PR 30, 36,39,40,51,70, and 150
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VIA ELECTRONIC MAIL

Annette Vietti-Cook, Secretary, U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
Washington, D.C. 20555-001
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Re: Comments to proposed rulemaking 10 C.F.R. Parts 30, 36, 39, 40, 51, 70, and 150; Docket ID NRC-2010-0075.

Dear Madame Secretary,

On July 27, 2010, the Nuclear Regulatory Commission ("NRC") published a notice of rulemaking in 75 Fed. Reg. 43865 (the "Part 40 Rulemaking").[1] The Part 40 Rulemaking seeks to revise the definitions of "construction" and "commencement of construction" with respect to material licensing actions instituted under NRC regulations. Pursuant to the revised definitions, "site exploration, including necessary borings;" "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;" "erection of fences;" "excavation;" "erection of support buildings;" "building of service facilities;" and "procurement or fabrication of components or portions of the proposed facility" (collectively, the "Site Preparation Activities") would fall outside the scope of "construction."[2]

The Part 40 Rulemaking invites comments, on or before September 27, 2010, regarding this change in definition. In addition, comments on the utility of a limited work authorization ("LWA") process for material licenses are also welcomed.

As lawyers who regularly practice before the NRC, we comment because the proposed change in definitions of "construction" and "commencement of construction" would both violate the National Environmental Policy Act ("NEPA") and allow NRC to shirk its duty to license and supervise the construction and operation of uranium enrichment and processing facilities. Moreover, we believe an LWA process for material licenses would likewise be unlawful and inappropriate.

1. The NRC has jurisdiction over the Site Preparation Activities because they have a "reasonable nexus to radiological health and safety and/or common defense."

Background

In the 2007 rulemaking, amending the definition of "construction" for utilization and production facilities (the "LWA Rulemaking"),[3] the NRC asserted that it did not have jurisdiction over the Site Preparation Activities under the Atomic Energy Act ("AEA") or NEPA.[4] Contrary to this assertion, NRC has the authority, and indeed is

[1] Licenses, Certifications, and Approvals for Material Licensees, 75 Fed. Reg. 43865 (July 27, 2010).
[2] *Id.* at 43872.
[3] 72 Fed. Reg. 57416 (Oct. 9, 2007); corrected at 73 Fed. Reg. 22786 (April 28, 2008)
[4] *Id.*. at 57427.

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required, to oversee the Site Preparation Activities under both the AEA and NEPA. Pursuant to the AEA, NRC has jurisdiction over actions that have a "reasonable nexus to radiological health and safety and/or common defense."[5] The LWA Rulemaking inappropriately narrowed the scope of actions considered to have this "reasonable nexus."[6]

In the LWA Rulemaking, NRC also declared that NEPA does not provide for jurisdiction over the Site Preparation Activities. NRC commented,

> while 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.[7]

NRC claimed the revised definition of "construction" "properly divides what was considered a single Federal action into private action for which the NRC has no statutory basis for regulation."[8] NRC viewed the Site Preparation Activities as "private action," and, thus, did not believe that the statutory reach of NEPA covered those actions and could not be used to bring Site Preparation Activities within NRC's jurisdiction.

Analysis

NRC explicitly extended its reasoning in the LWA Rulemaking to the Part 40 Rulemaking.[9] We believe that the definition and reasoning adopted in the first proposed rulemaking is flawed and that it would therefore be an error to apply the same reasoning to this proposed rule. NRC should not change the definition of "construction" to exclude Site Preparation Activities because those actions have a "reasonable nexus to radiological health and safety and/or common defense."[10] Indeed, the Site Preparation Activities are inextricably linked to the construction project. A company clears land and drives piles not for an aimless end, but rather for the specific purpose of constructing a material processing facility. Without the intent to construct and operate a material processing facility, the materials license applicant would not engage in these activities. Because of the Site Preparation Activities' nexus to construction, the activities fall within the agency's jurisdiction under the AEA. NEPA is not required to expand this jurisdiction.

