license should be issued. For the purposes of this section, the term "commencement of construction" is defined broadly as meaning any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site. Under § 40.32(e), "commencement of construction" is not intended to mean site exploration, roads necessary for site exploration, borings to determine foundation conditions, or other preconstruction monitoring or testing to establish background information related to the suitability of the site or the protection of environmental values.

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

DISCUSSION:

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

The Atomic Energy Commission (AEC) initially codified the prohibition against construction that currently exists in 10 CFR 40.32(e) in 1972 as part of a comprehensive rulemaking that made uniform the definitions for “commencement of construction” and the requirement that the environmental review be concluded prior to the commencement of construction of the materials facilities under Parts 30, 40, 50, and 70. 37 Fed. Reg. 5745 (Mar. 21, 1972). The amendments to Parts 30, 40, 50, and 70 were initiated to make the agency’s regulations,

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

37 Fed. Reg. at 5746

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

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

Recently, the Commission had an opportunity to consider the issue of pre-construction site preparation work performed by Part 50 (and Part 52) licensees and applicants at nuclear power plants. In 2007, the NRC issued a final rule amending the regulations applicable to limited work authorizations for nuclear power plants (LWA rulemaking). 72 Fed. Reg. 57416 (Oct. 9, 2007); corrected at 73 Fed. Reg. 22786 (Apr. 28, 2008). As part of that rulemaking, the NRC modified the scope of activities that are considered construction and for which a construction permit,

combined license, or LWA is necessary; specified the scope of construction activities that may be performed under a LWA; and changed the review and approval process for LWA requests. A LWA allows a Part 50 (or Part 52) applicant to engage in certain site preparation activities that would otherwise be considered construction prior to the NRC's issuance of a construction permit or combined license. The LWA activities could be either safety-related or non safety-related. After noting that the AEA does not require an applicant to obtain permission before undertaking site preparation activities that do not implicate radiological health and safety or common defense and security, the NRC developed a definition of construction that excluded certain preparatory activities.

The 2007 LWA rulemaking revised the definition of construction in 10 CFR 50.10 to expressly exclude certain activities and examined the nature and extent of the NRC's responsibilities under the National Environmental Policy Act of 1969, as amended (NEPA) in light of the exclusions of these activities. The NRC determined that its NEPA obligations and responsibilities arise only when the NRC undertakes a "Federal" action. 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007). With respect to the site-preparation activities excluded from the LWA definition of construction, the NRC noted that such activities do not have a reasonable nexus to radiological health and safety or the common defense and security, and as such, were "non-Federal actions." Accordingly, these site preparation activities are not subject to the requirements of NEPA as a result of NRC's AEA authority. Given the foregoing, the NRC amended its NEPA regulations in 10 CFR Part 51 to include a definition of construction that was consistent with the § 50.10 definition. The NRC's determination that certain site preparation activities did not constitute construction affected the scope of the agency's review of such activities for NEPA purposes. The NRC concluded that because these site preparation activities lacked a reasonable radiological nexus to radiological health and safety or common defense and security, and did not require NRC approval or oversight, these activities were non-Federal activities within the context of NEPA (they were not an environmental effect of the federal action being reviewed). The NRC further determined that the effects of these non-Federal activities would only be considered in the agency's environmental review to that extent necessary to establish an environmental baseline against which the incremental effect of the NRC's subsequent major Federal action (i.e., issuance of a license) would be measured. See 72 Fed. Reg. 57416, 57427 (Oct. 9, 2007).

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

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

In the UMTRCA-related rulemaking, the NRC found that construction activities at facilities in which source or byproduct materials are possessed and used for the production of uranium hexafluoride and commercial waste disposal by land burial should not precede the environmental review as they “are likely to result in [irrevocable and/or irretrievable] environmental impacts, the propriety of which cannot be ascertained until [the Part 51] environmental appraisals are completed and documented.” 45 Fed. Reg. 65521, 65529 (Oct. 3, 1980). Consequently, the NRC’s regulations did not authorize LWA’s for such facilities. In light of these concerns, which continue to be applicable to such facilities today, OGC is not recommending that the agency allow a LWA, which would allow materials applicants to engage in construction activities that may impact radiological health and safety or common defense and security, would be necessary or appropriate within the context of materials licensing.

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

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

RESOURCES:

Currently, exemption requests submitted by applicants for materials licenses are reviewed on an *ad hoc* basis. The Offices of Federal and State Materials and Environmental Management Programs (FSME) and Nuclear Material Safety and Safeguards (NMSS) indicate that the staff resources used for each exemption request averages approximately 200 hours (100 hours for the technical review and 100 hours for the environmental review). In comparison, OGC projects that this rulemaking, in which OGC has been designated the lead, would require a one-time resource allocation in FY 2011 of approximately 0.1 full-time equivalent position (FTE) which

has been requested through the FY 2011 Planning, Budget, and Performance Management Process. In addition, FSME has requested 0.1 FTE in their FY 2011 budget to review, consult, and provide input to OGC. This activity would be in addition to work on guidance documents that are already planned or started, and assumes that some of the previously planned work will be subsumed by the changes required by the rule.

COORDINATION:

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

RECOMMENDATION:

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

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Enclosure: Federal Register Notice

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ADAMS Accession Nos.:

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