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NUCLEAR ENERGY INSTITUTE

DOCKET NUMBER  
PROPOSED RULE **PR 71 + 73**  
(64FR71331)

MAR 22 12:37

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March 21, 2000

The Secretary  
U.S. Nuclear Regulatory Commission  
Washington DC 20555-0001

Attention: Rulemakings and Adjudications Staff

**SUBJECT:** Nuclear Energy Institute (NEI) comments on Advance Notice of Proposed  
10 CFR Part 71 and 73 rulemaking

The Nuclear Energy Institute (NEI),<sup>1</sup> on behalf of the nuclear energy industry, is pleased to submit these comments to the Nuclear Regulatory Commission (NRC) on the advance notice of proposed 10 CFR Part 71 and 73 rulemaking, *Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste*, (64 Fed. Reg. 71,331 – December 21, 1999)

The industry endorses NRC's intent to provide Native American Tribes with the opportunity to receive advance notice of used nuclear fuel and other high level radioactive waste shipments that may traverse Tribal lands. Such communications will be worthwhile in enhancing understanding of the measures taken to protect public health and safety while transporting these materials to potential interim storage and permanent repository sites. This is an important element of the overall policy framework needed to effectively manage used nuclear fuel.

<sup>1</sup> NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

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The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 2

Industry, therefore, makes the following recommendations:

- \* NRC should proceed forward with the proposed rulemaking in accordance with President Clinton's 1994 memorandum entitled "Government-to-Government Relations with Native American Tribal governments."
- \* The proposed rulemaking should include requirements for stewardship of Safeguards Information by Tribal governments that are equivalent to those currently imposed on States.
- \* In implementing any proposed rule, NRC should identify Tribal governments eligible to receive advance notification and maintain a central database of Tribal Government contact information that should be made readily available to shippers and carriers.
- \* Shippers and carriers should notify Tribal governments based on the information provided by NRC.

The driving force for this potential regulatory action, per the President's 1994 memorandum, is government-to-government relations. As such, NRC needs to be careful to avoid placing an undue burden on private industry for carrying out its government-to-government responsibility. Centralizing the identification, database management, and eligibility verification responsibilities within NRC would accomplish this objective as well as provide for a more effective overall program.

This advance notice of proposed rulemaking allows for all parties to thoroughly consider and discuss the implications of extending notification of these shipments to Tribal governments before the NRC moves forward with a proposed rule. NRC is exploring the appropriate range of issues that will need to be addressed in an eventual rulemaking, as reflected in the 17 questions posed in this notice.

Our enclosed comments outline, in detail, our recommendations in response to the 17 questions posed by NRC. In general, industry believes that, with the NRC's leadership and appropriate controls on Safeguards Information, advance notification of used nuclear fuel and other high level waste shipments can be provided to Tribal governments in a manner that is beneficial to all affected parties.

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 3

NEI would welcome a dialogue, if appropriate, with the NRC and other interested parties on any rulemaking that may be proposed. We would be pleased to address any questions the NRC may have on our comments.

Sincerely,



Steven P. Kraft

Enclosure

cc: The Honorable Richard Meserve, Chairman, NRC  
The Honorable Greta J. Dicus, Commissioner, NRC  
The Honorable Nils J. Diaz, Commissioner, NRC  
The Honorable Edward McGaffigan Jr., Commissioner, NRC  
The Honorable Jeffrey S. Merrifield, Commissioner, NRC  
Dr. William Travers, Executive Director for Operations, NRC  
Dr. Carl J. Paperiello, Deputy Executive Director for Operations, NRC  
Mr. William F. Kane, Director, Nuclear Materials Safety and Safeguards, NRC  
Mr. E. William Brach, Director, Spent Fuel Project Office, NRC

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 4

ENCLOSURE

**NUCLEAR ENERGY INSTITUTE (NEI)  
COMMENTS ON ADVANCE NOTICE OF PROPOSED 10 CFR PART 71 AND 73  
RULEMAKING  
ADVANCE NOTIFICATION TO NATIVE AMERICAN TRIBES OF TRANSPORTATION  
OF CERTAIN TYPES OF NUCLEAR WASTE  
(64 Federal Register 71,331, December 21, 1999)**

NEI endorses an NRC regulation that would provide for notifying Tribal governments prior to the transport of used nuclear fuel and other high level radioactive waste across Tribal lands. NRC has properly recognized that there are a number of issues that would need to be addressed to make such notification possible. Foremost, the proposed notification is a government-to-government responsibility and should, accordingly, be implemented in a manner that is not unduly burdensome to shippers and carriers. In carrying out this responsibility, NRC needs to also ensure that the notification is conducted in a manner, consistent with what is now provided to States, that facilitates responsible stewardship of Safeguards Information.

