

# TASWER

## TRIBAL ASSOCIATION ON SOLID WASTE & EMERGENCY RESPONSE

### BOARD OF DIRECTORS

#### CHAIRPERSON

Laura J. Weber  
Solid Waste Management Director  
St. Regis Mohawk Tribe

#### VICE-CHAIR

Marcie Phillips  
Environmental Protection Program  
Shoshone-Palate Tribes of the  
Duck Valley Reservation

#### SECRETARY

The Honorable Lydia Olympic  
Environmental Director  
Igiugig Village Council

#### TREASURER

Gerald Wagner  
Environmental Programs Director  
Blackfeet Nation

Calvin Murphy  
Executive Director  
Cherokee Tribal Utilities  
Eastern Band of Cherokee

Earl Hatley  
Environmental Program Director  
Quapaw Tribe of Oklahoma

Roy Spoonhunter  
Environmental Program  
Coordinator  
Prairie Band of Potawatomi  
Indians

Virginia Washington  
IRA Council Secretary  
Native Village of St. Michael

Cynthia Pilot  
Environmental Director  
Louden Tribal Council

Delano "Satch" Miller  
Public Utilities  
General Manager  
Confederated Tribes of the Warm  
Springs Reservation

Sheila D. Sevenstar  
Environmental Specialist  
Cherokee Nation

EXECUTIVE DIRECTOR  
Jeff Tomhave

March 21, 2000

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

Attn: Rulemakings and Adjudications Staff

RE: Advance Notification to Native Americans of Transportation of Certain Types of Nuclear Waste.

The Nuclear Regulatory Commission (NRC) seeks comment on a proposed Tribal notification rule. It is with great interest that the Tribal Association on Solid Waste and Emergency Response (TASWER) participates in this comment period.

TASWER shares NRC's goals of ensuring public health and safety and promoting environmental protection. TASWER is committed to working with the NRC on issues affecting Indian Country.

TASWER's comments to the federal register notice, suggested CFR language revision, and our Tribal notification concept are enclosed. Four (4) copies have been provided for your convenience.

Please feel free to contact me if you have any questions regarding this correspondence.

Sincerely,

Jeff Tomhave  
Executive Director

'00 MAR 22 AM 12:20

### MISSION

To recognize and advocate for the sovereign relationship between all federally recognized tribal governments and the United States government, to be proactively involved in the national decision making and regulatory processes, ensuring participation by tribes on an equal level and as decision-makers on all solid waste and emergency response issues.

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

DS10

## Specific Considerations

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

1. In preparing the list of Tribal contacts, the NRC should not look to the list maintained by the Bureau of Indian Affairs (BIA). The BIA is a large bureaucratic organization with burgeoning responsibilities and overburdened service delivery programs to Indian Country. The BIA is too large to accurately maintain an up to date Tribal contact list.

The BIA web page (<http://www.doi.gov/bureau-indian-affairs.html>) contains only an alphabetical list of federally recognized Tribes. It does not list any contact information. It does not include addresses or phone numbers, nor does it include the name of the elected Tribal leader, let alone the name of the emergency response contact at each Tribe.

In addition, the current information found on the BIA web page has not been updated since December 1998. Just as the federal government is an ever-evolving entity with constant changes, Indian Country also deals with changing leadership. The Indian Reorganization Act of 1934 (IRA), codified at 25 U.S.C. § 461 et seq., sought to shift bureaucratic control of Indian affairs from the federal government to elected Tribal councils.

As a result of the IRA, Tribes use a federal model of governance that includes limitations on political offices. Specifically, Tribes impose two year limits on Tribal leadership. That means that there is constant turnover in elected Tribal councils. With 558 federally recognized Tribes, any contact list that is used daily, must be updated to keep up with this turnover of leadership.

When dealing with an issue that is as serious as nuclear waste transport, public health and safety demand that licensees use lists that are current. NRC implementation of Tribal notification should be efficient and accurate. Because of the BIA's inability to maintain an active list of federally-recognized Tribes that accurately lists emergency response contacts, the NRC should consider an alternative approach for creating and maintaining a "living" contact database.

Such a database cannot be created or maintained without Tribal involvement, and Tribes will not work with an organization they do not trust. It is a historic fact, and a political reality, that the Tribes do not trust the BIA. Although reasons for this are many, the following example should illustrate this point: in a recent federal lawsuit, contempt citations issued against the BIA's Assistant Administrator and Interior Secretary because the BIA mishandled Indian Trust accounts.

Furthermore, by entrusting Tribal notification to the BIA, the NRC risks its own credibility with Congress. The NRC must also consider its own stature within the federal family. According to the Senate Committee on Governmental Affairs, the Department of Interior, where the BIA is located, missed the March 1, 2000 deadline for submission of the previous fiscal year financial statement under the Chief Financial Officers Act of 1990. While the NRC received a clean rating for its submission.