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[5] *Id.* at 57420.
[6] *Id.* at 57426.
[7] *Id.* at 43867 (quoting 71 Fed. Reg. 61330, 61332).
[8] *Id.* at 57418-19.
[9] 75 Fed. Reg. at 43867.
[10] Moreover, in the AEA, Congress states that in the context of material production, "The Commission shall insure that the management of any byproduct material, as defined in section 11e.(2), is carried out in such manner as the Commission deems appropriate to protect the public health and safety and the environment from radiological **and non-radiological** hazards associated with the processing and with the possession and transfer of such material taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate." 42 U.S.C. § 2114(a)(1) (emphasis added). Congress has spoken directly to the NRC and stated the clear breadth of its radiological and non-radiological obligations. In fact, NRC's authority is so broad in this arena, that Congress grants NRC authority over even those exempted from licensing by section 81 of the AEA where NRC deems it, "necessary or desirable to protect health or to minimize danger to life or property, and in connection with the disposal or storage of such byproduct material." Id.

The AEA further states that, "regulation by the United States of the production and utilization of atomic energy **and of the facilities used in connection therewith** is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public." **42 U.S.C.A. § 2012(e) (emphasis added).** Support buildings and service facilities clearly fall under the definition of "facilities used in connection therewith," yet NRC's proposed rule would exempt these facilities from any pre-mining review and allow them to be constructed without any agency oversight or environmental review.

Moreover, NRC is the national expert in material licenses. With a host of professionals who have expertise in nuclear power in general and material licenses in particular, NRC is best positioned to evaluate the health and safety concerns of proposed materials license facilities. Accordingly, NRC *should* exert jurisdiction over the Site Preparation Activities. If NRC does not monitor and evaluate these actions, no one else will.

2. NRC has a duty to be informed of and concerned about the Site Preparation Activities of material license applicants.

NRC should be informed of and concerned about Site Preparation Activities because it is a duty with which the Commission is charged under the AEA and the Energy Reorganization Act of 1974.[11] These statutes give NRC authority and regulatory control over nuclear power. This power is granted because NRC is a collection of knowledgeable professionals with a focus and expertise in nuclear power and materials processing. As such, NRC is in the best position to judge what impact a facility will have on radiological health and safety.

As a source of expertise in this field, the NRC is responsible for evaluating the entirety of a nuclear project, which includes the initial plans and Site Preparation Activities, as well as the completion of materials processing facilities. If NRC does not examine these activities and projects from the very start for safety, environmental impacts, and cohesive planning, material license applicants' actions will go unchecked. Without NRC regulation and approval of Site Preparation Activities to ensure nuclear projects are conducted conscientiously, material license applicants will be free to engage in Site Preparation Activities that have a "reasonable nexus to radiological health and safety" at will. This may result in untold negative environmental impacts as applicants clear land and begin construction without NRC evaluation of the effects.

Finally, in failing to examine Site Preparation Activities, NRC fails to live up to one of its stated organizational values – "commitment...to public health and safety, security and the environment."[12] This commitment is not met if NRC does not evaluate the entire project for health, safety, and environmental concerns.

3. The Site Preparation Activities are connected to the construction activities, and therefore the NRC is required to perform a NEPA analysis before the Site Preparation Activities commence.

In addition to the authority to act under the AEA, the NRC is also required to consider the environmental impacts of the project under NEPA.[13] The environmental impacts of connected actions must be considered together.[14] The definition of Site Preparation Activities, as proposed by the NRC, includes actions up to "erection of support buildings," "building of service facilities," and "procurement or fabrication of components or portions of the proposed facility."[15] The NRC proposes removing these actions from its jurisdiction.[16] However, the erection of support buildings, service facilities, and the procurement of portions of a proposed facility are certainly connected to the construction of uranium enrichment, milling, or storage facilities, and therefore are subject to NEPA review.

The Council on Environmental Quality ("CEQ") defines connected actions as those that "(i) [a]utomatically trigger other actions that may require an environmental impact statement[,] (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously[, or] (iii) [a]re interdependent parts of a larger action and depend on the larger actions for their justification."[17] The actions which the NRC proposes classifying as Site Preparation are clearly connected to the construction of uranium facilities under the CEQ definitions; the pre-construction actions are "interdependent parts" of the construction actions and "depend on the larger actions for their justification." A material license applicant would not prepare a site and begin constructing support and service facilities if it did not intend to construct a uranium enrichment facility at the site.

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[11] *Id.*, 42 U.S.C. § 5801 (2009).
[12] U.S. NRC "Values" (2010), *available at* http://www.nrc.gov/about-nrc/values.html.
[13] 42 U.S.C. § 4332(c) (2009).
[14] 40 C.F.R. § 1502.4(a) (2010).
[15] 75 Fed. Reg. at 43872.
[16] *Id.* at 43867.
[17] 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2010).

