RULEMAKING ISSUE
(Affirmation)

February 7, 2007 SECY-07-0030

FOR: The Commissioners

FROM: Luis A. Reyes
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SUBJECT: FINAL RULEMAKING ON LIMITED WORK AUTHORIZATIONS

PURPOSE:

To seek Commission approval to publish in the Federal Register a final limited work authorization (LWA) rule. The final LWA rule will revise the definition of construction and reform the limited work authorization (LWA) process in 10 CFR 50.10(e) by removing the need for construction permit and combined license applicants, and holders of early site permits, to obtain a limited work authorization, construction permit or combined license to conduct certain preconstruction activities. These preconstruction activities include site clearing, transmission line routing, and road building. In addition, construction of certain structures, systems and components (SSCs) not essential to public health and safety or common defense and security could proceed without NRC review or approval. However, construction of SSCs delineated in the rule would require some form of NRC approval *(i.e.*, LWA, construction permit, or combined license). The final rule will allow the applicant to submit the LWA information in advance of submission of the underlying construction permit or combined license application, and will also allow the LWA applicant to submit information on site suitability and obtain an early NRC decision on site suitability under Subpart F of 10 CFR Part 2. However, the final rule does not require the NRC to make a finding of site suitability before issuing an LWA (unless the LWA applicant requests such a finding).

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SUMMARY:

The Nuclear Regulatory Commission (NRC) staff and the Office of the General Counsel (OGC) have prepared a final rulemaking that revises the NRC's regulations governing the construction activities for which NRC review and approval are necessary, and simplifies the LWA process, which allows the Commission to approve the conduct of certain construction activities in advance of the issuance of a construction permit or combined license. These changes will enhance the efficiency of the NRC's licensing and approval process for production and utilization facilities, including new nuclear power reactors.

BACKGROUND:

On March 13, 2006, the Commission published a proposed rule which would substantially amend 10 CFR Part 52.71 FR 12782. During the period leading to the March 2006 proposed rule, industry stakeholders did not raise issues with either the "limited work authorization" (LWA) process in § 50.10, or more generally, with the definition of "construction" in that section.[1] Hence, the 2006 proposed rule contained no substantive provisions amending § 50.10. In a May 25, 2006 letter and attachment commenting on the 2006 proposed rule, NEI recommended that the Commission make substantial changes to § 50.10, in order to minimize the time interval between an applicant's decision to proceed with a combined license application, and the start of commercial operation. NEI stated that the current LWA process adds 18 months to the estimated construction schedule if an early site permit with LWA authority is not referenced. Separately, in a March 31, 2006 memorandum, the Commission directed the staff and OGC to prepare a notice and comment rulemaking to limit the scope of the environmental review for requests for limited work authorizations submitted in conjunction with a limited class of combined license applications. These combined license applications are for sites for which the AEC/NRC had previously prepared an environmental impact statement (EIS) and issued a construction permit for one or more units that were ultimately not built. The SRM directed that this proposed rulemaking be provided to the Commission by the end of December 2006.

Upon consideration of the NEI comment, and to implement the Commission's March 31, 2006 memorandum, the NRC staff and OGC prepared a supplemental proposed rule that would significantly revise the LWA process in § 50.10, and make conforming changes in Parts 2, 51 and 52. *See* SECY-06-0180 (August 14, 2006). In an October 2, 2006 SRM, the Commission approved the publication of the proposed rule, and the proposed rule was published in the

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1 In particular, the Nuclear Energy Institute (NEI) letter to the Chairman, dated December 14, 2005, did not discuss changes to the limited work authorization process in 10 CFR § 50.10.

Federal Register on October 17, 2006 (71 FR 61330). The key elements of the proposed rule were:

1. Redefining “construction” of a nuclear power plant to be largely consistent with the current § 50.10(b) definition of construction for other production and utilization facilities.

2. Eliminating the requirement for NRC authorization in the form of a “LWA-1” to conduct most all of the activities that are listed in current paragraph (e)(1).