2. The NRC can ensure that contact information is kept current for smaller Tribes by having a smaller, less bureaucratic organization administer the information, rather than the BIA, or some other federal behemoth. A smaller organization with a primary mission of Tribal emergency response advocacy will ensure that all Tribes, both large and small, are accurately represented.

The NRC should not follow the same approach for annual Tribal contact revision that it uses for States. Although States have been able to supply annual notification contact information, Tribes have unique situations because of their diversity. Some Tribes have well-established governmental programs that can supply annual updates. Other Tribes may have part time government employees who perform many different governmental functions at the same time. Most Tribes will be somewhere in between.

To ensure that Tribal lists are updated annually, the NRC must not allow the process of updating to be permissive. In many cases, the elected Tribal leader or contact person is bombarded with mail and is running a Tribal office without any support staff. It is very likely that a request for updated information will be lost or overlooked by an understaffed Tribe. The NRC can ensure that Tribal contacts are accurately updated if the NRC entrusts this responsibility to an organization that works vigorously with Tribes.

3. Licensees can effectively and efficiently provide notification to Tribes of schedule changes by contacting individual Tribes directly. Tribal contact information will be available upon request from the Director, Office of Public Affairs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. The NRC can ensure that Tribal contacts are accurately updated and available to licensees twenty four hours a day, seven days a week by working with a Tribal emergency

response organization that develops the "living" contact database and posts this information on a website for just that purpose.

In some cases, Tribes, particularly smaller Tribes, may be difficult, if not impossible, to contact. There are times when certain Tribes may close their government operations for cultural purposes. Under staffing at other Tribes may prove difficult for notification. In these instances, licensees can contact the Tribal emergency response organization that has worked with the NRC to develop the "living" contact database. This Tribal emergency response organization will have established procedures for notification, arranged beforehand with the effected Tribes. This Tribal emergency response organization will then contact these difficult to reach Tribes following the notification plan according to that Tribe. Licensees can then proceed with their business.

## **B. Minimizing the Licensees Administrative Burden**

1. Licensees can comply with the notification requirement and keep their administration burden minimal if the NRC ensures that NRC implementation of Tribal notification is easy to use and accurate. The NRC can ensure this through the establishment of a "living" contact database that is maintained by an organization outside of the federal bureaucracy.

2. If the licensee is unable to make contact with a Tribe prior to or during a shipment, the shipment should be delayed. Under no circumstances should nuclear waste be transported across Tribal land without notification. The administrative burden is less if the NRC promulgates its regulation to prohibit licensees from transport across Tribal land without Tribal notification. That regulation would then be substantially the same as the current regulation that prohibits licensees from transport across State land without State notification.

## **C. Identifying the Location of Tribes Along Shipment Routes**

1. Licensees can effectively and comprehensively identify the location of Tribes along a particular route if the NRC ensures that a database contains both Tribal geographic boundaries and

vehicle, rail, and vessel shipment routes. As the NRC implements regulations for Tribal notification, such regulations must serve public health, safety and the environment. To that end, the NRC should ensure that the Tribal location database is easy to use, accurate, and secure. The NRC can ensure that the Tribal location database achieves these outcomes if the NRC works with an organization that shares the goal of protecting public health, safety and environmental protection

2. Department of Energy (DOE) and NRC licensees should have access to a central database regarding the location of Tribal lands. To minimize the administrative burden to licensees, the NRC should ensure that the establishment of this database is maintained by an organization that will meet the needs of licensees and Tribes.

Geographic Information System (GIS) resources may be used to establish the Tribal location database, however, GIS may not be necessary to meet the requirements of licensees and Tribes. Licensees will require comprehensive Tribal geographic boundaries along a particular vehicle, rail, and vessel shipment route. Tribes will require that certain geographic feature location remain the proprietary information of the Tribe.

The NRC must ensure that Tribal notification regulations consider the needs of both licensees and Tribes. The NRC can ensure this by working with an organization that will provide licensees with comprehensive Tribal geographic boundaries along shipment routes while respecting Tribal rights to proprietary geographic feature information.

3. This notification rule must apply to all of Indian Country. Under federal law, Indian Country is defined as land within the borders of Indian reservations, regardless whether such land is owned in fee simple or in trust or is owned by an Indian or non-Indian and land held in trust for a Tribe or for a particular Indian and all independent Indian communities within the borders of the United States. (18 U.S.C. § 1151).

In addition, Tribes have civil jurisdiction over non Tribal member's based on the non Tribal member's consensual relationship with the Tribe or where the non Tribal member's conduct threatens, or has a direct effect on, the political integrity, economic security or health or welfare of the Tribe. Strate v. A-1 Contractors, 117 S. Ct. 1404.