Because the actions are connected, the NRC cannot commit itself to the construction of a uranium enrichment or storage facility before considering all reasonable alternatives before construction commences.[18] The alternatives section is considered to be "the heart of the environmental impact statement."[19] The Site Preparation Activities mark the beginning of the construction process, and allowing material license applicants to undertake Site Preparation Activities without any NRC oversight or consideration of the alternatives to the project violates NEPA.

4. The NRC's consideration of the environmental impacts of Site Preparation Activities after these activities are conducted violates NEPA.

NEPA requires that the environmental impacts of an action be considered before the action commences.[20] Allowing Site Preparation Activities to go forward without consideration of their environmental impacts therefore violates NEPA.

The rulemaking proposes changing the definition of construction so that material license applicants can complete Site Preparation Activities without any NRC oversight, prior to receiving their material license and beginning construction of a uranium enrichment, milling, or storage facility.[21] The environmental impacts of the Site Preparation Activities would only be considered in the cumulative environmental impact analysis for subsequent licensing actions, as part of the "baseline against which the incremental effects of the subsequent major Federal action ... would be measured."[22] Considering the impacts of the Site Preparation Activities only in the "baseline" for analyzing impacts of later, licensed actions is not permitted under NEPA; environmental impacts of an activity cannot be considered after the actions have already occurred.[23]

5. The NRC's statement that an LWA provision would not be appropriate for material license projects is correct, because LWAs impermissibly segment a major Federal action, violating NEPA.

We agree with the NRC's assertion that an LWA-like process for materials licenses is not appropriate because the LWA process impermissibly segments a major Federal action in violation of NEPA.[24] Impermissible segmentation occurs when an agency considers separately the environmental impacts of component parts of a proposed major Federal action.[25] Courts have explained that the environmental impacts of parts of an action must be considered together when the parts lack utility independent of one another, such that a party would not reasonably undertake one part of the action as an end in itself, for its own utility.[26]

LWA activities, as defined by the NRC, lack independent utility and therefore the environmental impacts of the project as a whole must be considered before any actions are permitted to go forward.

6. The Part 40 Rulemaking is a major Federal action subject to NEPA analysis.

NEPA requires that agencies consider the environmental impacts of proposed major Federal actions.[27] The Part 40 Rulemaking proposes allowing applicants to commence Site Preparation Activities, which previously

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[18] *Chelsea Neighborhood Ass'ns v. United States Postal Serv*, 389 F.Supp. 1171, 1182 (S.D. N.Y. 1975).
[19] 40 C.F.R. § 1502.14 (2010).
[20] 42 U.S.C. § 4332 (2009).
[21] 75 Fed. Reg. at 43867.
[22] *Id.* at 43867.
[23] *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 389 F.Supp. 1171, 1182 (S.D. N.Y. 1975) (citing 40 C.F.R. § 1500.1(a) (1975)).
[24] *See* 75 Fed. Reg. at 43867. ("[I]t is not clear at this time that an LWA process applicable to materials licenses is appropriate, or even necessary.")
[25] *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987); NEPA Law & Litig. § 9:11 (2d ed. 2009).
[26] *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985). See also *Coal. On Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1297-99 (8th Cir. 1976); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974).
[27] 42 U.S.C. § 4332(C) (2009).

required prior NRC approval, without any agency oversight.[28] This proposed change is itself a major Federal action and therefore requires a "detailed statement" from the responsible NRC official on the potential environmental impacts of the proposed action, alternatives to the action, and potential irreversible or irretrievable commitments of resources.[29] Furthermore, the NRC must first "consult with and obtain the comments of any Federal agency which has . . . special expertise with respect to any environmental impact involved."[30]

Conclusion

We oppose a change to the rule as proposed and suggest the NRC include Site Preparation Activities in its environmental review to avoid AEA and NEPA violations. Inclusion of Site Preparation Activities in the definition of "construction" and "commencement of construction" would be consistent with NRC's purpose to promote radiological health and safety and support its commitment to public health and safety, security, and the environment.

Respectfully submitted this 27th day of September, 2010,

/signed (electronically) by/

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[28] 75 Fed. Reg. at 43872.
[29] 42 U.S.C. § 4332(C)(i)-(v).
[30] 42 U.S.C. § 4332(C).

Rulemaking Comments

From: Sanders, Lawrence D [lawrence.sanders@emory.edu]
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