Summary and Discussion of Public Comments
on
Advance Notice of Proposed Rulemaking

Advance Notification to Native American Tribes
of Transportation of Certain Types of Nuclear Waste
10 CFR Parts 71 and 73
(64 FR 71331)

Executive Summary

An ANPR was published in the Federal Register on December 21, 1999, to solicit stakeholder input on how to effectively and efficiently communicate advance notification to Native American Tribes about shipments of high-level waste (HLW) and spent fuel through their lands. Information was sought on minimizing the burden on licensees, identifying location of Tribal lands in relationship to shipment routes, and the sharing and protection of Safeguards Information. Forty-eight comment letters were received on the seventeen questions posed. Several key issues are summarized below:

- Comments supporting advance notification to Tribal governments were nearly unanimous, including support by thirty Tribes, four Tribal Groups/Associations, industry (NEI and one utility), one State, the Department of Energy (DOE), and four private citizens.
- Comments from Tribal governments, DOE, private industry, one State, and citizens were generally in favor of treating Tribal governments on the same basis as State governments.
- Many commenters support use of up-to-date electronic communication of advance notifications, e.g., via the Internet; use of the Internet to make information readily available to licensees.
- Several Tribal governments oppose shipments through Tribal lands. Some have adopted "nuclear free zone" resolutions but are in favor of advance notification. (One of the Tribal governments was mute on the subject of support for advance notification.)

Public Comments and Discussion

Question A. Developing a List of Native American Tribe Contacts

Four questions were posed in the ANPR regarding issues on development of a list of contacts, including: the appropriateness of using the Bureau of Indian Affairs' (BIA) listing of Federally recognized Native America Tribes, keeping the data up-to-date, and how licensees can effectively and efficiently provide advance notification to Tribes, including schedule changes that would require updated notification by telephone at any time of day.

Commenters suggested several alternatives to obtaining contact information from the BIA and how to keep the data up-to-date. The BIA's listing of Federally recognized Tribes was generally seen as a good starting point to identify contacts. Commenters suggested inclusion of Tribes that are recognized by States but not by the Federal government. The NRC staff believes the NRC is bound to work with Federally recognized Tribes in government-to-government relations, as identified in the Federal Register and maintained by the BIA.

Commenters indicated that BIA lists of contacts are sometimes not up-to-date. For this and other reasons, the NRC was urged to contact Tribes directly to obtain contact information. Stakeholders suggested that, as with States, allowance for contact with Tribal police should be provided for in NRC regulations, particularly in case of sudden changes in scheduling of shipments. Commenters urged review and/or use of methods used by the DOE for advance notification to identify Tribal contacts. The NRC staff believes that BIA lists may serve as a starting point for identifying contacts and that, to keep information up-to-date, mechanisms should be established to keep contact lists up-to-date by direct contact with Federally recognized Tribal governments. The Office of State and Tribal Programs has mechanisms in-place to accomplish this on an annual basis for States and they may be extended to Tribal governments.

Several comments from Tribal representatives and others indicated that communications may be made more efficiently and effectively by using up-to-date methods, e.g., facsimile or Email. Other commenters suggested continued use of surface mail and telephone. These methods were suggested for routine communication of advance notification as well as last-minute schedule changes. The NRC included in the rulemaking plan proposed amendments to enable this option use of electronic means to communicate advance notification; allowing for up-to-date methods of communications that would be in line with strategic goals of increasing efficiency and effectiveness.

Question B. Minimizing the Licensees' Administrative Burden

This series of questions sought input on minimizing burden on licensees and whether a shipment should proceed if contact with a Tribe can not be made.

