RULEMAKING ISSUE
AFFIRMATION

March 18, 2011 SECY-11-0039

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

SUBJECT: FINAL RULE: DEFINITION OF CONSTRUCTION IN 10 CFR PARTS 30, 36, 39, 40, 51, 70, AND 150

PURPOSE:

The purpose of this paper is to request Commission approval to publish a final rule, in the *Federal Register*, that will amend 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 amendment 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." The scope of the NRC's environmental reviews for power reactor and materials license applications and amendments differs because of the differences in the definition of what constitutes construction, such that similar activities are treated more restrictively for materials licensees and applicants than for power reactor licensees and applicants. This rule would eliminate those differences, and result in materials license applicants and licensees being able to engage in certain non-safety or non-security related site preparation activities not related to radiological health and safety or common defense and security considerations without requiring NRC involvement and prior to the completion of the staff's environmental review. 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:

On December 11, 2008, the Commission held a briefing on uranium recovery during which time it was briefed by members of the NRC staff and representatives from stakeholders, including various Federal agencies, Tribes, State agencies, and interest groups. Various participants raised issues concerning the need for exemptions from NRC regulatory requirements in order to conduct certain site preparation activities.

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On January 8, 2009, the Commission issued Staff Requirements Memorandum M081211 directing staff to provide the Commission with a proposed rule to revise 10 CFR 40.32, "General requirements for issuance of specific licenses," to address whether limited work authorization (LWA) provisions are appropriate for uranium in-situ recovery facilities. The history of 10 CFR 40.32 revealed that the Commission had kept it and other materials licensing regulations comparable with respect to the definition of "construction". On February 5, 2010 (SECY-10-0018), the Office of General Counsel (OGC) submitted a proposed rule for Commission consideration that revised the definition of "construction" in Parts 30, 36, 40, and 70 in a consistent manner, and made conforming changes in 10 CFR parts 51 and 150. On July 27, 2010, the proposed rule was published in the Federal Register for public comment. The initial comment period ended on September 27, 2010, and was reopened for an additional period of time that ended on November 29, 2010.

This rule identifies certain site preparation activities which would no longer be considered construction and, therefore, would not be subject to the NRC's prohibition against construction prior to licensing. This would eliminate, for purposes of NRC's environmental reviews and cohesion among NRC's power reactor and materials license regulations, the inconsistency that existed within the Commission's regulations concerning the determination of what constitutes construction.

BACKGROUND:

On July 27, 2010, the NRC published a proposed rule, "Licenses, Certifications, and Approvals for Materials Licenses" (75 FR 43865). The rule proposed to amend the NRC regulations to clarify the definitions of "construction" and "commencement of construction" applicable to the licensing and approval processes for byproduct, source and special nuclear material licenses, and irradiators. The proposed rulemaking was intended to eliminate inconsistencies that existed between the NRC's definition of "construction" and its use for nuclear power reactor licensing and for materials licensing as those terms are used for environmental review purposes.

The impetus for the proposed rule arose from a December 11, 2008, briefing of the Commission 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. 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).

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. Accordingly, 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.

The Office of General Counsel (OGC) reviewed 10 CFR 40.32(e) to evaluate 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 had 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. In 2007, the NRC had issued a final rule amending the regulations applicable to limited work authorizations for nuclear power plants (LWA rulemaking). (72 FR 57416; October 9, 2007; corrected at 73 FR 22786; April 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 Atomic Energy Act of 1954, as amended (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.

In approaching this rulemaking, OGC concluded that 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 National Environmental Policy Act (NEPA) responsibilities. Comparable activities by certain materials licensees or applicants could not take place prior to the NRC conclusion of its environmental review. As a result, OGC developed a proposed rule that would align the above parts of 10 CFR and which was published for comment. (75 FR 43865; July 27, 2010). Having considered the public comments received on the proposed rule, OGC recommends the Commission approve a final rule which would allow the definition of "construction" adopted by the NRC for Part 51 in 2007 to be applied not only to materials license applicants or licenses under Part 40, but also to applicants and licensees for Parts 30, 36, or 70 licenses or amendments thereto. The final rule would limit site preparation activities to those

actions that are not required to ensure radiological health and safety or common defense and security.

DISCUSSION:

The NRC received 12 public comments on the proposed rule. The commenters include four members of the public, three industry organizations, two public interest and consumer advocacy groups[1], one company who indicated an intent to apply for a materials license, one law school environmental law clinic, and one anonymous commenter.