Finally, Public Law 83-280, codified at 28 U.S.C. § 1360, does not confer regulatory jurisdiction on states. Bryan v. Itasca County, 426 U.S. 373 (1976); California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987). To avoid confusion and litigation, on the part of licensees and Tribes, the NRC should promulgate the application of this notification rule to all of Indian Country.

#### **D. Safeguards Information**

1. Advance notification of spent fuel shipments being sent to or across Tribal boundaries should be provided to all federally recognized Tribes that are directly impacted by the shipment. However, the NRC should ensure that Tribal notification regulations will provide the resources for Tribes to develop protocols that will ensure the Safeguards Information is properly protected in full compliance of 10 CFR §73.21, as amended.
2. The NRC's "need-to-know" requirement should be broadened to include federally recognized Tribes. In recognition of Tribal sovereignty, information that is shared with States should be equally shared with Tribes. Again, the NRC should ensure that Tribal notification regulations will provide the resources that enable Tribes to develop protocols that will ensure the Safeguards Information is properly protected in full compliance of 10 CFR §73.21, as amended.
3. Wider dissemination of shipment information will increase the risk of safeguarding spent fuel shipments if the Safeguards Information is not handled properly. The NRC can address any increase in risk by providing the resources for training and technical assistance to ensure that Tribes develop their own safeguarding regulations in full compliance of 10 CFR §73.21, as amended. In doing so, the NRC will protect public health and safety to the benefit of all. If the NRC fails to provide the resources that are necessary for Tribal training, then there will be little, if any, benefit gained from Tribal notification.

4. The proposed rule change should address the point of contact for Safeguards Information in the Tribal notification context in a manner similar to that for State notification. Under 10 CFR §73.21(c)(iii), the Governor of a State or designated representatives is the point of contact. Under the amended regulations, the elected Tribal leader or designated representative (emergency response personnel) should be the point of contact.

5. There are Tribes who may not want to receive Safeguards Information because they do not have the necessary resources to appropriately handle that information. The NRC should provide these resources to Tribes to guarantee full protection compliance under 10 CFR §73.21, as amended. In promulgating this regulation, the NRC should consider the federal government's trust obligation in relation to Indian Tribes.

The trust obligation is one of the primary cornerstones of federal Indian law. It recognizes a federal duty to protect Tribal lands, resources, and ways of living. This obligation arose from the transfer of Indian land to the federal government by conquest, treaty, executive order, or congressional legislation. The obligation remains independent of treaties and it inures to the benefit of all Tribes, treaty and non treaty alike. Federal agencies cannot abrogate or extinguish the trust obligation and federal agencies must implement its programs in manners that protect Tribal lands and resources.

6. If a Tribal government receives Safeguards Information, the NRC should utilize the same review procedures for Tribes that it uses to review State action to control and protect Safeguard Information. The NRC can ensure that review procedures for Tribes and States are equitable by providing the resources needed for Tribes to control and protect Safeguard Information in a similar manner that is provided for the States.

7. The NRC should determine the ability of Tribal governments to protect Safeguards Information in a manner that is similar to the method that the NRC uses to determine the States ability to do the same. The NRC can ensure the determination procedures for Tribes and States are equitable by providing the resources that enable Tribes to develop information protection

procedures employed by Tribal law enforcement in full compliance with 10 CFR §73.21(a), as amended.

8. The contemplated rule should 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. The only basis for granting such an exemption should be when a Tribal government has no established recognized functioning government. Under such a circumstance, it may be difficult, if not impossible, to determine the elected Tribal leader or designated representative (emergency response personnel) as the point of contact.

To serve public health, safety and the environment, the contemplated rule must establish an alternative procedure in the event that an exemption to the notification requirement is made. The NRC should ensure that an alternative procedure recognizes both Tribal sovereignty, and the need for Tribes to be informed about activities that occur on Tribal lands. The NRC can do this by requiring that licensees establish an alternative vehicle, rail, and vessel shipment route that does not impact the Tribal geographic boundaries of a Tribe that has been exempted from the notification requirement.

To minimize the licensee's administrative burden, the NRC should ensure that the Tribal notification database includes Tribal government stability information. A database that includes this information will alert licensees in advance when they input potential shipping routes, thereby giving them the immediate option to develop an alternative route. The NRC can ensure that the Tribal notification database meets this requirement by working with an organization that shares the goal of protecting public health, safety and environmental protection and that works for the benefit of Tribes.

9. The contemplated rule should not be changed to be permissive when applied to the Tribal notification requirement, under 10 CFR §73.37(f), as amended. Licensees must be required to release Safeguards Information to responsible Tribal government officials just as they are now required to release such information to State government officials under current 10 CFR §37.37(f) authority.

In proposing this contemplated rule, the NRC recognizes Tribal sovereignty and the need for Tribes to be informed about activities that occur on Tribal lands. In developing Tribal notification regulations, the NRC should account for the requirements the NRC owes to Tribes under the federal trust doctrine.

