

RULEMAKING ISSUE NOTATION VOTE

July 23, 2010

SECY-10-0095

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROPOSED RULE: ADVANCE NOTIFICATION TO NATIVE
AMERICAN TRIBES OF TRANSPORT OF CERTAIN TYPES
OF NUCLEAR WASTE (RIN 3150-AG41)

PURPOSE:

To request Commission approval to publish a proposed rule in the *Federal Register* that would require licensees to provide to Federally recognized Tribal governments advance notification regarding shipments of irradiated reactor fuel and certain nuclear wastes listed in Section 71.97 of Title 10 of the *Code of Federal Regulations* (CFR) for any shipment that passes through Tribal reservations.

BACKGROUND:

Current U.S. Nuclear Regulatory Commission (NRC) regulations require licensees to inform State governors, or the governor's designee, of certain shipments of irradiated reactor fuel and certain nuclear wastes listed in § 71.97 that pass through or across the boundary of States. The NRC developed these advance notification regulations in 1982 to comply with the NRC Authorization Act for Fiscal Year 1980. Neither the Atomic Energy Act of 1954, as amended (AEA), nor the notification regulations required licensees to notify Native American Tribes of this type of shipment passing through Tribal reservations. Tribal officials sought similar notification in the 1990s.

CONTACT: Merri Horn, FSME/DILR
(301) 415-8126

On December 21, 1999 (64 FR 71331), the NRC published an Advance Notice of Proposed Rulemaking (ANPR) to solicit stakeholder input on a possible rulemaking that would consider requiring advance notification to Native American Tribes of transportation of certain types of nuclear waste. Forty-four comment letters were received on the ANPR. In SECY-01-0021, dated February 2, 2001, the staff provided a summary of the ANPR comments and a rulemaking plan to proceed with a proposed rule. The staff suspended the rulemaking following the terrorist attacks of September 11, 2001. The staff now proposes to go forward with the proposed rule. The comments received in response to the ANPR were taken into account during the development of this proposed rule.

DISCUSSION:

The purpose of the proposed rule is to recognize Tribal sovereignty and to recognize Tribal governments' interest in being informed of activities occurring on Tribal reservations by offering to inform Tribes of shipments of irradiated reactor fuel and certain nuclear wastes described in § 71.97 passing through their reservations.

Regulations under § 73.37 require advance notifications to State governors for shipments of irradiated reactor fuel in excess of 100 grams in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding. Regulations under § 71.97 require advance notice for shipments of irradiated reactor fuel in quantities less than that subject to § 73.37 and certain licensed material that is required to be transported in Type B packaging and is being transported to a disposal facility or a collection point for transport to a disposal facility. The advance notification provisions apply if the quantity of licensed material in a single package exceeds the least of: (1) 3000 times the A_1 value of the radionuclides as specified in Part 71, Appendix A, Table A-1, for special form radioactive material; (2) 3000 times the A_2 value of the radionuclides as specified in Appendix A, Table A-1, for normal form radioactive material; or (3) 1000 Terabequerel (TBq) (27,000 curies). Schedule and itinerary information provided for shipments in excess of 100 grams of irradiated reactor fuel is considered to be Safeguards Information (SGI) under NRC regulations and must be protected in accordance with requirements in §§ 73.21 and 73.22. The staff is proposing to amend these regulations to include a provision that would require licensees to provide to Tribal officials, or their designees, advance notice of shipments of irradiated reactor fuel and other nuclear wastes listed in § 71.97 before crossing the border of Tribal reservations. The proposed changes would also include revising § 73.59 to provide relief for Tribal officials, Tribal officials' designees, and Tribal law enforcement officials from the criminal history checks, fingerprinting, and other elements of background checks that are required for access to SGI for receiving the advance shipment notifications. Recipients must also satisfy the "need to know" criteria in § 73.21(c)(1) before receiving the advance notification SGI material.