Several comments indicated that the same methods used to provide advance notification to States be used for Tribal governments, continuing the theme of treating Tribal and State governments alike. Use of the Internet was suggested as a means of lessening the burden on licensees. Commenters suggested both communication of advance notification information via the Internet and using an NRC or DOE maintained web site to aid licensees in identifying Tribes to be contacted, Tribal contacts, and information about Tribal lands in relation to shipment routes. Commenters suggested that the NRC should be responsible for lessening the burden on licensees while others suggested that the NRC provide advance notification rather than licensees. Others suggested that the burden would be small for many reasons, among which were few of the lands of the 556 Federally recognized Tribes would be expected to be on spent fuel shipping routes. The NRC staff believes that minimizing unnecessary administrative burden on licensees is consistent with the NRC's strategic goals.

Should shipments proceed if a Tribe can not be contacted? The Nuclear Energy Institute (NEI) commented that "the course of regulated commerce" should not be altered if a Tribe is either unwilling or unable to make available a contact to exercise the "option of receiving notification." A private citizen indicated that no Tribe should have the opportunity to block or delay a shipment by failing to acknowledge a notification. Others indicated that Tribal governments, like States, should not be able to block shipments. Several Tribal governments argued that shipments should not be made through their lands unless they received funding to cover the cost of receipt and handling of Safeguards Information. Two Tribal governments and three Tribal associations indicated that shipments should not proceed if contact can not be made. Arguments in support of blocking shipments did not include rationales based on safety or other

reasons sufficient to impede the progress of shipments of HLW or spent fuel. NRC staff believes that Tribal governments should not be in a position to block shipments. Stakeholders will have an additional opportunity to comment on this issue during the proposed rulemaking stage should the Commission approve the rulemaking plan.

Question C. Identifying the Location of Tribes Along Shipment Routes

Questions posed in the ANPR sought input on how licensees may effectively and comprehensively identify the location of Native American Tribes along routes of shipment, development of a central database by the DOE and/or the NRC, and use of Geographic Information System (GIS) resources to provide licensees with information about the location of Tribal lands, and to what types of Tribal lands should the advance notification rule apply.

Many comments indicated that a combination of resources should be used by the NRC to identify Tribal lands in relation to routes for shipment and advance notification. These included maps provided by the BIA, supplemented by maps and a database maintained by the DOE. Many comments indicated that use of the GIS would be helpful. Commenters noted that some Tribes are already using DOE's systems and have GIS capability, as part of their participation in DOE's advance notification program. Several suggested that the NRC use the DOE's systems. Use of the Internet was recommended to communicate advance notifications as well as to make available lists of Tribal contacts and information to aid shippers in identifying when shipments would cross Tribal boundaries and trigger notification requirements. The NRC staff would consider these options for communications as well as examining resources available at the DOE, BIA as well as other agencies, e.g., resource maps from the National Geologic Survey and the Department of Transportation (DOT) during the rulemaking process.

The question on which Tribal lands should be included if advance notification is implemented led to a wide variety of responses, especially from Tribal representatives. Example of lands for which advance notification was suggested included: on or near Tribal lands; trust lands; all of "Indian Country;" lands for which Tribes have a "vested interest;" requests for Tribes to be able to participate in route selection and to avoid densely populated areas as well as traverses of shallow aquifers; lands received under claims settlements and claimed under aboriginal title; trust plus fee lands; lands that might contain Traditional Cultural Properties and other sacred sites. The DOE commented that the NRC should use BIA maps to identify lands and consult with DOE on technical details of GIS and route modeling; further, that the rule should apply to reservation lands of Federally recognized Tribes. The NRC staff believes that notification should be applied to reservations of Federally recognized Tribes. Similarly, NRC staff believes that, in the same manner as for States, notification should only be required for shipments to or crossing Tribal territory, not for shipments merely "near Tribal lands," as requested by some of the commenters.

Question D. Safeguards Information

Eight questions were asked regarding the sharing and protection of Safeguards Information.