NRC should implement its government-to-government responsibility by performing the following functions in support of an effective and efficient shipper and carrier Tribal Government notification program:

- \* Identification of federally recognized Tribal governments
- \* Outreach to Tribal governments to determine if they wish to receive advance notification, and if so, who the Tribal contacts will be
- \* Instruction of Tribal government contacts on NRC requirements for receipt and handling of Safeguards Information associated with notification
- \* Verification of the ability of Tribal governments to meet NRC requirements for the protection of Safeguards Information
- \* Creation and maintenance of a database of Tribal government contact information for those tribes determined by the NRC to be eligible to receive notification
- \* Making the Tribal contact database available in real time to shippers and carriers who are in the process of planning and making shipments

With these functions accomplished, shippers and carriers will be able to notify Tribal governments in the same manner as State governments

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 5

The 17 questions posed by NRC in its December 21, 2000, advance notice of proposed rulemaking form an effective basis for addressing the relevant implementation details of these functions as well as the shippers' and carriers' activities in performing the proposed notification. Accordingly, we have framed our reply to this advance notice in the form of responses to those questions as follows:

A. *Developing a List of Native American Tribe Contacts*

A.1. *In preparing the list of Tribal contacts, the NRC would most likely look to the list of Federally recognized Native American Tribes maintained by the Bureau of Indian Affairs (BIA), U.S. Department of the Interior. Is this an appropriate approach? Are there any other sources that the NRC should consider? (See the BIA website at <http://www.doi.gov/bureau-indian-affairs.html>).*

Industry Response:

*As this proposal would be implementing a government-to-government responsibility, only federally recognized Native American Tribes should be included. While the references above appear to be reasonable sources of Tribal lists, the industry has no particular expertise on this subject. However, we suggest that NRC should also coordinate with the Department of Transportation (DOT). DOT maintains Tribal contacts as part of its emergency response training program and has published a list of Indian Reservations in a non-regulatory supplement to 23 CFR Part 460 dated December 9, 1991. Programs for used nuclear fuel and other high level radioactive waste transportation should be consistent in scope with those for other Federal and State hazardous material transportation programs.*

A.2. *How can the NRC ensure that contact information is kept current, particularly for smaller Tribes? In maintaining State contacts, the NRC provides each State with the opportunity to update its information annually. Should NRC follow the same approach for Tribal contacts?*

Industry response:

NRC should maintain a central database of Tribal contacts and provide Tribes with the opportunity to update their information annually. The need for information to be current and consistent is a key reason why this responsibility should rest with the NRC (as proposed in our response to question B.1). This way, Tribes will only have one central point of contact to which to provide updates.

A.3. *How can licensees effectively and efficiently provide notification to Native American Tribes, particularly smaller Tribes, of a schedule change that would require*

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 6

*updated notification by telephone at any time of day?*

Industry response:

The NRC should require that Tribes provide an equivalent level of contact information and responsiveness as States are required to do. Accordingly, the NRC database called for in our response to question A.2 should include the most current Tribal Government phone numbers. Again, a centralized program would ensure that the most current and appropriate contact information was always available to shippers and carriers. Protocols for short notice situations should be established in the procedures that implement NRC's regulations. Therefore, NRC's database should provide Tribe-specific instructions by which shippers and carriers can make appropriate notifications in such situations.

NRC's proposed rule also should address how requirements for the communication of Safeguards Information over only secured telephone networks will be implemented. To the extent possible, NRC's centralized information system should support the establishment of predetermined codes for use in phone contact situations between shippers and carriers and Tribes in a way that minimizes the administrative burden on shippers and carriers.