3. Requiring NRC authorization in the form of an LWA to conduct excavation, the setting of piles, and foundation construction, for any structure which is required to be described in the Standard Safety Analysis Report (SSAR), Preliminary Safety Analysis Report, or Final Safety Analysis Report (FSAR).

4. Allowing an LWA application to be submitted in advance of a complete application for either a construction permit or combined license, and requiring - regardless of whether the LWA is submitted in advance of, or as part of a complete application - that the presiding officer issue a partial initial decision on the LWA, and the Director of the Office of Nuclear Reactor Regulation complete his or her consideration of the LWA request. Thus, an LWA under the proposed rule would not require a finding of site suitability (although the applicant could choose to have site suitability submitted as part of the LWA application and seek early NRC determination of that matter under Subpart F of Part 2).

5. Specifying the preparation of an EIS for a LWA request, which may be (at the applicant’s option) limited to consideration of the activities to be authorized. Inasmuch as this limited-scope EIS for the LWA would be issued prior to the EIS for the construction permit or combined license application, the main EIS for the construction permit or combined license would be treated as a supplement to the LWA EIS. However, no updating of the earlier information in the LWA EIS would be required. However, the EIS for the underlying construction permit or combined license must consider the impacts of LWA activities as described in the LWA EIS.

6. Allowing an LWA applicant at a site for which an EIS was prepared, but construction was not completed under a construction permit, to reference the earlier EIS in its environmental report (ER), and for the NRC to incorporate by reference the earlier EIS in the EIS prepared for the LWA.

To assist the NRC in preparing and adopting a final LWA rule, the statement of considerations (SOC) for the proposed rule raised three specific questions for which public comment was requested (71 FR at 61340, second column).

DISCUSSION*:*

Public comments on proposed rule

The NRC received thirteen (13) public comments[2] on the supplemental proposed rule. Ten (10) of the 13 public comments were from external industry stakeholders, consisting of NEI and seven (7) nuclear power plant licensees - including the three applicants for early site permits (ESPs) whose applications are currently pending before the NRC, and two companies who have applied (or are expected to apply) for standard design certifications (GE Nuclear and Areva NP-application expected 12-2007). One (1) commenter, Diane Curran, submitted a comment on behalf of Public Citizen, a consumer advocacy organization, and the Nuclear Information and Resource Service (NIRS), an information and networking organization for organizations concerned about nuclear issues and energy sustainability. One (1) comment was received from the U.S. Environmental Protection Agency (EPA), and one (1) comment was received from an NRC staff individual.

NEI supported the general approach and objective of the supplemental proposed rule, but raised three key issues on the supplemental proposed rule: (i) inclusion of excavation in the definition of “construction;” (ii) designation of SSCs “required to be described” in the SSAR or FSAR as a key element of the definition of “construction;” and (iii) limiting submittal of LWA applications within twelve (12) months in advance of a combined license application. NEI also proposed a number of changes to the supplemental proposed rule to address three less-significant areas of concern: (i) an LWA applicant’s reliance on an earlier EIS for an unconstructed facility; (ii) LWA applicant’s ability to take advantage of the provisions of § 2.101(a)(9) for an accelerated hearing schedule when submitting an LWA application in advance of a combined license application; and (iii) the need for “grandfathering” of current ESP applicants. Finally, NEI suggested that § 2.101(a)(5) be modified from the March 2006 proposed rule, in order to allow one part of a combined license application to precede or follow the other part of the application by no more than twelve (12) months. The other industry commenters, including GE Nuclear and Areva NP, generally supported the NEI comments, and in some cases provided additional discussion in support of one or more of NEI’s specific comments. Areva suggested that the final rule be modified to allow an LWA applicant to both submit its LWA application in advance of the underlying construction permit or combined license, as well as seek an early agency determination of siting issues under Subpart F of Part 2. Public Citizen and NIRS opposed granting of an LWA in advance of issuance of a construction permit or combined license, in general because these commenters perceived the process as introducing additional complexity to the licensing process, and increasing the cost to individuals who wish to participate in the licensing process. However, these organizations supported the NRC’s proposal to include excavation and the driving of piles in the definition of

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[2]A public comment dated November 7, 2006 from Westinghouse Electric Company LLC, on the main part 52 rulemaking, was erroneously designated as comment no. 1 on the supplemental proposed LWA rule. This number was later assigned to a comment filed by Mitch Lucas, TXU Power.

