

# POLICY ISSUE NOTATION VOTE

July 7, 2005

SECY-05-0121

FOR: The Commissioners

FROM: Luis A. Reyes  
Executive Director for Operations

SUBJECT: REQUEST TO CONSIDER DEVELOPING A FORMAL TRIBAL  
CONSULTATION PROTOCOL

PURPOSE:

To obtain Commission direction on consultation with Native American Tribal Governments on the potential siting of a nuclear reactor in Galena, Alaska (the City).

SUMMARY:

NRC staff met with representatives from the Yukon River Inter-Tribal Watershed Council (YRITWC) to discuss opportunities for communication with Tribal Governments. The meeting was requested by the YRITWC relative to the potential siting of a nuclear reactor in the City. During the meeting, the YRITWC requested that NRC explore development of a formal Tribal consultation protocol. The request was presented on behalf of the tribes who could be potentially affected by, or would be interested in, the potential reactor in the City.

Staff notes that "Consultation," as applied in this context is a unique term used to describe communication and coordination between Federal agencies and Native American Tribal Governments in regard to Federal agency activities. Although the basis for consultation has a long tradition in the relationship between the Federal government and Native American Tribal Governments, an expression of the importance of the consultation process can be found in President Clinton's Executive Memorandum, dated April 29, 1994. The Commission has previously directed the staff to continue to implement the spirit and letter of this Memorandum. This paper presents for Commission consideration staff analysis of the request and a recommendation for responding to the request.

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BACKGROUND:

The City is isolated, remote, and located on the Yukon River, with a population of about 700. There are no roads to the City. Transportation in or out of the City is either by barge or airplane. In the winter months, when the river is frozen, the only transportation in and out of the City is by air. The City operates six diesel generators, as the main power source, with an average annual consumption of 700,000 gallons of diesel fuel.

Fuel is brought in during the summer by barge. The City has been examining ways to lower the cost of power. Various options have been examined, including coal bed methane, solar, and coal. However, for a variety of reasons, (e.g., distance to the city), the options have appeared non-viable.

In May 2003, the City Manager was informed of the 4S ("Super Safe, Small, and Simple," as referred to by the designer) reactor, a liquid-sodium-cooled reactor design developed in Japan, with an electric output of about 10 MW (approximately 30 MWt). The core design is intended to not require refueling over the 30-year lifetime of the plant. The City Manager was then put in touch with representatives from the law office of Shaw Pittman and the Toshiba Corporation, and a meeting was held to discuss the possibility of siting the 4S reactor in the City. Subsequently, the City Manager held meetings with City officials, Toshiba, and multiple public meetings were held, to obtain more information on the reactor.

The 4S design is, in many ways, similar to the Power Reactor Inherently Safe Module (PRISM) and Sodium Advanced Fast Reactor (SAFR) designs that were reviewed by the NRC about 15 years ago. The reactor has a compact core design, with metal-alloy fuel and advanced ferritic steel cladding. A three-loop configuration is used: primary system (sodium-cooled), an intermediate sodium loop as a "buffer" between the radioactive primary system and the steam generators, and the water loop used to generate steam for the turbine. The basic layout is a "pool" configuration, with the pumps and intermediate heat exchanger inside the primary vessel. A guard vessel is used outside the reactor vessel, to protect against sodium leakage; that vessel together with an assembly over the reactor head comprise the containment. The steam generator tubes have double walls, a technology that was employed in the Experimental Breeder Reactor-II in the U.S. The decay heat removal systems are also based on previous designs, with natural convection air cooling of the reactor vessel and of a heat exchanger connected to the secondary sodium piping. Reactor operating pressure is essentially atmospheric and an inert cover gas is maintained in the primary system.

On December 9, 2003, staff briefed Commissioner Merrifield on liquid metal reactor technology, Toshiba's 4S design, an overview of the City, and the local perspectives, at the time, on the potential reactor. Chairman Diaz was briefed on the 4S design on February 8, 2005. In addition, staff met with representatives of the law office of Shaw Pittman, who represent the City, twice in 2004 to discuss the potential siting of the reactor.

On February 2, 2005, staff met with the City Manager, Marvin Yoder, and Vice Mayor, Lewis Johnson, to discuss and answer questions on NRC's reactor licensing process. Discussions during the meeting included an update on the status of the 4S project in the City, an overview of the NRC organization, and an overview of the NRC's licensing process. A summary of the meeting can be found in NRC's Agencywide Documents Access and Management System (ADAMS) at Accession Number ML050660160. During the meeting, the City officials presented

a report on energy alternatives for the City, prepared by a collaborative group under the sponsorship of the U.S. Department of Energy's (DOE) Arctic Energy Office, comprised of representatives from Science Applications International Corporation (SAIC), University of Alaska-Anchorage, Idaho National Engineering and Environmental Laboratory, and the University of Alaska-Fairbanks. The report concluded that the nuclear option was the most economical and favorable option, if certain conditions were met. Coal was identified as the next favorable option. In addition, the City officials (1) extended an invitation to NRC to visit the City, (2) noted that the City was in the process of seeking funding for a series of "white papers" to analyze regulatory issues specific to the 4S reactor, such as safety and security; and (3) indicated the City's intent to explore obtaining an early site permit.