*B. Minimizing the Licensees' Administrative Burden*

*B.1. In what ways can licensees comply with this advance notification requirement, while keeping their administrative burden at a minimum?*

Industry response:

Shipper and carrier responsibility in this regard should be limited to providing notification to Tribes determined to be eligible to receive such notification by the NRC based on contact information provided by the NRC.

As recognized in the "Specific Proposal" section of the subject Federal Register Notice (3<sup>rd</sup> column on page 71,332), notifying Tribal governments of used nuclear fuel and other high level radioactive waste shipments is a government-to-government relations issue. As such, it would be most appropriate for the NRC to be responsible for providing sufficient information management infrastructure to ensure that all information that shippers and carriers need to notify Tribes is readily available.

The proposed rulemaking represents NRC's effort to satisfy a Federal policy initiative that originated with President Clinton's 1994 memorandum entitled, "Government-to-Government Relations with Native American Tribal Governments." Placing

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 7

requirements on shippers and carriers that would require each of them to develop relations with Tribal governments would not be responsive to this initiative. Private sector firm relations with Tribal governments are, and should continue to be, a substantively different matter than those the federal government maintains.

More importantly, centralizing Tribal information management responsibility with NRC will ensure that the communicative program is both more effective and more efficient. If NRC is responsible for identifying and determining the eligibility of Tribal contacts to receive notification, consistency can be assured across the entire United States. Tribal contact information would only need to be maintained in one place. This would be highly advantageous over requiring shippers and carriers to maintain numerous and redundant programs for obtaining, verifying and maintaining current the necessary information. A centralized program will also better facilitate the verification that controls on Safeguards Information are adequate (see our response to questions D.1 through D.8).

Finally, maintaining a centralized program versus each shipper and carrier maintaining its own program to be individually verified by NRC, the burden on NRC, as well as shippers and carriers, would be less.

*B.2. If a shipper is unable to make contact with a Tribe prior to or during a shipment, should the shipment proceed?*

Yes. NRC's requirements for notification of Tribal governments need to specifically address this issue. The ability to receive notification is being extended to the Tribal governments by the federal government as a matter of policy. This government-to-government relations policy is intended to give Tribes the option of receiving notification, but does not require that they accept it. Therefore, the federal government is under no obligation to alter the course of regulated commerce if a Tribe is either unwilling or unable to make available a contact to exercise this option.

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 8

*C. Identifying the Location of Tribes along Shipment Routes*

*C.1. How can licensees effectively and comprehensively identify the location of Native American Tribes along a particular vehicle, rail, or vessel shipment route?*

Industry Response:

As the proposed notification is a government-to-government responsibility, shippers and carriers should not be responsible for identifying locations of federally recognized Tribes that are interested in and qualified for receiving notification. Consistent with our recommendations in response to questions A.1 and B.1, this responsibility should be centralized with NRC. Having each individual shipper and carrier do this would be needlessly burdensome. Having all of this information in one central database, maintained by the NRC that is available for use by shippers and carriers in making the required notifications, represents the optimum approach.

*C.2. Should DOE and NRC licensees develop and maintain a central database regarding the location of Tribal lands? Should NRC look to Geographic Information System (GIS) resources to provide licensees with information regarding the location of Tribal lands?*

Industry Response:

No, as mentioned previously the NRC should maintain the central database. NRC should take advantage of Internet technology to ensure that this database is available to all interested parties. Again, a level of efficiency is gained here because the NRC only needs to be concerned with making the completed database available, not with providing in-process information to shippers and carriers so that they can develop and maintain their own databases. To ensure consistency, both DOE and private sector shippers and carriers should rely on the same NRC database. As DOE also has a government-to-government responsibility in this regard, NRC should work with DOE to ensure that Tribal communication efforts relating to high level waste shipments under DOE responsibility are appropriately coordinated.

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 9

*C.3. What types of Tribal lands should the rule apply to (e.g., Trust Lands, Fee Lands (i.e., lands owned by Native Americans but not held in trust by the Federal government), etc.)?*

Industry Response:

Consistent with limiting the proposed rulemaking to federally recognized Tribes, NRC should coordinate with DOE and DOT. The agencies should work together to ensure that consistent approaches are pursued in identifying the specific lands to which a proposed NRC rule would apply.