"construction." EPA indicated that it had no objections to the supplemental proposed LWA rule, stating that the supplemental rule would "enhance the efficiency of the NRC's LWA approval process, while maintaining appropriate consideration of environmental effects pursuant to NEPA." In addition, NRC was advised by telephone that Council on Environmental Quality had no objection to the supplemental proposed LWA rule, and therefore would not submit a written comment on the rule. The NRC staff individual provided eight (8) numbered comments on the supplemental proposed LWA rule, in general focused on compliance with the National Environmental Policy Act (NEPA) and the potential adverse effect of the supplemental proposed rule on the NRC staff's resources. Only one commenter provided separate responses to the three Commission questions in the SOC for the proposed rule, and these responses were simply an abbreviated version of that commenter's comments.

Key issues/comments and their resolution

Compliance with NEPA

We believe that the final rule complies with NEPA, for the reasons originally set forth in the SOC for the proposed rule. No substantial adverse comments were received that lead to a determination that the legal bases for the rule, as described in the proposed rule's SOC, was substantially flawed or were otherwise subject to a substantial legal infirmity. Neither Public Citizen, NIRS, or the NRC individual provided any legal discussion demonstrating that the legal bases for the proposed rule was incorrect. These commenters identified policy considerations (*e.g.*, public confidence in NRC decisionmaking, complexity of licensing process, undue burden placed upon participation in NRC hearings) and NRC implementation considerations (*e.g.*, need to develop additional NRC guidance on LWA process) which they felt weighed against adoption of the rule in its proposed form. However, upon careful consideration, the staff and OGC believe that the commenters' policy arguments are not persuasive in favor of abandoning the proposed rule. Summaries and responses to each of these comments are set forth in the SOC for the final rule. No changes in the fundamental elements or the bases for this rulemaking are included in the final rule's SOC. However, upon consideration of the staff's needs for information in the environmental report to support the cumulative effects discussion, the final LWA rule has been revised to make clear that the ESP, construction permit and combined license, the applicant's ER must include information describing pre-construction impacts in sufficient detail to support the evaluation of the cumulative impacts of LWA, construction permit or combined license activities, when considered with the preconstruction activities.

Excavation

The staff's recommendation at the proposed rule stage of including excavation within the definition of construction was based upon the rationale that: (i) excavation activities in the past have uncovered potentially adverse geologic, soil and hydrological conditions not anticipated by the construction permit applicant, which have resulted in design changes; and (ii) excavation activities in the past have caused unanticipated damage to surrounding native rock, which had to be corrected by the construction permit holder. The staff believed that, in such situations, these considerations provided the "reasonable nexus to radiological health and safety and/or

common defense and security" necessary to include excavation in the definition of construction. In addition, the staff also considered the potential reduction in confidence of the general public with respect to NRC's regulatory process if excavation - an intensive activity involving large machinery, substantial noise, and in some cases explosions - were to occur without the involvement of the NRC.