On February 14, 2005, staff met with representatives from the YRITWC, at their request, to discuss and answer questions on opportunities available for communication with Tribal Governments relative to the potential siting of a nuclear reactor in the City. A summary of the meeting can be found in ADAMS at Accession Number ML050880345. Fifty-eight Tribal Governments, 46 located in Alaska and the remaining twelve in Canada, signed treaties with each other to create the YRITWC, an international organization, with the objective of keeping the Yukon River clean. The YRITWC has a responsibility to provide information to the tribes and to be kept informed of issues relative to the tribes. In addition, the YRITWC circulates resolutions that are proposed by the various Tribal Governments and provides assistance to the Tribal Governments through various activities, such as developing emergency plans, addressing proposed energy options, grant writing, and water sampling. During the meeting, the YRITWC presented a request, on behalf of the potentially affected tribes, that NRC consider developing a formal Tribal policy, or consultation protocols to assure effective communications between the tribes and the NRC during the potential siting and licensing of the 4S reactor in the City. The request was also presented in a letter, Attachment 1, dated May 16, 2005 (ADAMS Accession Number ML051380354). The letter also invited NRC to meet with Tribal leaders at a summit in Dawson City, Yukon, Canada, August 9-11, 2005, to further discuss Tribal consultation, and the possible format of a formal Tribal consultation protocol.

#### DISCUSSION:

To date, staff has maintained government-to-government communications with national Native American Tribal organizations, such as the YRITWC and the National Congress of American Indians, and with Federally-recognized tribes who are potentially affected by, or otherwise interested in, NRC regulatory activities. On a case-by-case basis, exchanges of information and provisions for participation by Native American Tribal Governments are made on specific issues.

As noted earlier, "consultation" is a unique term used to describe communication and coordination between Federal agencies and Native American Tribal Governments in regard to Federal agency activities. The Presidential Executive Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," directed executive departments and agencies to consult, to the greatest extent practicable and to the extent permitted by law, with Tribal Governments prior to taking actions that affect Federally recognized Tribal governments.

Consultation can take many forms depending on the statutory authority of the Federal agency involved and the circumstances of the particular case. However, at a minimum, providing

information to the Tribal Government about the Federal activity and listening to Tribal concerns, are part of consultation. The specific details of what consultation will consist of in a particular case can be set forth in a letter of protocol or memorandum of understanding between the Federal agency and the Tribal Government, but it is not always necessary to do so. In its November 13, 1996, Staff Requirements Memorandum on SECY-96-187, "Policy Issues Raised In Meeting With Prairie Island Dakota Indian Representatives," dated August 28, 1996, the Commission directed the staff to continue to implement the spirit and letter of the President's 1994 guidance.

The following are examples of past and ongoing exchanges of information and provisions with Native American Tribal Governments:

- (1) Due to the interest of the Prairie Island Dakota Community, located within the 10-mile Emergency Planning Zone of the Prairie Island Nuclear Power Plant in Welsh, Minnesota, NRC determined that the Community could observe inspections at the plant on the same basis as an Adjacent State.
- (2) Seven tribes that had formerly occupied the geographical area in the vicinity of the Arkansas Nuclear One Nuclear Power Plant received copies of the plant's draft Supplemental Environmental Impact Statement (SEIS) related to the license renewal application for comment, as well as a copy of the final SEIS. (This is an example of typical staff practice on the environmental reviews of license renewal applications.)
- (3) With respect to Private Fuel Storage LLC's license application, tribes in the area were consulted in accordance with Section 106 of the National Historic Preservation Act.
- (4) In 2000, the Office of State Programs was designated as the Office of State and Tribal Programs (STP) to provide Native American Tribal Governments with a liaison point of contact at the NRC. STP staff also provides interested Native American Tribal Governments with NRC-related information of general interest, such as press releases, advance notices of proposed rulemaking, and meeting notices, via an electronic list server.
- (5) In keeping with the Nuclear Waste Policy Act, NRC regulations for the licensing of a high-level radioactive waste repository, Title 10 of the Code of Federal Regulations Part 63 (10 CFR Part 63), a low-level radioactive waste disposal facility, 10 CFR Part 61, and a monitored retrievable storage installation, 10 CFR Part 72, have provisions for Native American Tribal participation.
- (6) Commissioner Merrifield led a government-to-government meeting with Native American Tribal Governments at a September 2001 High Level Waste Workshop, in Las Vegas, Nevada.
- (7) The Commission's Rules of Practice in 10 CFR Part 2 have provisions for the participation of Native American Tribal Governments in the Commission's hearing process.