Under federal law, Tribes have civil jurisdiction over non-Tribal members where the non-Tribal member's conduct threatens, among other things, the health or welfare of the Tribe. Also, federal law does not confer regulatory jurisdiction on states. To avoid jurisdictional confusion and lessen administrative burden, the NRC should require licensees to release Safeguards Information to responsible Tribal government under 10 CFR §37.37(f), as amended.

## Suggested CFR Revision

Suggested language revision for Tribal notification regulations, 10 CFR Parts 71 and 73, regarding advance notification to Native American Tribes of transportation of certain types of nuclear waste. Language additions are underlined.

### **§71.97 Advance notification of the shipment of irradiated reactor fuel and nuclear waste.**

(a) As specified in paragraphs (b), (c) and (d) of this section, each licensee shall provide advance notification to the governor of a State, or leader of a Tribe, or the governor's, or the Tribal leader's, designee, of the shipment of licensed material, through, or across the boundary of the State or Tribe, before the transport, or delivery to a carrier, for transport, of licensed material outside the confines of the licensee's plant or other place of use or storage.

(b) Advance notification is required under this section for shipments of irradiated reactor fuel in quantities less than that subject to advance notification requirements of §73.37 (f) of this chapter. Advance notification is also required under this section for shipment of licensed material, other than irradiated fuel, meeting the following three conditions:

(1) The licensed material is required by this part to be in Type B packaging for transportation;

(2) The licensed material is being transported to or across a State or Tribal boundary en route to a disposal facility or a collection point for transport to a disposal facility; and

(3) The quantity of licensed material in a single package exceeds the least of the following:

(i) 3000 times the A1 value of the radionuclides as specified in appendix A, Table A-1 for special form radioactive material;

(ii) 3000 times the A2 value of the radionuclides as specified in appendix A, Table A-1 for normal form radioactive material; or

(iii) 1000 TBq (27,000 Ci).

(c) Procedures for submitting advance notification.

(1) The notification must be made in writing to the office of each appropriate governor, each appropriate tribal leader, or governor's, or tribal leader's designee and to the Administrator of the appropriate NRC Regional Office listed in appendix A to part 73 of this chapter.

(3) The point of origin of the shipment and the 7-day period during which departure of the shipment is estimated to occur;

(4) The 7-day period during which arrival of the shipment at State or Tribal boundaries is estimated to occur;

(5) The destination of the shipment, and the 7-day period during which arrival of the shipment is estimated to occur; and

(6) A point of contact, with a telephone number, for current shipment information.

(e) Revision notice. A licensee who finds that schedule information previously furnished to a governor or governor's designee or tribal leader or tribal leader's designee, in accordance with this section, will not be met, shall telephone a responsible individual in the office of the governor of the State or of the governor's designee, or tribal leader or tribal leader's designee, and inform that individual of the extent of the delay beyond the schedule originally reported. The licensee shall maintain a record of the name of the individual contacted for 3 years.

(f) Cancellation notice. (1) Each licensee who cancels an irradiated reactor fuel or nuclear waste shipment for which advance notification has been sent shall send a cancellation notice to the governor of each State or to the governor's designee, or tribal leader or tribal leader's designee, previously notified, and to the Administrator of the appropriate NRC Regional Office listed in appendix A of part 73 of this chapter.

(2) The licensee shall state in the notice that it is a cancellation and identify the advance notification that is being canceled. The licensee shall retain a copy of the notice as a record for 3 years.

### **§73.21 Requirements for the protection of safeguards information.**

(a) General performance requirements. Each licensee who (1) possesses a formula quantity of strategic special nuclear material, or (2) is authorized to operate a nuclear power reactor, or (3) transports, or delivers to a carrier for transport, a formula quantity of strategic special nuclear material or more than 100 grams of irradiated reactor fuel, and each person who produces, receives, or acquires Safeguards Information is protected against unauthorized disclosure. To meet

this general performance requirement, licensees and persons subject to this section shall establish and maintain an information protection system that includes the measures specified in paragraphs (b) through (i.) of this section. Information protection procedures employed by State, Tribal, and local police forces are deemed to meet these requirements.

(b) Information to be protected. The specific types of information, documents, and reports that shall be protected are as follows:

(1) Physical protection at fixed sites. Information not otherwise classified as Restricted Data or National Security Information relating to the protection of facilities that possess formula quantities of strategic special nuclear material, and power reactors. Specifically:

(i) The composite physical security plan for the nuclear facility or site.

(ii) Site specific drawings, diagrams, sketches, or maps that substantially represent the final design features of the physical protection system.

(iii) Details of alarm system layouts showing location of intrusion detection devices, alarm assessment equipment, alarm system wiring, emergency power sources, and duress alarms.

(iv) Written physical security orders and procedures for members of the security organization, duress codes, and patrol schedules.

(v) Details of the on-site and off-site communications systems that are used for security purposes.

(vi) Lock combinations and mechanical key design.