*D. Safeguards Information*

*D.1. Should advance notification of spent fuel shipments be provided to any federally recognized Native American Tribe when spent fuel shipments are transported to or across Tribal boundaries?*

Industry Response:

No, only those Tribes that are in compliance with NRC requirements for handling and protecting Safeguards Information, equivalent to those currently imposed on the States, should be eligible to receive advance notification.

*D.2 The NRC's "need-to-know" requirement for advance notification of spent fuel shipment information is found in 10 CFR 73.21. Should this requirement be broadened to include other entities, such as federally recognized Native American Tribes?*

Industry Response:

Yes, if found to be qualified by the NRC. Specific considerations relating to such qualification are addressed in our response to question D.6.

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 10

*D.3. Does wider dissemination of shipment information increase the risk to safeguarding spent fuel shipments (i.e., protecting public health and safety)? How should the NRC address any increase in risk compared with the benefits to be gained from Tribal notification?*

Industry Response:

NRC should address this issue in the same manner it does with the States. Specifically, requirements applicable to Tribes should be developed that are equivalent to those currently applicable to the States in 10 CFR 73.21 and 10 CFR 73.57.

*D.4. How should the rule address the point of contact for Safeguards Information in the context of Tribal notification?*

Industry Response:

NRC should address the point of contact for Tribal governments in the same manner that it currently does for the point of contact in State Governments per 10 CFR Part 73.

*D.5. A recipient of Safeguards Information must expend resources to ensure the information is handled properly. Are there Tribes who may not wish to be recipients of Safeguards Information?*

Industry Response:

It would not be appropriate for industry to speculate on the desires of each potentially affected Native American Tribe. NRC should conduct an appropriate degree of outreach to Tribal governments to ensure that any concerns they may have can be addressed. Such outreach would be an important element of the NRC's government-to-government responsibility.

*D.6. If a Tribal government receives Safeguards Information, should the NRC review the Tribe's actions to control and protect Safeguards Information?*

Industry Response:

Yes, NRC should expect the same degree of control and protection of Safeguards Information from Tribes as is expected of States. Any rule proposed by NRC should specifically address how NRC will review each Tribe's programs so as to give the NRC the same level of confidence in a Tribe's capabilities as that which currently exists for the States. Also, since this would be the first time most Tribes would be implementing

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 11

these requirements, whereas States have had them in place for many years, NRC should specifically address how initial Tribal program validation will be conducted.

It would not be appropriate for NRC to expect shippers and carriers to carry out this responsibility.

*D.7. 10 CFR 73.21(a) states that "information protection procedures employed by State and local police forces are deemed to meet the information protection requirements of § 73.21(b) through (i)." Should the NRC determine the ability of Tribal governments to protect Safeguards Information and, if so, how?*

Industry Response:

Yes, NRC must specifically determine the ability of Tribal governments to protect Safeguards Information. NRC should determine if Tribal governments have in place information protection procedures comparable to those deemed satisfactory by the NRC under the terms of 10 CFR 73.21(a) insofar as States and local police forces are concerned. Accordingly, the NRC should specifically apply the requirements of 10 CFR 73.21(b) through (i) to Tribal governments, including the "need to know" provisions of 73.21(c)(1). Application of these requirements will involve initial review and approval of the information protection system, as well as periodic inspection by NRC.

*D.8. Should the contemplated rule include an exemption to the notification requirement if there is reason to believe that a Tribe will not be able to protect the Safeguards Information from disclosure? What basis would the NRC need for granting such an exemption?*

Industry Response:

Yes, NRC should specifically exempt Tribes that do not affirmatively indicate a desire to receive advance notification of shipments. Also, Tribes that can not provide the same level of protection as is currently expected of States should be exempted from the program. Such exemptions should be based upon the importance to public security of maintaining the integrity of Safeguards Information by not disseminating such information to parties that either do not want it or are not qualified to receive it.

*D.9. Should 10 CFR 73.37(f) be changed to a permissive form? That is, should the licensee be permitted rather than required to release Safeguards Information to responsible Tribal government officials?*

Industry Response:

The Secretary  
U.S. Nuclear Regulatory Commission  
March 21, 2000  
Page 12

No, consistent implementation of this program is necessary to ensure its credibility.