While the NRC has had these and other interactions, and provisions for Native American Tribal Government participation, the NRC has not issued a formal policy for NRC interactions with Tribal Governments.

In staff's analysis of the request presented by the YRITWC, the staff considered generic aspects of developing a formal consultation protocol with Native American Tribal Governments who are potentially affected by, or otherwise interested in, the potential licensing of a reactor to be sited in the City, as well as policy issues raised in SECY-96-187. One aspect considered was whether developing a formal consultation protocol could lead to a substantial number of additional requests for formal consultation from other tribes on this, and other NRC activities. Based on the one previous request for Tribal consultation and other staff interactions with tribes, staff concludes that it is unlikely that engaging in a formal consultation process would have such a consequence. However, staff believes that lessons learned from developing a formal Tribal consultation protocol with tribes who are potentially affected by, or interested in, the potential licensing of a reactor to be sited in the City could be used to inform the Commission on the possibility of establishing a generic NRC Tribal consultation policy for national Native American Tribal Governments and organizations who are potentially affected by, or otherwise interested in, other NRC regulatory activities.

Staff also considered the possibility of delaying the consultation process with the Native American Tribal Governments who are potentially affected by, or otherwise interested in the potential licensing of a nuclear reactor to be sited in the City until a later date (i.e., a formal license application is submitted). Staff concluded that, in this case, with a shorter amount of time to develop a formal consultation protocol, the extent of early Tribal engagement to determine the framework for consulting could be limited in the consultation process. In addition, impending project deadlines once an application is submitted could be a factor that may limit the completeness and efficiency of the consultation process. The staff believes that the consultation process should begin early in order for those Tribal Governments to have meaningful information about the Commission's licensing process, because proper timing of consultation plays an important role in successful and meaningful consultation.

Staff notes that NRC has not received any requests from the City, Toshiba, or any other party for licensing or pre-application activities. Therefore, discussions between the YRITWC, affected Tribal Governments, and the Office of Nuclear Reactor Regulation (NRR) regarding specific licensing scenarios would be speculative. NRR plans to reach out to affected stakeholders, including affected Tribal Governments, if and when licensing or pre-application discussions have been initiated. Until that time, NRR will assist STP efforts to inform Tribal Governments on NRC responsibilities and processes.

#### RECOMMENDATION:

Staff recommends that the Commission direct the staff to engage in consultation with the appropriate Native American Tribal Governments who may be affected by the potential licensing of a nuclear reactor to be sited in the City, at this time.

Staff would institute a Tribal Consultation Team that would consist of representatives from STP, Office of the General Counsel (OGC), NRR, and Region IV. As an initial step in the consultation process, the staff would accept the invitation, provided in the YRITWC's May 16,

2005 letter, to meet with potentially affected Tribal Governments at the YRITWC Summit scheduled for August 9-11, 2005 in Dawson City, Yukon, Canada. Two members of the Team would plan to attend the YRITWC Summit on August 10, 2005, a representative from STP and OGC. NRR will assist the NRC attendees as they prepare for the meeting. The staff's objectives at the Summit would be to (1) continue to provide information to the Tribal Governments on the Commission's responsibilities, and (2) listen to the concerns of the Tribal Governments in regard to the potential licensing of a nuclear reactor in the City.

Outcomes from the YRITWC Summit, along with other staff interactions with Tribes potentially affected by the potential licensing of a reactor in the City, would be used in the consultation process to (1) define prospective roles, responsibilities, and expectations, (2) identify a means to share information, and (3) gain a better understanding of the needs of the Tribes.

RESOURCES:

Staff estimates the resources needed in FY 2005 to implement staff's recommendation to be 0.4 FTE (0.2 for STP, 0.1 for OGC, and 0.05 each for NRR and Region IV) and funding for travel for the NRC staff to participate in the YRITWC Summit. The staff has sufficient FY 2005 resources for these activities. The FTE needed to implement staff's recommendation are minimal and would be divided among three offices and a region. Therefore, the recommendation can be accomplished using existing resources, without impacting existing FY 2005 planned activities.

Additional future resources needed for implementation and maintenance of the formal consultation protocol will be determined in its development and will be shared with the Commission at a later date. In addition, as a part of the development of the consultation process, staff will identify whether and when funding for travel and per diem should be provided to Native American Tribal Government representatives to participate in the consultation process.

COORDINATION:

OGC has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections. This paper has also been coordinated with the Office of International Programs, which has no objections.

***/RA Martin J. Virgilio Acting For/***

Luis A. Reyes  
Executive Director  
for Operations

Attachment:  
As stated

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