Comments addressed the following areas: (1) the scope of the NRC's authority with respect to construction activities; (2) NRC compliance with NEPA and other environmental statutes; and (3) a limited work authorization process for *in situ* uranium recovery (ISR) facilities.

A discussion of each major comment area and the responses thereto are included in the draft *Federal Register* Notice (FRN) (Enclosure 1) and summarized here.

1) Scope of the NRC's authority with respect to construction activities.

The majority of the commenters generally disagree with the NRC's determination that its authority under the AEA is limited to the consideration of the radiological impacts on the public health and safety and the common defense and security. However, the NRC's determination is buttressed by a history of judicial case law affirming this interpretation.

2) NRC Compliance with NEPA and Other Environmental Statutes

The commenters express concern that the final rule would violate NEPA. Upon review, OGC believes that the final rule complies with NEPA, for the reasons originally set forth in the Statement of Considerations for the proposed rule. The major Federal action that is subject to the requirements of NEPA is the construction action(s) related to the facility in which licensed activities will occur. The site preparation activities contemplated are private actions to which NEPA is inapplicable, at least with respect to NEPA's application to the NRC licensing action (it is possible site preparation activities could trigger NEPA responsibilities by other federal entities). No commenter provided any substantive legal argument to refute this determination.

3) Limited Work Authorization Process for *In Situ* Uranium Recovery Facilities

In the proposed rule, the NRC specifically requested comments on the appropriateness of an LWA process for materials licensees. Four commenters provided comments in response to the NRC's question regarding whether an LWA process is appropriate. One commenter opposed such a process claiming that an LWA process for materials licenses would result in segmentation of the major Federal action and would violate NEPA. The remaining three commenters were generally supportive of an LWA process. For the reasons discussed in more detail in the final rule FRN, OGC does not believe that a properly developed LWA process would violate NEPA. However, for reasons set forth below, the final rule would not provide for an LWA process for materials licenses.

[1] One of the comments referenced was a joint submission on behalf of seven consumer advocacy organizations.

Although the public comments received expressed concern about an LWA process permitting certain construction activities being contrary to NEPA, at least one commenter noted that an LWA process would, as a specific licensing action, include a NEPA review of the proposed action. Notwithstanding the receipt of some comments on an LWA process, the actual proposals received in response to the Commission's question regarding a specific LWA process were sparse, incomplete, and mostly directed towards one type of materials licensee, an *in situ* uranium recovery licensee. Given the diverse nature of materials licensees, the NRC would need to develop a thorough and comprehensive LWA program that would be available to all materials licensees, and which would be adequate to ensure that the radiological health and safety of the public is protected. As indicated, none of the proposals regarding an LWA process presented in comments on this rulemaking were comprehensive, and there is insufficient information on the record of this rulemaking from which the NRC could develop such a process, or even determine whether such a process is feasible for materials licensees on a generic scale. OGC recommends that should the Commission determine to further pursue this option, it be the subject of a separate rulemaking in the future.

4) Changes to the Proposed Rule Text

The draft final rule includes rule text that is substantially similar to that included in the proposed rule. Textual changes were made to the "commencement of construction" definition in §§ 30.4, 36.2, 40.4, 70.4, and 150.31(b)(3)(iv)(A) by replacing the phrase "site preparation" with "other" This modification ensures that the rule is not construed too narrowly. Additionally, a conforming edit was made to the rule text for § 51.45 to ensure that environmental reports submitted by materials license applicants that have engaged in site preparation activity contain the information necessary for the NRC to review the licensing action. Finally, a cross-reference in §150.31(b)(3)(iv) was corrected.

RESOURCES:

Upon adoption of this rule, OGC believes that the only remaining action would be for the NRC staff to complete its development of guidance documents.

COORDINATION:

The Offices of Federal and State Materials and Environmental Management Programs (FSME) and Nuclear Materials Safety and Safeguards (NMSS) staff reviewed the proposed rule language and have provided comments. OGC also consulted the Office of the Chief Financial Officer (OCFO), which has no objections.

RECOMMENDATIONS:

OGC recommends that the Commission:

1. Approve for publication in the *Federal Register* the enclosed notice of final rulemaking (Enclosure 1).

2. Certify that this rule will not have significant impact on a substantial number of small entities, as required by the Regulatory Flexibility Act, 5 U.S.C. 605 (b). This certification is included in the enclosed FRN.

3. Note:

a) That the final amendment will be published in the *Federal Register*; and

b) That 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).

/RA/

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Enclosure: Federal Register Notice

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/RA/

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Enclosure: Federal Register Notice

ADAMS Accession Nos.:

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