RULEMAKING ISSUE
NEGATIVE CONSENT

February 2, 2001 SECY-01-0021

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: RULEMAKING PLAN: 10 CFR PARTS 71 AND 73 — "ADVANCE NOTIFICATION TO NATIVE AMERICAN TRIBES OF TRANSPORTATION OF CERTAIN TYPES OF NUCLEAR WASTE"

PURPOSE:

To inform the Commission of the input received on an Advance Notice of Proposed Rulemaking (ANPR) and to request, by negative consent, Commission approval of the subject rulemaking plan.

BACKGROUND:

To amend U.S. Nuclear Regulatory Commission (NRC) rules to (1) extend the advance notification and Safeguards Information protection requirements that now apply to States, to cover Federally recognized Tribal governments regarding shipments of spent fuel and high-level radioactive wastes (HLW) through their lands, and (2) allow up-to-date means of communication of Safeguards Information related thereto.

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10 CFR Parts 71 and 73 require a licensee to inform a State governor, or the governor's designee, of certain shipments of spent fuel and HLW passing through the boundary of the State. The NRC promulgated these regulations in 1982 to comply with Public Law No. 96-295. This statute was enacted to deal with concerns States expressed about their abilities to fulfill their responsibilities to protect public health and safety, while shipments of HLW pass through their jurisdictions.

In a Staff Requirements Memorandum dated November 13, 1996, responding to SECY 96-187, "Policy Issues Raised in Meeting with Prairie Island Dakota Indian representatives," the Commission directed the staff to " . . . continue to implement the spirit and letter of the President's 1994 guidance to ensure that the rights of sovereign Tribal governments are fully respected and to operate within a government-to-government relationship with Federally recognized Native American Tribes." The presidential guidance encouraged each Executive department and agency to ". . . apply the requirements of Executive Order (EO) Nos. 12875[1] and 12866[2] to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs to Tribal communities." This direction from the President was also reiterated in EO 13084[3], "Consultation and Coordination With Indian Tribal Governments." issued on May 14, 1998. Subsequently, EO 13175, "Consultation and Coordination With Indian Tribal Governments," was issued on November 6, 2000, re-emphasizing the need to work closely with Tribal governments on matters that may affect them; it also provides for new procedures for rulemaking processes.

To obtain input from stakeholders, the NRC published an ANPR on December 21, 1999[4] for a 90-day public comment period. The comment period was extended to July 5, 2000, in response to a request from the National Congress of American Indians, which represents 210 Tribal governments.

DISCUSSION:

Summary of Responses to the ANPR. Forty-eight comment letters were received from Tribal governments, Tribal associations, private citizens, a State, a licensee, and an industry association.

- Virtually all the commenters favored providing advance notification to Tribal governments, with some disagreement on the details of implementation.
- Most commenters were in favor of treating Tribal and State governments on the same basis.
- Commenters encouraged the NRC to make it possible to use more up-to-date means of communication of advance notification, e.g., via the Internet.

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[1] EO 12875, "Enhancing the Intergovernmental Partnership," 58 FR 58093, October 26, 1993

[2] EO 12866, "Regulatory Planning and Review," 58 FR 51735, September 30, 1993

[3] 63 FR 27655

[4] 64 FR 71331, December 12, 1999

- Tribal representatives and others encouraged the NRC to communicate directly with Tribal governments during the rulemaking process, as well as when implementing procedures for advance notification.
- Some Tribal governments have declared lands to be "nuclear free zones" and are opposed to shipments through Tribal lands; however, even they were in favor of advance notification.

Public comments were taken into account while developing the rulemaking plan (Attachment 1). A summary and discussion of the public comments are contained in Attachment 2.

Staff Evaluation and Rationale for Recommended Changes to Rules. An interoffice working group (WG) was established to prepare a rulemaking plan. After evaluation of responses to the ANPR, the WG recommends that regulations should be amended to extend to Federally recognized Tribal governments the advance notification requirements now applicable to States. Changes should also be made to allow for more up-to-date, protected means of electronic communications of advance notification. WG members also identified the need to extend to Tribal governments an exclusion from fingerprinting requirements (granted to State officials) for access to Safeguards Information.

Anticipated rule changes: The attached draft rulemaking plan recommends: (1) amending 10 CFR 71.97, 73.21, 73.37 and 73.57, to extend the advance notification and Safeguards Information protection requirements that now apply to States to also cover Federally recognized Tribal governments; (2) amending 71.97 and 73.21 to permit the use of more up-to-date methods for communicating the advance notification information; and (3) amending 10 CFR 73.57(b)(2) to exempt Tribal officials from fingerprinting requirements (for purposes of criminal history checks) that currently apply to State officials.

This rulemaking would directly address the public health and safety concerns of the Federally recognized Native American Tribes by providing for advance notification of shipments of HLW and spent fuel through Tribal lands. Promulgation of the amendments would increase public confidence in the NRC and increase regulatory efficiency by extending the requirements for advance notification to Tribal governments. For those Tribal governments that elect to receive advance notification, public health and safety may be improved by making it possible for Tribal governments to more effectively carry out their responsibilities in protecting their citizens by promptly responding to any incidents involving these shipments. Notification requirements across Federal agencies would be more consistent by making the NRC's regulations more like the policies of the U.S. Department of Energy and the Department of the Navy, providing for greater efficiency and effectiveness. There may be a small increase in burden on some stakeholders by requiring: (1)Tribal governments to provide contact information and to protect Safeguards Information, if they elect to receive advance notification, and (2) licensees to notify affected Tribal governments of shipments of spent fuel and HLW. The staff does not believe this rulemaking imposes an unnecessary burden on stakeholders and does believe that the rulemaking will help to ensure that the rights of sovereign Tribal governments are fully respected, in the spirit of EOs related to furthering cooperation between Federal and Tribal governments.

COORDINATION:

The OGC has no legal objection to this paper and the attached rulemaking plan. The Office of the Chief Information Officer has reviewed this paper for information technology and information management implications and concurs in it. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections.

RECOMMENDATION:

It is my intent to approve this rulemaking plan within 10 days after the date of this paper, in the absence of further direction from the Commission. Action will not be taken until the SRM is received. We consider this action to be within the delegated authority of the EDO.

/RA/

William D. Travers
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for Operations

Enclosures:
1. Rulemaking Plan
2. "Summary and Discussion of Public Comments"

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ADAMS Package Accession No. ML003779615 ***See previous concurrence.**

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