Rulemaking Plan

10 CFR PARTS 71 & 73, ADVANCE NOTIFICATION TO NATIVE AMERICAN TRIBES OF TRANSPORTATION OF CERTAIN TYPES OF NUCLEAR WASTE

Regulatory Issue

Nuclear Regulatory Commission (NRC) regulations currently require NRC licensees who ship spent fuel or high-level radioactive waste (HLW) to provide advance notification of such shipments to governors of States or their designees. This rulemaking would amend these regulations to extend the provision for advance notification to Tribal governments. This action would further Federal efforts to consult and coordinate with Tribal governments with regard to Federal affairs that are of concern to them, in recognition of the right of Native American Tribes to self-government, thereby supporting Tribal sovereignty and self-determination.

Background

Current NRC regulations require licensees to inform State governors, or the governor's designee, of certain shipments of irradiated reactor fuel and HLW passing through or across the boundary of the State (see 10 CFR 71.97 and 73.37). The NRC developed these regulations in 1982 to comply with Public Law No. 96-295, which was enacted to deal with concerns expressed by States about their abilities to fulfill their responsibilities to protect public health and safety while shipments of high-level radioactive wastes pass through their jurisdictions. Schedule information provided to States for shipments in excess of 100 grams of spent fuel is treated as Safeguards Information under NRC regulations; current NRC regulations do not permit the release of Safeguards Information except to those persons specified in §73.21(c)[1]. The regulatory issue of concern to the Commission is to determine if the requirement for advance notification of States should be extended to Federally recognized Native American Tribes.

The NRC sought input from stakeholders on this issue by publishing an advance notice of proposed rulemaking (ANPR) for public comment (64 FR 71331; December 21, 1999). In a letter to the Secretary of the Commission, dated March 1, 2000, the National Congress of American Indians (NCAI), which represents 210 Tribal governments, requested a 90-day extension of the comment period. The request was granted and the comment period was extended from March 22 to July 5, 2000. The comments received in response to the ANPR were taken into account while developing this rulemaking plan.

In 1994, the U.S. Department of Energy (DOE) notified the NRC of its intent to implement a policy of Tribal notification of waste shipments for its shipments of spent nuclear fuel and HLW. The DOE indicated that implementation of this policy would allow it to better integrate

[1] In certain cases when Tribal Police serve as the local law enforcement authority, they have received advance notification of shipments to enable response in case of emergency and to escort shipments through Tribal lands.

transportation planning activities within DOE. A DOE order[2] and implementation guide[3], in-place since 1995, provide for "pre-notification" (DOE's term for advance notification) and access by Tribal governments to information about shipments. Federal grants are made to various Tribes under transportation programs by DOE, the Department of the Navy, and other Federal agencies. The Department of the Navy also provides advance notification to Tribal governments of shipments of certain types of high-level radioactive wastes.

A Presidential memorandum dated April 29, 1994, entitled "Government-to-Government Relations with Native American Tribal Governments" [59 FR 22951; May 4, 1994], stated, in part:

> The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

While this memorandum does not impose any new obligations on NRC as an independent regulatory agency, it does encourage Federal agencies to consult with Tribal governments before engaging in activities that may affect Tribes, and to remove any procedural impediments to agencies being able to work directly with Tribal governments. To accomplish this, the memorandum encourages each Executive department and agency to ". . . apply the requirements of Executive Order (EO) Nos. 12875[4] and 12866[5] 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[6], "Consultation and Coordination With Indian Tribal Governments," issued on May 14, 1998.

The Commission recognized the importance of enhanced government-to-government relations with Tribes as expressed in the President's memorandum as well as in a Staff Requirements Memorandum responding to SECY 96-187, "Policy Issues Raised in Meeting with Prairie Island Dakota Indian Representatives," dated November 13 1996. It 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."

On November 6, 2000, the President issued EO 13175, "Consultation And Coordination With Indian Tribal Governments" (effective 60 days from the above date). It both revokes EO 13084

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[2]DOE Order O 460.2, Departmental Materials Transportation and Packaging Management, Chg 1. Approved 9/27/95.

[3]Implementation Guide for Use with Doe O 460.2, Departmental Materials Transportation and Packaging Management, 11/15/96.

[4] EO 12875, "Enhancing the Intergovernmental Partnership," 58 FR 58093, 10/26/1993.

[5] EO 12866, "Regulatory Planning and Review," 58 FR 51735, 9/30/1993.

[6] 63 FR 27655, 5/19/1998.

