

September 24, 2009

MEMORANDUM TO: Mark R. Shaffer, Director
Division of Intergovernmental Liaison and Rulemaking
Office of Federal and State Materials and Environmental
Management Programs

FROM: Richard P. Correia, Director/**RA**/
Division of Security Policy
Office of Nuclear Security and Incident Response

SUBJECT: USER NEED MEMORANDUM – DEVELOPING RULEMAKING
FOR ADVANCE NOTICE TO NATIVE AMERICAN TRIBES OF
CERTAIN RADIOACTIVE WASTE SHIPMENTS

The Office of Nuclear Security and Incident Response (NSIR) requests that the Office of Federal and State Materials and Environmental Management Programs (FSME) conduct a rulemaking to incorporate updated advance notification requirements for the secure transport of spent nuclear fuel (SNF) and high level waste (HLW) into the *Code of Federal Regulations*. This request is based on common defense and security concerns and would be compatibility category "NRC" (Nuclear Regulatory Commission).

NRC regulations require licensees shipping certain radioactive waste shipments (per Title 10 of the *Code of Federal Regulations* (CFR) 71.97 and 10 CFR 73.37) to inform State governors of such shipments passing through or across the boundary of the State. The regulations do not require notification of Native American Tribes of these types of shipments passing through Tribal lands. In addition, schedule information for spent fuel shipments in excess of 100 grams net weight irradiated fuel is designated Safeguards Information under 10 CFR 73.22(a)(2) and Safeguards Information may only be provided to persons listed in 10 CFR 73.59. However, tribal officials are not listed in 10 CFR 73.59. It is noted that the Department of the Navy and the Department of Energy provide advance notice to Tribal governments of waste shipments through their territories.

In November 1999, the staff provided an advance notice of proposed rulemaking (ANPR) (SECY-99-258) on this issue to the Commission. The ANPR Commission paper solicited information on the preparation of a list of tribal contacts, notification of tribes, minimizing licensees' administrative burden, and identifying the location of tribes along shipment routes. The Commission approved the ANPR on November 30, 1999, and in February 2001, the staff provided the Commission with a rulemaking plan (SECY-01-0021) for 10 CFR Parts 71 and 73. The rule would require licensees to notify federally recognized Native American Tribes of certain

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radioactive waste shipments, including SNF, before transporting such shipments across Tribal lands. The rulemaking plan also recommended exempting Tribal officials from the fingerprinting requirements.

The Commission approved the rulemaking plan by negative consent in February 2001. However, on October 25, 2001, the staff informed the Commission of its intent to suspend this rulemaking effort, to permit the staff to focus on higher-priority tasks as a result of the events of September 11, 2001. With the SNF transportation security rulemaking now underway, this is now the appropriate time to address this complimentary rulemaking effort.

The goal of this rulemaking is to extend the provisions for advance notification of SNF and HLW shipments to Federally recognized Native American Tribes. 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. The updated advance notification requirements align with our mission to protect public health, safety, and the environment; promote the security of our nation; and provide for regulatory actions that are open, effective, efficient, realistic, and timely.

Interested stakeholders for this transportation security rulemaking include the public, Congress, licensees, other Federal Agencies, and particularly Native American tribes.

Based on discussions with FSME staff, and after consideration of the Rulemaking Common Prioritization Table, the rulemaking process should start no later than October 2009. NSIR will provide technical expertise regarding the requirements for access to, and management of, Safeguards Information, as well as requirements associated with the advance notice of spent fuel shipments. NSIR does not, however, have the expertise with regard to identifying Native American Tribal lands, interacting with Native American Tribal Governments, or compiling contact information for Native American Tribal Governments. Before this rulemaking was suspended, the working group identified a need for a database (or resource) for licensees to use to identify and notify Native American Tribal Governments of spent fuel shipments. NSIR requests that FSME carry out these tasks. This rulemaking effort falls under RM 501, "Spent Fuel Shipment, Tribal Notification of, Parts 71 and 73," and is designated as medium priority. Currently, NSIR has budgeted 0.1 full time equivalents in Fiscal Year 2010 to support the rulemaking and guidance development effort.

The updated rulemaking plan, attached to this memorandum, is provided as the technical basis.

Enclosure:
As stated

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* See previous concurrence

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