Upon consideration of stakeholder comments and further evaluation, the staff has determined that it is not necessary for the NRC to include excavation in the definition of construction, thus requiring some kind of NRC review and approval before undertaking excavation, to ensure public health and safety or common defense and security in the situations noted above. With respect to geologic, soils, and hydrological matters, prior NRC review and approval of excavation is not necessary to ensure that any adverse geologic, soil, or hydrological conditions that result in the need for design changes or some other form of mitigation are considered in NRC's review of the associated LWA, construction permit, or combined license application. In the situation where a potential applicant performs excavation activities prior to submitting its LWA, construction permit, or combined license application, 10 CFR 52.6(a) requires that information provided to the Commission by an applicant for a license be complete and accurate in all material respects. In the situation where an applicant performs excavation activities after submitting its LWA, construction permit, or combined license application, 10 CFR 52.6(b) requires the applicant to notify the Commission of information identified by the applicant as having, for the regulated activity, a significant implication for public health and safety or common defense and security. The staff believes that 10 CFR 52.6 provides an equally-acceptable way of ensuring public health and safety if excavation is eliminated from the definition of construction for those limited situations where excavation activities uncover potentially adverse geologic, soil and hydrological conditions not anticipated by the applicant or excavation activities cause unanticipated damage to surrounding native rock. The LWA, construction permit, and combined license applicant, as applicable, would be responsible - as is currently the case - for adequately describing the geologic, soil, and hydrologic conditions of the site. The difference with the approach in the final rule is that the approved site description would, in many cases, be based upon actual knowledge of the conditions as revealed or confirmed by the excavation activities, and not only on reasonable assumptions based upon extrapolations from test borings and other indirect information. Therefore, in many cases, the actual foundation and structural design to be approved at the construction permit or combined license stage would be based upon actual geologic, soils, and hydrological information as revealed or confirmed by the excavation.

With respect to the policy issue raised by commenters of potential adverse impact on public confidence, the staff acknowledges that some members of the public may have less confidence in the NRC's regulatory process for the reason stated above. However, this is probably a relatively small incremental decrease in public confidence for those stakeholders, given that the most publicly-visible and dramatic disturbance of a site will be the initial site clearing, grading, and construction of roads and support buildings - all of which may be accomplished without any NRC review and approval under the proposed (and final) rule. Excavation activities, in this context, may not be viewed as being different in kind from the preceding activities. Moreover, the staff believes that other segments of the public may have an enhanced view of the NRC's

regulatory process. Setting aside the industry stakeholders, there are other segments of the public which are keenly concerned about energy independence, reduction in greenhouse gas generation, electric reliability, or reducing what are perceived as unnecessary governmental restrictions on private action. These stakeholders may view the exclusion of excavation from the definition of construction - to the extent that it may decrease the time needed to license and construct a nuclear power plant - as a positive regulatory change.

For these reasons, the staff believes that existing regulatory mechanisms provide reasonable assurance of public health and safety and common defense and security without imposition of the regulatory mechanism of licensing these excavation activities. Accordingly, the final rule does not include excavation within the scope of construction.

With the exclusion of excavation from the definition of construction, the staff believes that the redress requirement should be altered to remove the requirement that redress achieve an "aesthetically acceptable site suitable for whatever non-nuclear use may conform with local zoning laws...." Redress would be limited to addressing the impacts of piles, and removing the foundation placed in the excavation, which are the only activities which may be accomplished under a LWA. Accordingly, the final LWA rule does not include that requirement, and the SOC has been modified to reflect the narrower scope of redress.

Structures, systems and components within the scope of "construction"

In the proposed rule, the definition of construction included any SSCs of a facility required by the Commission's rules and regulations to be described in the site safety analysis report or preliminary or final safety analysis report. This definition of construction included essentially all SSCs of a facility, except for those SSCs that were specifically excluded by the definition, *e.g.*, potable water systems. Some commenters claimed that the proposed definition was too broad and that some SSCs would not have a reasonable nexus to safety. Upon consideration of the industry comments and further evaluation, the staff agrees that there may be some SSCs that are described in the safety analysis report that do not have a reasonable nexus to radiological health and safety, or the common defense and security. Therefore, the final rule changes the scope of SSCs that fall within the definition of construction.

The revised scope is generally based upon the scope of SSCs required to be included in a licensee's program for monitoring the effectiveness of maintenance at nuclear power plants, as defined in 10 CFR 50.65(b). This scope is well understood by the staff and the industry, and there is a common understanding among these stakeholders regarding its implementation. The final rule has supplemented this definition in order to clearly identify the SSCs that have a reasonable nexus to radiological health and safety, or the common defense and security. The revised definition is discussed in detail in the SOC.