(having the same title and which was in effect at the time the ANPR was published for this rulemaking) and provides new direction to Federal agencies. For example, agencies are directed to grant Indian Tribal governments the maximum administrative discretion possible. New rules resulting in unfunded mandates must be made following special procedures involving consultation with Tribal governments. In addition, certain documents are to be provided to OMB when announcements are published in the Federal Register. Prior to transmittal of a draft final regulation that has Tribal implications to OMB, pursuant to EO 12866, agencies are required to include a certification from the agency official designated to ensure compliance with EO 13175 stating that its requirements have been met in a meaningful and timely manner. Independent regulatory agencies are encouraged to comply with the provisions of this order.

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 will 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.

Existing Regulatory Framework

Current NRC regulations require NRC licensees to inform State governors, or the governor's designee, of shipments of spent fuel or HLW passing through a State or across its boundary. The NRC promulgated these regulations pursuant to Pub. L. No. 96-295 to address concerns of the States of their responsibilities to protect public health and safety while shipments of spent fuel and HLW pass through their jurisdictions. These provisions of Title 10 of the CFR are found in the following sections:

§71.97 requires advance notification to States of certain shipments of HLW and small quantities of spent fuel;

- The types of shipments for which notification is required are found in §71.97(b).

§73.37 requires advance notification to States of shipments of more than 100 grams of spent fuel;

- The types of irradiated nuclear fuel shipments are found in §73.37(a).

§73.37(g) establishes requirements for the protection of schedule information that is designated as Safeguards Information from unauthorized disclosure as specified in §73.21.

§73.21 identifies State and local officials who are authorized to have access to Safeguards Information and the protection measures to be used for this information. (Tribal officials are not included therein). Information protection procedures employed by State and local police forces are deemed to meet these protection requirements.

Further, the method by which information is to be communicated to States is covered in:

§71.97(c) and §73.37(f)(1) and (3) provide that the advance notification and Safeguards Information must be in written form, while

§73.21(g)(3) provides for electronic transmission of Safeguards Information via protected telecommunications circuits (including facsimile) approved by the NRC.

Exemption from fingerprinting requirements for individuals with access to Safeguards Information under §73.21 is covered in:

73.57(b)(2) provides for exemption of State governors and their designees from the fingerprinting requirements.

How Regulatory Issue Would be Addressed By Rulemaking

The staff recommends that a proposed amendment to Parts 71 and 73 be developed to require advance notification of Tribal governments who wish to be informed of shipments of certain types of high-level radioactive wastes. The proposed amendments would extend to Tribal governments the advance notification requirements for shipments of spent fuel and HLW that currently apply for States by amending §§ 71.97 and 73.37. Conforming changes also would be made to §73.21 to permit Tribal governments to receive Safeguards Information and to §73.57(b)(2) to extend the exemptions from fingerprinting requirements to Tribal governments and their designees. The amendments to 10 CFR 71.97 and 10 CFR 73.37 would allow for secure, electronic communications of advance notifications, a method suggested by several stakeholders in response to questions posed in the ANPR.

Rulemaking Options

Option 1 - No action

Under this option, NRC regulations would not be amended to require advance notification to Tribal governments of shipments of spent fuel and HLW through their lands.

Pros:
- Minimization of expenditure of NRC staff resources consumed during rulemaking efforts and costs of implementation.
- Lessens the perception of potential for unauthorized disclosure and resulting increase in risk of radiological sabotage due to wider dissemination of Safeguards Information.
- Licensees would benefit from not having additional notification requirements placed on them. (The incremental costs associated with notifying Tribal governments would be relatively small, given that advance notification of States is already required.)
- The small increase in costs to Tribal governments associated with protection of Safeguards Information, should they elect to receive it, would be avoided.

Cons:
- The Commission's direction to implement the spirit and letter of Presidential guidance on fostering government-to-government relations with Tribes, as expressed in SECY 96-187 and EOs 13084 and 13175, would not be fully implemented.

- Tribes would not be treated on an equal basis with States. Responses to questions posed in the ANPR indicate strong support by Tribes and others for requiring advance notification.
- Failure to require advance notification to Tribal governments would be inconsistent with the existing policies of other Federal agencies. The Department of the Navy and DOE already provide advance notification to Tribal governments.
- Tribal governments would be denied information necessary to plan for and conduct operations such as emergency planning and response if they have such capability .
- The NRC sought opinions in the ANPR on how licensees could effectively and efficiently provide notification to Tribes; in response, Tribal representatives and others encouraged the use of more advanced methods of communication and the opportunity to effect this change through this rulemaking would be lost should it not go forward.