(vii) Documents and other matter that contain lists or locations of certain safety-related equipment explicitly identified in the documents as vital for purposes of physical protection as contained in physical security plans, safeguards contingency plans, or plant specific safeguards analyses for production or utilization facilities.

(viii) The composite safeguards contingency plan for the facility or site.

(ix) Those portions of the facility guard qualification and training plan which disclose features of the physical security system or response procedures.

(x) Response plans to specific threats detailing size, disposition, response times, and armament of responding forces.

(xi) Size, armament, and disposition of on-site reserve forces.

(xii) Size, identity, armament, and arrival times of off-site forces committed to respond to

safeguards emergencies.

(xiii) Information required by the Commission pursuant to 10 CFR 73.55 (c) (8) and (9)

(2) Physical protection in transit. Information not otherwise classified a Restricted Data or national Security Information relative to the protection of shipments of formula quantities of strategic special nuclear material and spent fuel. Specifically:

(i) The composite transportation physical security plan.

(ii) Schedules and itineraries for specific shipments. (Routes and quantities for shipments of spent fuel are not withheld from public disclosure. Schedules for spent fuel shipments may be released 10 days after the last shipment of a current series.)

(iii) Details of vehicle immobilization features, intrusion alarm devices, and communication systems.

(iv) Arrangements with and capabilities of local police response forces, and locations of safe havens.

(v) Details regarding limitations of radiotelephone communications.

(vi) Procedures for response to safeguards emergencies.

(3) Inspections, audits, and evaluations. Information not other wise classified as National Security Information or Restricted Data relating to safeguards inspections and reports. Specifically:

(i) Portions of safeguards inspection reports, evaluations, audits, or investigations that contain details of a licensee's or applicant's physical security system or that disclose uncorrected defects, weaknesses, or vulnerabilities in the system. Information regarding defects, weaknesses or vulnerabilities may be released after corrections have been made. Reports of investigations may be released after the investigation have been complete, unless withheld pursuant to other authorities, e.g., the Freedom of Information Act (5 U.S.C. 552).

(4) Correspondence. Portions of correspondence insofar as they contain Safeguards Information specifically defined in paragraphs (b)(1) through (b)(3) of this paragraph.

(c) Access to Safeguards Information. (1) Except as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established "need to know" for the information and is:

(i) An employee, agent, or contractor of an applicant, a licensee, the Commission, or the United States Government. However, an individual to be authorized access to Safeguards

Information by a nuclear power reactor applicant or licensee must undergo a Federal Bureau of Investigation criminal history check to the extent required by 10 CFR 73.57;

(ii) A member of a duly authorized committee of the Congress;

(iii) The Governor or a State or designated representative.

(iv) The Leader of a Tribe or designated representative.

(v) A representative of the International Atomic Energy Agency national Atomic Energy Agency (IAEA) engaged in activities association with the U.S./IAEA Safeguards agreement who has been certified by the NRC;

(vi) A member of a state, tribal, or local law enforcement authority that is responsible for responding to requests as assistance during safeguards emergencies; or

(vii) An individual to whom disclosure is ordered pursuant to §2.744(e) of this chapter.

(2) Except as the Commission may otherwise authorize, no person may disclose Safeguards Information to any-other person except as set forth in paragraph (c)(1) of this section.

(d) Protection while in use or storage. (1) While in use, matter containing Safeguards Information shall be under the control of an authorized individual.

(2) While unattended, Safeguards Information shall be limited to a minimum number of personnel for operating purposes who have a "need to know" an are otherwise authorized access to Safeguards Information in accordance with the provisions of this section.

(e) Preparation and marking of documents. Each document and other matter that contains Safeguards Information as defined in paragraph (b) in this section shall be marked "Safeguards information" in a conspicuous manner to indicate the presence of protected information (portion marking is not required for the specific items of information set forth in paragraph §73.21 (b) other than guard qualification and training plans and correspondence to and from the NRC). Documents and other matter containing Safeguards Information in the hands of contractors and agents of licensees that were produced more than one year prior to the effective date of this amendment need not be marked unless they are removed from storage containers for use.

(f) Reproduction and destruction of matter containing Safeguards Information. (1) Safeguards Information may be reproduced to the minimum extent necessary consistent with need without permission of the originator.

(2) Documents or other matter containing Safeguards Information may be destroyed by any

method that assures complete destruction of the Safeguards Information they contain.

(g) External transmission of documents and material. (1) Documents and other matter containing Safeguards Information, when transmitted outside an authorized place of use or storage, shall be packaged to preclude disclosure of the presence of protected information.

(2) Safeguards Information may be transported by messenger-courier, United States first class, registered express, or certified mail, or by any individual authorized access pursuant to §73.21(c).

(3) Except under emergency or extraordinary conditions, Safeguards Information shall be transmitted only by protected telecommunications circuits (including facsimile) approved by the NRC. Physical security events required to be reported pursuant to §73.71 are considered to be extraordinary conditions.