Commenters placed strong emphasis on treating Tribal governments like State governments in responses to this and other questions posed in the ANPR. Commenters emphasized the need to work with Tribes on a government-to-government basis and to work within the spirit of Executive Orders on Federal relations with Tribal governments, including treating them with respect and recognizing their sovereignty. In the ANPR, the question was raised: "If a Tribal government receives Safeguards Information, should the NRC review the Tribe's actions to control and protect Safeguards Information?" The opinions voiced in response were varied. Many Tribal representatives argued that Tribal governments should be treated as responsible governments, like States. Some expressed concern about increased risk to public safety, indicating the NRC should review the capability of Tribal governments to protect Safeguards Information. The NEI suggested that the NRC should review each Tribes ability to protect Safeguards Information and conduct periodic inspections of this capability; further, that the NRC conduct an outreach program to ensure that concerns of Tribes may be addressed. The NRC staff plans to consider these suggestions during the proposed rulemaking process.

Many commenters were in favor of extending "need-to-know" requirements in §73.21 to Tribes, as well as the assumption that information protection procedures of police forces are "deemed to meet" information protection requirements. Several Tribes and others indicated that Tribes should have the option to opt-out of the advance notification program. Tribal representatives and associations were strongly in favor of continuing requirements contained in §73.37(f) to have licensees release Safeguards Information, i.e., to *not* change this requirement to a permissive form. NRC staff analysis of comments leads to the assessment that most commenters believe that Tribes should be treated like States with regard to sharing of Safeguard Information, meaning, simply, that the provisions of the regulations relating to sharing of this information should be extended to Tribes, without special qualifications. As with States, Tribal governments should be allowed to elect to participate in advance notification programs.

Other Comments

Several comments submitted in response to the ANPR that went beyond the questions posed, raising issues that deserve attention:

Nuclear free zones; bans on shipments, route selection. Several Tribes indicated that they either have declared their lands to be nuclear free zones or prohibit shipments of radioactive wastes through their lands. In cases where State or local governments have attempted to impose absolute bans on shipments or establish pre-notification requirements that are different from those of the Federal government, Federal courts have ruled the regulations to be invalid[1].

[1]National Conference of State Legislatures (NCLS), January, 2000. Author: James B. Reed, Program Director, Transportation, NCLS. Environment, Energy and Transportation Program; The State Role in Spent Fuel Transportation Safety: Year 2000 Update. Transportation Series No. 14. http://www.ncsl.org/programs/ESNR/transer14.htm; see in particular http://www.ncsl.org/programs/ESNR/transer14.htm#preempt

Federal regulations preempt State and local requirements and States may be challenged on two primary grounds: violation of the Commerce Clause of the Constitution and preemption by federal transportation law. Several Tribal governments also requested the privilege of consultation on preferred routes in their lands. The NRC staff believes that the issue of consultation on routes comes under the DOT's jurisdiction, not the NRC's. The NRC staff will consider issues relating to advance notification of Tribal governments who have declared their lands to be 'nuclear free zones' or otherwise indicated they may prohibit shipments of nuclear wastes during proposed rulemaking.

Requests for Funding: Several Tribal representatives suggested that the NRC (or other federal agencies or the licensees) should provide funding to Tribes to cover the costs related to advance notification. The costs cited included for training of staff, development of infrastructure for communication and protection of Safeguards Information, and for administrative needs. A comment from Tribal representatives indicated that protection requirements are relatively simple and should not pose an undue increase in expenses on Tribal governments.

Consultation With Tribal and State Governments: The State of Illinois Department of Nuclear Safety commented that the President's 1994 memorandum encourages federal agencies to consult with Tribal governments before engaging in activities that may affect Tribal governments. The NRC ANPR did not address establishment of a consulting mechanism. The commenter recommended the rulemaking be expanded to provide for substantive consultation with the Tribal governments and States for shipments of spent nuclear fuel. Some Tribal governments also urged direct consultation with Tribal governments on nuclear waste shipments. The rulemaking plan contains recommendations to promote communications with Tribal representatives. In addition to the usual mechanisms such as notices in the Federal Register and on the NRC's rulemaking web site, the NRC staff recommends consider holding a public meeting during the comment period for the proposed rule.