Option 2 - Amend Regulations to Provide for Advance Notification of Tribal Governments

Under this option, the NRC would conduct a rulemaking to: (1) Amend §§71.97, 73.21 and 73.27 of Title 10 CFR to extend to Federally recognized Tribal governments the advance notification requirements that now apply to State governments for spent fuel and HLW that cross the boundaries of their lands. (2) Extend to Tribal governments requirements to protect Safeguards Information. (3) Amend §§71.97 and 73.21 to permit the use of up-to-date, protected means of electronic communication, e.g., encrypted Internet transmission. (4) Amend §73.57 to extend the exemption for fingerprinting requirements of State governors and their designees who may receive Safeguards Information to Tribal governments by extending the exemptions in §73.57(b)(2) to Tribal governments.

Pros:

- Increase in regulatory efficiency. The rulemaking would enhance coverage of Parts 71 and 73 regulations as they apply to the notification requirements for the shipments of radioactive material across State boundaries and Federally recognized Native American lands. The need to resolve, on a case-by-case basis, questions that arise as to the applicability of these regulations to governing Tribal Nations would be avoided.
- Increase the consistency of regulations across Federal agencies by making the NRC's regulations consistent with policies of the DOE and the Department of the Navy.
- Public awareness and public confidence in the NRC's regulatory scheme would be enhanced.
- Increased public safety. The amendments would enhance the ability of Tribal governments to prepare for emergencies and escort shipments, should they choose to, thereby increasing the security of shipments across their lands. The ability to respond in case of an incident would be enhanced.
- The rulemaking would add to the Federal Government's efforts to recognize and work with Tribal governments, in concert with Executive Orders[7], by furthering Federal/Tribal government-to-government relations and enhancing Indian Tribal self-government. It would contribute to increase levels of sovereignty and respect for Tribal self-government, in recognition of responsibilities that arise from the unique legal relationship between the Federal Government and Tribal governments. This is in concert with SECY 96-187.

[7]EOs 13084 and, EO 13175, discussed above.

Cons:

- Tribal governments would have the increased burden of protecting Safeguards Information, if they participate. (Tribes asked for funding in responses to the ANPR; the DOE now funds Tribal governments as does the U.S. Environmental Protection Agency.)
- Places some additional burden on licensees.
- NRC resources would be necessary to complete the rulemaking.
- NRC resources would be required to obtain and update a list of contacts for Federally recognized Tribal Governments as well as to identify Tribal lands through which NRC licensees may ship spent fuel and HLW.
- Increased potential for a perception by the public of unauthorized disclosure of Safeguards Information due to wider dissemination, as expressed by some commenters in response to the ANPR.

Recommended Option

The NRC Staff recommends Option 2 using the standard, two-step process of a proposed and final rulemaking.

Impacts On Licensees

- Licensees would have the burden of identifying Tribal governments prior to shipping.
- Licensees would need to provide additional training to staff to implement the rule. It is likely that communications equipment needed to provide the notification would already be possessed by licensees, so expenditures to conduct notification would likely represent a small increment to existing programs and facilities.

Impacts on Other Federal Agencies

A small impact may be on the U.S. Department of Interior's Bureau of Indian Affairs (BIA) resulting from the NRC's and licensee's dependence upon them for listing of Federally recognized Tribal governments. Some increase in costs may be realized by the DOE if NRC's licensees are dependent upon this agency for maps and other information about Tribal boundaries and their relationship to routes for shipping of hazardous materials. Given that the BIA and DOE already conduct these activities, the incremental cost to these agencies is expected to be negligible.

Office of General Counsel Legal Analysis

The proposed amendments to rules would provide for advance notification to Tribal governments of shipments of spent fuel or HLW. Currently, licensees are required to inform a State's governor, or the governor's designee, of certain shipments of irradiated reactor fuel and HLW passing through or across the boundary of the State. The proposed rule would extend the requirement for advance notification to Tribal governments.

The purpose of this rulemaking should be described as an action to further Federal efforts to consult and coordinate with Tribal governments with regard to Federal affairs that are of concern to them. This action is in recognition of the right of Native American tribes to self-government, thereby supporting Tribal sovereignty and self-determination. As a result of public

comments to the ANPR, an issue that would need to be addressed is the increased potential for public perception of unauthorized disclosure of Safeguards Information due to wider dissemination.