(h) Use of automatic data processing (ADP) systems. Safeguards Information may be processed or produced on an ADP system provided that the system is self-contained within the licensee's or his contractor's facility and requires the use of an entry code for access to stored information. Other systems may be used if approved for security by the NRC.

(i) Removal from Safeguards Information category. Documents originally shall be removed from the Safeguards Information category whenever the information no longer meets the criteria contained in this section.

### **§73.37 Requirements for physical protection of irradiated reactor fuel in transit.**

(a) Performance objectives. (1) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a quantity of irradiated reactor fuel in excess of 100 grams in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding, shall establish and maintain, or make arrangements for, and assure the proper implementation of, a physical protection system for shipments of such material that will achieve the following objectives:

(i) Minimize the possibilities for radiological sabotage of spent fuel shipments, especially within heavily populated areas; and

(ii) Facilitate the location and recovery of spent fuel shipments that may have come under the control of unauthorized persons.

(2) To achieve these objectives, the physical protection shall:

(i) Provide for early detection and assessment of attempts to gain unauthorized access to, or control over, spent fuel shipments;

(ii) Provide for notification to appropriate response forces of any spent fuel shipment sabotage attempts; and

(iii) Impede attempts at radiological sabotage or spent fuel shipments within heavily populated areas, or attempts to illicitly move such shipments into heavily populated areas, until response forces arrive.

(b) General requirements. To achieve the performance objectives of paragraph (a) of this section, a physical protection system established and maintained, or arranged for, by the licensee shall:

(1) Provide for notification of the Nuclear Regulatory Commission in advance of each shipment, in accordance with §73.72 of this part.

(2) Include and retain a copy of current procedures for coping with circumstances that threaten deliberate damage to spent fuel shipment and with other safeguards emergencies as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license for which the procedures were developed and, if any portion of the procedures is superseded, retain the superseded material for three years after each change.

(3) Include instructions for each escort and retain a copy of the current instructions as a record for three years after the close of period for which the licensee possesses the special nuclear material under each license that authorized the activity that requires the instruction and retain any superseded material for three years after each change. The instructions must direct that, upon detection of the abnormal presence of unauthorized persons, vehicles, or vessels in the vicinity of the spent fuel shipment or upon detection of a deliberately induced situation that has the potential for damaging a spent fuel shipment, the escort will:

(i) Determine whether or not a threat exists;

(ii) Assess the extent of the threat, if any;

(iii) Inform local law enforcement agencies of the threat and request assistance; and

(iv) Implement the procedures developed in accordance with paragraph (b)(2) of this section.

(4) Include a communications center at a designated location, which will be staffed continuously by at least one individual who will monitor the progress of the spent fuel shipment and will notify the appropriate agencies in the event a safeguards emergency should arise.

(5) Provide for maintenance of a written log by the escorts and communications center, personnel for each spent fuel shipment, which will include information describing the shipment and significant events that occur during the shipment and will be available for review by authorized NRC personnel for a period of at least three years following the completion of the shipment.

(6) Provide that arrangements have been made with local law enforcement agencies along the routes of road and rail shipments, and at U.S. ports where vessels carrying spent fuel shipments are docked, for their response to an emergency or a call for assistance.

(7) Provide for advance approval by the NRC of routes used for road and rail shipments of spent fuel, and of any U.S. ports where vessels carrying spent fuel shipments are scheduled to stop.

(8) Provide that shipments are planned so that scheduled intermediate stops are avoided to the extent practicable.

(9) Provide that at least one escort maintains visual surveillance of the shipment during periods when the shipment vehicle is stopped, or the shipment vessel is docked.

(10) Provide that escorts (other than members of local law enforcement agencies, or ship's officers serving as unarmed escorts) have successfully completed the training required by appendix D of this part.

(11) Provide that shipment escorts make calls to the communications center at least every 2 hours to advise of the status of the shipment for road and rail shipments, and for sea shipments while shipment vessels are docked at U.S. ports.

(c) Shipments by road. In addition to the provisions of paragraph (b), the physical protection system for any portion of a spent fuel shipment that is by road shall provide that:

(1) A transport vehicle within a heavily populated area is:

(i) Occupied by at least two individuals, one of whom serves as escort, and escorted by an armed member of the local law enforcement agency in a mobile unit of such agency; or

(ii) Led by a separate vehicle occupied by at least one armed escort, and trailed by a third vehicle occupied by at least one armed escort.

(2) A transport vehicle not within any heavily populated area is:

(i) Occupied by at least one driver and one other individual who serves as escort; or

(ii) Occupied by a driver and escorted by a separate vehicle occupied by at least two escorts;

or

(iii) Escorted as set forth in paragraph (c)(1) of this section.