Differing construction concepts under section 50.10 and final Part 26 rule

In this final LWA rule, a definition of "construction" is included in sections 50.10 and 51.4, for purposes of determining when NRC authority (either in the form of LWA, construction permit, or combined license), is needed to undertake certain activities for certain SSCs (see 50.10(d)). Under an LWA, an entity may perform subsurface preparation up through installation of foundations of SSCs that fall within the definition of construction. Further erection of SSCs at their final "in-place" location would require a construction permit or a combined license. The scope of SSCs included in the definition of construction includes those SSCs within the Part 26 definition, as well as some additional SSCs. In the final rule for fitness-for-duty (SECY-06-0244), there is a definition of "constructing, or construction activities," which was developed for purposes of specifying that set of workers who are to be subject to NRC fitness for duty requirements. The definition includes both specification of certain SSCs (i.e., safety-related and security-related) as well as certain work activities (fabricating, erecting, integrating, and testing the nuclear power plant SSCs, and the installation of their foundations, including the placement of concrete).

The staff definition of "construction" in section 50.10 reflected the full scope of SSCs and activities for which NRC believes there is a reasonable nexus to radiological health and safety or the common defense and security. By contrast, the staff developed another term "constructing or construction activities" for Part 26 to be more focused on those SSCs and activities for which a fitness for duty program would be most effective in providing reasonable assurance of public health and safety.

Consideration of site suitability for LWA issuance

During the development of the draft final rule, the staff considered whether a key requirement in the current version of 10 CFR 50.10, which was proposed to be removed in the supplemental proposed rule, should be retained in the final LWA rule. This requirement, in current § 50.10(e)(2), provides that an LWA be granted only after the presiding officer in the proceeding on the construction permit application has determined that there is reasonable assurance that the proposed site is a suitable location for a reactor of the general size and type proposed from the standpoint of radiological health and safety considerations under the Act and rules and regulations promulgated by the Commission pursuant thereto. It could be argued that such a finding is appropriate because the Commission is authorizing construction of a nuclear power plant (albeit limited construction) when it issues an LWA. Under past requirements, the Commission did not authorize construction without determining whether a proposed site was suitable to host a nuclear power plant. The Commission's regulations regarding site suitability can be found mainly in 10 CFR Part 100. Section 100.2 states that the siting requirements in Part 100 apply to applications for site approval for the purpose of constructing and operating stationary power and testing reactors pursuant to the provisions of Part 50 or Part 52. It was also one of the main goals in promulgating 10 CFR Part 52 to resolve all safety and environmental issues before authorizing construction.

Notwithstanding these concerns, the final rule proposed to the Commission does not require a site suitability finding to be made prior to the issuance of an LWA. The staff recognizes that, under the revised definition of construction and revised requirements for activities that can be authorized under an LWA, the amount of construction work that can be done under an LWA is limited (driving of piles, subsurface preparation, placement of backfill, concrete, or permanent retaining walls within an excavation, and installation of the foundation). The LWA process requires that a safety review be performed for the requested foundation activities, including related site characteristics, and that a partial EIS be issued. As stated in the final rule (§ 50.10(f)), any activities undertaken under an LWA are entirely at the risk of the applicant and issuance of the LWA has no bearing on the issuance of the associated construction permit or combined license. The staff also notes that the applicant for an LWA has the option of requesting a site suitability determination. For these reasons, the final LWA rule does not require a determination of site suitability before issuance of an LWA.

Early consideration and decision on siting issues

Areva suggested that the proposed rule does not allow an LWA applicant to use both the two-part (phased) LWA process under § 2.101(a)(9), and the provisions allowing early consideration of site suitability under § 2.101(a)(5) and subpart F of part 2. The commenter believes that the additional flexibility afforded by allowing applicants to use both processes simultaneously would be helpful, and that the final rule should be modified to allow LWA applicants to utilize both approaches simultaneously. The staff and OGC believe that the proposed rule already permits what the commenter requested, *viz.*, it allows, but does not require, the applicant to submit its LWA application in advance of the underlying construction permit or combined license, and to obtain an early NRC determination on site suitability (under § 2.101(a)(9), the applicant could submit an LWA application in advance of the underlying construction permit or combined license application without addressing siting issues/site suitability). Accordingly, the changes proposed by the commenter, which are somewhat ambiguous and problematic, are not included in the final rule. The section-by-section analysis for the final rule, as well as the comment response to this comment, expressly state that the commenter's approach is permitted by the final rule.