The current regulations provide relief from the criminal history checks, fingerprinting, and other elements of a background investigation that are required for access to any SGI for federal, state, and local government representatives. At this time the staff is not proposing to provide this broader relief to Tribal officials, Tribal official's designees, or tribal law enforcement officials for access to other types of SGI. Because the scope of this rule is limited to advance notifications, the relief being proposed is only for receipt of the SGI contained in advance shipment notifications. A rulemaking to provide broader relief from criminal history background checks, fingerprinting, and other elements of background investigations for Tribal officials, Tribal official's

designees, or Tribal law enforcement officials to receive all SGI (subject to a need to know) could be conducted in a future rulemaking, if directed by the Commission.

Implementation

The staff plans to recommend that the final rule, if approved, would be effective 1 year after publication in the *Federal Register*. This would provide time for NRC to develop the list of Tribal contacts, provide training on protection of SGI to the Tribes, and provide time for licensees to develop procedures and conduct training on the new requirements.

In order to receive the advance notifications, Tribes would need to declare that they would like to receive the information and certify that the Tribe would appropriately protect any SGI information. Given the information protection requirements involved, the NRC believes Tribes should have the option of choosing whether to receive advance notifications of shipments that pass within or across their Tribal reservations. If a Tribe opts to receive the advance notifications, the Tribe would be obligated to protect the schedule of the shipments and itineraries in accordance with SGI information handling requirements in §§ 73.21 and 73.22. If a Tribe opts not to receive the advance notifications, the Tribe would have no SGI information protection obligations relating to the shipments. If the final rule is approved by the Commission, the NRC staff would contact each Federally recognized Tribe to develop a list of contacts for those Tribes that decide to receive the advance notifications.

No change to the enforcement policy should be necessary for implementation.

Strategic Goals and Objectives

The proposed rule is consistent with NRC strategic objectives and performance goals. The proposed rule would continue to ensure the protection of public health and safety and the common defense and security. The rulemaking will be conducted in an open process that allows the public to comment on the advance notification measures. The proposed rule will be published in the *Federal Register* for a 75-day public comment period.

AGREEMENT STATE ISSUES:

A copy of the draft proposed rule *Federal Register* Notice was provided to the Agreement States so they could have an early opportunity for review.

NRC staff has analyzed the proposed rule in accordance with the procedures established within Part III of the Handbook to Management Directive 5.9, "Categorization Process for NRC Program Elements." The proposed changes to Part 71 would be Compatibility Category B and the changes to Part 73 would be reserved to the NRC. Compatibility is also addressed in Section V of the Statements of Consideration. The Standing Committee on Compatibility reviewed the proposed rule and agreed that these proposed amendments to the NRC regulations are a matter of compatibility between the NRC and the Agreement States. The Committee and the staff have reached agreement on the compatibility designations.

COMMITMENTS:

Notify each Federally recognized Tribe of the opportunity to comment on the proposed rule.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication in the *Federal Register* the proposed amendments to Parts 71 and 73 (Enclosure 1).
2. Note:
 - a. That the proposed amendments will be published in the *Federal Register*, allowing 75 days for public comment.
 - b. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b).
 - c. That a draft Regulatory Analysis has been prepared for this rulemaking (Enclosure 2).
 - d. That appropriate Congressional committees will be informed of this action.
 - e. That a press release will be issued by the Office of Public Affairs when the proposed rulemaking is filed with the Office of the Federal Register.
 - f. An Office of Management and Budget (OMB) Paperwork Reduction Act review is required and a clearance package will be forwarded to OMB no later than the date the proposed rule is submitted to the Office of the Federal Register for publication.

RESOURCES:

The estimated resources to complete the rule are included in the fiscal year (FY) 2010 President's Budget and FY 2011 budget request.

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed rulemaking. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource

The Commissioners

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/RA/

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Enclosures:

1. *Federal Register* Notice
2. Draft Regulatory Analysis

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