(3) Escorts have the capability of communicating with the communications center, local law enforcement agencies, and one another, through the use of:

(i) A citizens band (CB) radio available in the transport vehicle and in each escort vehicle;

(ii) A radiotelephone or other NRC approved equivalent means of two-way voice communications available in the transport vehicle or in an escort vehicle committed to travel the entire route; and

(iii) Citizens band (CB) radio and normal local law enforcement agency radio communications in any local law enforcement agency mobile units used for escort purposes.

(4) The transport is equipped with NRC-approved features that permit immobilization of the cab or cargo-carrying portion of the vehicle.

(5) The transport vehicle driver has been familiarized with, and is capable of implementing, transport vehicle immobilization, communications, and other security procedures.

(d) Shipments by rail. In addition to the provisions of paragraph (b), the physical protection system for any portion of a spent fuel shipment that is by rail shall provide that:

(1) A shipment car shipment within a heavily populated area is accompanied by two armed escorts (who may be members of a local law enforcement agency), at least one of whom is stationed at a location on the train that will permit observation of the shipment car while in motion.

(2) A shipment car not within any heavily populated area is accompanied by at least one escort stationed at a location on the train that will permit observation of the shipment car while in motion.

(3) Escorts have the capability of communicating with the communications center and local law enforcement agencies through the use of a radiotelephone, or other NRC-approved equivalent means of two-way voice communications, which shall be available on the train.

(e) Shipments by sea. In addition to the provisions of paragraph (b), the physical protection system for any portion of a spent fuel shipment that is by sea shall provide that:

(1) A shipment vessel, while docked at a U.S. port within a heavily populated area, is protected by:

(i) Two armed escorts stationed on board the shipment vessel, or stationed on the dock at a location that will permit observation of the shipment vessel; or

(ii) A member of a local law enforcement agency, equipped with normal LLEA radio communications, who is stationed on board the shipment vessel, or on the dock at a location that will permit observation of the shipment vessel.

(2) A shipment vessel, while within U.S. territorial waters, or while docked at a U.S. port not within a heavily populated area, is accompanied by an escort, who may be an officer of the shipment vessel's crew, who will assure that the shipment is unloaded only as authorized by the licensee.

(3) Escorts have the capability of communicating with the communications center and local law enforcement agencies through the use of a radiotelephone, or other NRC-approved equivalent means of two-way voice communications.

(f) Prior to the transport of spent fuel within or through a state or within or through a tribe a licensee subject to this section shall notify the governor or the governor's designee or the tribal leader or tribal leaders designee. The licensee shall comply with the following criteria in regard to the notification:

(1) The notification must be in writing and sent to the office of each appropriate governor or governor's designee or each appropriate tribal leader or tribal leaders designee. A notification delivered by mail must be postmarked at least 7 days before transport of a shipment within or through the state or tribe. A list of mailing address of governors and governor designees and tribal leader or tribal leaders designee is available upon request from the Director, Office of Public Affairs, U.S. Nuclear Regulatory Commission, Washington, and DC 20555.

(2) The notification must include the following information:

(i) The name, address, and telephone number of the shipper, carrier, and receiver.

(ii) A description of the shipment as specified by the Department of Transportation in 49 CFR §172.202 and §172.203(d).

(iii) A listing of the routes to be used within the state or tribal boundaries.

(iv) A statement that the information described below in §73.37(f)(3) is required by NRC regulations to be protected in accordance with the requirements of §73.21.

(3) The licensee shall provide the following information on a separate enclosure to the written notification:

(i) The estimated date and time of departure from the point of origin of the shipment.

(ii) The estimated date and time of entry into the governor's state or tribal leader's boundaries.

(iii) For the case of a single shipment whose schedule is not related to the schedule of any subsequent shipment, a statement that schedule information must be protected in accordance to provisions of §73.21 until at least 10 days after the shipment has entered or originated within the state or tribal boundaries.

(4) A licensee shall notify by telephone or other means a responsible individual in the office of the governor or tribal leader or in the office of the governor's designee or tribal leader's designee of any schedule changes that differs by more than 6 hours from the schedule information previously furnished in accordance with §73.37(f)(3), and shall inform that individual of the number of hours of advance or delay relative to the written schedule information previously furnished.

(g) State officials, state employees, tribal officials, tribal employees, and other individuals or organizations, whether or not licensees of the Commission, who receive schedule information of the kind specified in §73.37(f)(3) shall protect that information against unauthorized disclosure as specified in §73.21.

## **Tribal Notification Concept**

### **Proposed Rulemaking**

In recognition of Tribal sovereignty, the NRC seeks to amend current regulations to require licensees to provide advance notice to Tribes of certain radioactive waste shipments to and across Tribal land. Specifically, the NRC is considering amending 10 CFR Parts 71 and 73 regarding: (1) the development of a Tribal contact list; (2) minimizing administrative burden to licensees; (3) identifying Tribal locations along shipment routes, and; (4) Tribal compliance with Safeguards Information.