Rulemaking directed by Commission's March 31, 2006 Memorandum

No adverse comments were received on those aspects of the proposed rule directed at implementing the Commission's March 31, 2006 memorandum. However, one commenter suggested that an inconsistency in the applicability of this provision (to include issued construction permits where construction had not been completed) should be corrected. The commenter's suggestion is incorporated into the final rule.

One change in the final LWA rule has been made as a result of the resolution of NEPA compliance issues in the draft final Part 52 rulemaking (SECY-06-0180). In the draft final Part 52 rule, a combined license applicant referencing an Early site permit is required to, *inter alia*, describe the applicant's process for identifying new and significant information. The NRC staff believes that, as a matter of logic and consistency with the draft final Part 52 rulemaking, the

combined license applicant referencing a construction permit where an EIS had been issued, but where facility construction was not completed, should also be required to describe its process for identifying new and significant information. Accordingly, the draft final LWA rule includes such a requirement.

Regulatory procedure for final LWA rulemaking

In SECY-06-0180, OGC indicated that it intended to provide the final rule in the form of a replacement to the Part 52 Federal Register notice of final rule, in which the additional rulemaking elements on LWA (*e.g.*, discussion of basis, rule language) are integrated into the previously-provided version of the Federal Register notice. As a result, the final Part 52 rule would include the final rules on LWA. This was premised upon publication of the supplemental proposed rule in September 2006, the expectation that no significant comments on the supplemental rule would be raised, and the assumption that the draft final LWA rule would be provided to the Commission at a time when it was still considering the final Part 52 rule. Not all of these assumptions have been or will appear to be met. Accordingly, the staff and OGC have prepared a "standalone" final LWA rulemaking package.

To address the Paperwork Reduction Act, the staff has determined that the final LWA rule represents an insignificant change in burden, when compared to the (projected) final Part 52 rulemaking (SECY-06-0180). Assuming that OMB approves the Paperwork Reduction Act clearance for the final Part 52 rulemaking, the staff expects that there will be no issue raised by OMB with respect to obtaining Paperwork Reduction Act clearance for the final LWA rule.

RESOURCES

The staff projects that revision of staff guidance documents to reflect the final LWA rule will require the approximately 1 FTE and $760K, none of which is currently planned or budgeted. The work will need to be completed in FY07 so that it is available when applications arrive at the beginning of FY08. This activity would be in addition to work on guidance documents that was already planned and started, and assumes that some of the previously planned work is subsumed by the changes required by the rule. The resources for this new work would be reallocated from currently budgeted infrastructure work for Standard Review Plan updates which are taking less resources than anticipated. OGC projects that approximately .1 FTE will be required to support the staff's effort to revise the guidance.

COORDINATION

The Office of Chief Financial Officer has reviewed the final rule language and has no objections. Consistent with the discussion in SECY-06-0180 which transmitted the proposed LWA rule, the staff has not sought review of the final rulemaking package by either the CRGR or ACRS.

RECOMMENDATIONS:

We recommend that the Commission:

1. Approve publication of the Federal Register notice of final rulemaking.

2. Waive review of the final rulemaking package by the CRGR and the ACRS.

3. Certify that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities in order to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

4. Note that:
   a. The staff has prepared a final regulatory analysis for this rulemaking (Enclosure 2),

   b. The staff has determined that this action is not a “major rule,” as defined in the Congressional Review Act of 1996, 5 U.S.C. 804(2), and has confirmed this determination with the Office of Management and Budget (OMB).

   c. The appropriate Congressional committees will be informed.

   d. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the office of the Federal Register.

/RA/

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Enclosures:
1. Federal Register Notice of Final Rulemaking
2. Final Regulatory Analysis

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Enclosures:
1. Federal Register Notice of Final Rulemaking
2. Final Regulatory Analysis

Location: G:\RFC\GSM\SECY-LWA Final w-out report GM8 w.wpd

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