The proposed rule will not require preparation of either an environmental assessment or an environmental impact statement, as the amendments to Parts 71 and 73 fall under the categorical exclusion for recordkeeping and reporting requirements found at 10 CFR 51.22(c)(3).

It appears that the rule is not a "major rule" under the Small Business Regulatory Enforcement Fairness Act, inasmuch as it does not appear that the rule is likely to result in: a $100,000,000 impact upon the economy; a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. Because the rule is not a major rule, the mandated 60-day period prior to effectiveness of major rules is not applicable.

The backfit rules (10 CFR 50.109, 70.76, 72.62) do not apply to this rulemaking. Amendments to NRC regulations resulting from this rulemaking would not impose a backfit as defined in the regulations; therefore, a backfit analysis is not required.

The proposed rule will require licensees and Tribal governments to generate and maintain records related to the advance notification of shipments of spent fuel or HLW to Tribal governments. Accordingly, the changes will require OMB review for purposes of the Paperwork Reduction Act, and cannot be promulgated through direct final rulemaking.

In conclusion, OGC has determined that there are no known bases for legal objection to the contemplated rulemaking.

Category of Rule

In accordance with NRC guidance (Section 5.23 of the NRC "Regulations Handbook," NUREG BR-0053, Rev. 4, 1997), this rulemaking would not constitute a major rule under the Small Business Regulatory Enforcement Fairness Act.

Regulatory Analysis

The staff intends to provide a regulatory analysis of the costs and benefits associated with the proposed rulemaking, which would also provide the basis for determining the impact of the proposed changes on small entities as required by the Regulatory Flexibility Act.

Coordination with Other Federal Agencies

The NRC staff expects that coordination with the BIA, DOE, DOT, and US Geologic Survey may be required to identify contacts for Federally recognized Tribal governments and shipping routes in relation to Tribal boundaries.

Backfit Analysis

The backfit rules (10 CFR 50.109, 70.76, 72.62) do not apply to this rulemaking because amendments to NRC regulations pertaining to advance notification requirements which result from this rulemaking would not impose a backfit as defined in the regulations. Therefore, a backfit analysis is not required.

Agreement State Implementation Issues

There are no Agreement State issues: The NRC staff has determined that this rule addresses a regulatory area which is reserved to the NRC and cannot be relinquished to Agreement States under the Atomic Energy Act.

Supporting Documents Needed

An OMB Paperwork Reduction Act clearance package, to be submitted when the proposed rule is forwarded to the Office of the Federal Register for publication, would be necessary because the rule would impose additional reporting and record keeping requirements on licensees and Tribal governments. NRC staff will review findings of OGC with regard to new record keeping and reporting requirements that may result from EO 13175 and incorporate them into proposed rules. No environmental assessment or environmental impact statement is needed as these amendments to Parts 71 and 73 fall under the categorical exclusion in Part 51 for Record keeping and Reporting requirements found at §51.22(c)(3). Existing guidance related to advance notification of States, and protection of Safeguard Information, if needed, for new methods of transmission of advance notification, would be updated to reflect this rule change.

Issuance by Executive Director of Operations or Commission

The NRC staff recommends that the Commission issue proposed and final rules because of the changes in policy associated with changes to the regulations.

Management Steering Group

No need for a steering group has been identified at this time.

Public Participation

Public participation will be sought through normal rulemaking procedures, including use of NRC's interactive web site, the "Rulemaking Forum." However, directed communications will be used to contact Tribal governments. STP has received estimates that approximately 16 to 30 of the 556 Federally recognized Tribal governments might be affected. The staff will send copies of the proposed rule to all Federally recognized Tribal governments in the continental United States, as well as Tribal associations, when it is published in the Federal Register (NRC staff does not anticipate that HLW and spent fuel shipments will take place in Alaska and Hawaii). The Staff will consider holding a public meeting during the comment period for the proposed rule. This rulemaking plan will be placed on the NRC's Rulemaking Forum web site following the Commission's approval.

Resources Needed to Complete Rulemaking

The estimated resources entailed in this rulemaking would be on the order of 2.1 FTEs. These resources will come principally from NMSS, OGC, and STP. These resources are within FY 2001 budget allocations and the proposed FY 2002 budget.

NMSS . . 1.0 FTE
OGC . . . 0.2 FTE
STP . . . . 0.3 FTE
ADM . . . 0.1

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Schedule

1 year after approval of plan	Proposed Rulemaking Package to Commission (and OMB clearance package for submittal to OMB)
1 year after end of public comment period	Final Rule to the Commission (with supporting documents)