### **Outsource Potential**

In simpler terms, these considerations can be summarized as: (1) gathering information (contacts and locations); (2) dispersing information (easing licensee burden), and; (3) providing instruction (regulatory compliance). These three considerations are not inherently governmental functions. As such, the NRC should consider outsourcing the implementation of this project if, and when, it becomes available.

Outsourcing this project will increase NRC efficiency and reduce wasteful spending. Outsourcing would require only one NRC full time employee, a contract project officer, to ensure an accurate and complaint project develops. NRC spending will be reduced with one NRC staff, as opposed to the few necessary to develop this project. Resources will not be wasted if this project is outsourced to an organization that is accountable to Tribes and already maintains a relationship with Tribes that is based on mutual trust and respect.

### **Government Performance and Results Act Objectives**

Outsourcing will also permit the NRC to meet its Government Performance and Results Act (GPRA) objectives. NRC has a management goal to streamline and improve information delivery through information technology. Outsourcing this function to an organization that advocates for

Tribal involvement and that employs state of the art technology will guarantee that accurate and accessible information will be delivered. NRC investment in this approach will result in a focused response to licensees' needs.

Outsourcing to a Tribal advocacy organization can also inspire public confidence in the NRC by providing stakeholders with clear and accurate information. Outsourcing to an organization that shares the goal of zero radiation related fatalities and no significant exposures from the transportation of nuclear waste will ensure the NRC meets its mission to protect public health, safety and the environment.

### **Strategic Planning**

Consistent with GPRA, NRC annually reviews and revises its performance and the external and internal factors that affect its mission. GPRA provides guidance for future NRC decision-making. Proposed changes to NRC's strategic plan form the basis for subsequent performance plan development and budget formulation cycle. This proposed Tribal notification amendment would include Tribes as specific stakeholders in NRC's strategic plan. To implement this amendment, the NRC must provide an adequate budget appropriation.

Congress has indicated that GPRA will become more useful in time and that future appropriations and authorizations will be based on GPRA reports. As the NRC prepares for the waste repository at Yucca Mountain, this proposed Tribal notification amendment serves as just such a preparation, TASWER is committed to offer stakeholder involvement in NRC's strategic planning. TASWER is ready now to assist the NRC in developing a strategy to deliver Indian Country with the capacity to institute a complaint notification program.

### **TASWER Background**

In 1994, Tribal leaders requested parity from the United States Environmental Protection Agency (EPA) in the form of the same training and technical assistance on solid waste and emergency response issues that the EPA provides to states. EPA responded by funding TASWER,

a Tribal association dedicated to enabling Tribes to comply with federal environmental law. TASWER is incorporated as a non-profit organization in the District of Columbia.

Tribal initiative created and governs TASWER. Members of the TASWER Board of Directors represent Tribes and Tribal interests from EPA regions throughout the United States. Because Tribal involvement is essential for a successful notification project, TASWER is uniquely qualified to administer the Tribal notification program. TASWER has the resources, understanding, Tribal commitment and accountability to create and administer a fully complaint notification program.

### **Tribal Notification Contacts**

TASWER will develop and maintain the Tribal notification contact list on the internet. TASWER will provide maximum network security for the internet site. TASWER will supply necessary written details about its network security, network reliability and backup services. TASWER will update the website within eight hours after being notified by a Tribe of new information.

TASWER, through an Internet Service Provider, will provide the Tribal notification contact list 24 hours a day, 7 days a week. NRC regional offices, the nuclear industry, and NRC policy makers will have immediate and easy access. TASWER will use full-time staff to support the creation and maintenance of the Tribal notification contact website pages.

### **Safeguards Information Protection**

TASWER will develop and maintain the Safeguards Information protections instruction for Tribal personnel in full compliance with amended regulations. TASWER will provide qualified instructors. Instructors, curriculum developers, and designers will have knowledge and expertise that is grounded in formal training and practical experience. Instructors, curriculum developers and designers will also be well versed in current NRC and Federal laws, policy, and regulations. Instructors will be uniquely qualified to conduct classes with Tribal participants.

TASWER will hire full-time staff to support the creation and maintenance of the Safeguards Information protections instruction for Tribal personnel. TASWER anticipates a design of two to four course offering each year. Courses can be held in the NRC facility located in Rockville, Maryland or in facilities located in each of the NRC Regional offices. However, to ensure maximum Tribal participation, this course should be held in facilities close to, or in, Indian Country. When NRC facilities are deemed inadequate for instruction, TASWER will secure the appropriate facility.

TASWER anticipates that Tribal participant travel will be necessary for the proper administration of the project. Travel costs and related activities shall be charged in accordance with the limitations of the Office of Management and Budget Circular A-122, Cost principles for Nonprofit Organizations. To receive payment, TASWER will complete the required ACH payment procedures of the NRC.