

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 71 and 73

RIN: 3150-AG41

[NRC-1999-0005]

**Advance Notification to Native American Tribes
of Transportation of Certain Types of Nuclear Waste**

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations that govern packaging and transportation of radioactive material and physical protection of plants and materials. Specifically, the proposed amendments would require licensees to provide advance notification to Federally recognized Tribal governments regarding shipments of irradiated reactor fuel and certain nuclear wastes for any shipment that passes within or across their reservations. The Tribal government would be required to protect the shipment information as Safeguards Information (SGI).

DATES: Submit comments on the rule by **(insert 75 days from date of publication)**. Submit comments specific to the information collections aspects of this proposed rule by **(insert date 30 days from date of publication)**. Comments received after the above dates will be

considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: Please include Docket ID NRC-1999-0005 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see Section I, "Submitting Comments and Accessing Information" in the SUPPLEMENTARY INFORMATION section of this document. You may submit comments by any one of the following methods.

Federal e-Rulemaking Portal: Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-1999-0005. Comments may be submitted electronically through this Web site. Address questions about NRC dockets to Carol Gallagher, telephone 301-492-3668; e-mail Carol.Gallagher@nrc.gov.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301-415-1677.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm Federal workdays. (Telephone 301-415-1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

You may submit comments on the information collections by the methods indicated in the Paperwork Reduction Act Statement.

FOR FURTHER INFORMATION CONTACT: Merri Horn, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone 301-415-8126, e-mail, Merri.Horn@nrc.gov.

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I. Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the

documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, or 301-415-4737, or by e-mail to PDR.Resource@nrc.gov.

Federal Rulemaking Web site: Public comments and supporting materials related to this proposed rule can be found at <http://www.regulations.gov> by searching on Docket ID NRC-1999-0005.

II. Background

Current NRC regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) require licensees to inform State governors, or the governor's designee, of certain shipments of irradiated reactor fuel and certain nuclear waste passing through or across the boundary of their States. Section 73.37 requires licensees to provide advance notifications 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. Section 71.97 requires licensees to provide 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 the following: (1) 3000 times the A_1 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for special form radioactive material; (2) 3000 times the A_2 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for normal form radioactive material; or (3) 1000 Terabequerel (TBq) (27,000 curies). Schedule and itinerary information provided for shipments of more than 100 grams of irradiated reactor fuel is

considered to be SGI under NRC regulations and must be protected under the requirements in §§ 73.21 and 73.22.

The NRC developed these advance notification regulations in 1982 to comply with the NRC Authorization Act for Fiscal Year 1980, which was enacted to deal with concerns expressed by States about their abilities to fulfill their responsibilities to protect public health and safety while waste shipments pass through their jurisdictions. 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 their Tribal reservations. Tribal officials requested similar notification in the 1990s.

On December 21, 1999, 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 (64 FR 71331; December 21, 1999). Information was sought on minimizing the burden to licensees, identifying the location of Tribal reservations in relationship to shipment routes, and the sharing and protecting of SGI. A total of 44 comment letters were received. Thirty-six of the letters received were from Tribes and Tribal organizations; four letters were received from private citizens; and letters were received from a licensee, an industry association, a State agency, and a Federal agency. Virtually all the commenters favored providing advance notification to Tribal governments with some disagreement on the details of the implementation. Most commenters were in favor of providing Tribal governments the same advance notification that State governments receive regarding high-level radioactive waste shipments. Commenters encouraged the NRC to provide advance notification through more up-to-date means of communication, e.g., via the Internet. Tribal representatives and others encouraged the NRC to communicate directly with Tribal governments during the rulemaking process as well as when

implementing procedures for advance notification. The comments received in response to the ANPR were taken into account during the development of this proposed rule.

On November 6, 2000, President Clinton issued Executive Order (EO) 13175, “Consultation and Coordination with Indian Tribal Governments.” EO 13175 emphasized the importance of respecting the sovereignty of Tribal governments and working with them on a government-to-government basis.¹ On November 5, 2009, President Obama expressed his commitment to EO 13175 at the White House Tribal Nations Conference and Interactive Discussion with Tribal Leaders. During the conference, the President signed an Executive Memorandum on Tribal consultation for the heads of Executive Departments and Agencies, directing Cabinet agencies to take steps to develop regular and meaningful consultation with Tribal governments. The Memorandum underscored a commitment to regular and meaningful collaboration and consultation with tribal officials, and sought complete and consistent implementation of EO 13175. The NRC has adopted agency practices that are consistent with the principles of consultation and cooperation with Indian Tribal governments articulated in President Clinton’s April 29, 1994, guidance and EO 13175. The NRC practice is to conduct its activities in a manner that respects the rights of sovereign Tribal governments, and involves consultation and cooperation with Federally recognized Tribes on a government-to-government basis.

III. Discussion

A. What Action is the NRC Taking?

The NRC is proposing to amend its regulations to require licensees to provide to Tribal officials, or their designees, advance notice of shipments of irradiated reactor fuel under § 73.37

¹ These ideas were previously emphasized in a Presidential Memorandum dated April 29, 1994, entitled “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951; May 4, 1994) and Executive Orders 12875 and 12866.

and other nuclear wastes listed in § 71.97 before crossing the border of Tribal reservations. For the purposes of these regulatory provisions, Tribal official is defined as the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership of an Indian Tribe. This action would only affect commercial shipments being made by NRC and Agreement State licensees. This action would not include shipments made by the Department of Energy or the Department of Defense.

B. What Is the Purpose of the Proposed Rule?

The purpose of the proposed rule is to recognize Tribal sovereignty by informing Tribes of shipments of irradiated reactor fuel and other nuclear wastes passing across their reservations and to recognize Tribal governments' interest in being informed of activities occurring on Tribal reservations.

C. Whom Would This Action Affect?

The proposed rule would apply to any NRC licensee that ships irradiated reactor fuel. The proposed rule would also affect any licensee that ships other nuclear wastes listed in § 71.97, namely, certain licensed material that is: (a) required to be transported in Type B packaging; (b) being transported to or across a State boundary enroute to a disposal facility or to a collection point for transport to a disposal facility; and (c) the quantity of licensed material in a single package exceeds the least of the following: (1) 3000 times the A_1 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for special form radioactive material; (2) 3000 times the A_2 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for normal form radioactive material; or (3) 1000 TBq (27,000 curies).

Finally, the proposed rule would affect any Tribe that chooses to receive the advance notifications of shipments passing within or across its Tribal reservation.

D. Would All Tribes Receive Advance Notifications?

No. Given the information protection requirements involved, the NRC believes Tribes should have the option to decide whether to receive advance notifications of shipments that pass across their Tribal reservations. If a Tribe opts to receive the advance notifications, the Tribe would be obligated to protect the schedule and itineraries of the shipments under the SGI requirements in §§ 73.21 and 73.22. If a Tribe opts not to receive the advance notification, the Tribe would have no information protection obligations relating to the shipments. For the purposes of the advance notifications, an Indian tribe is defined as an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994. There are currently 565 Federally recognized Tribes.

E. How and When Would Tribes be Given the Option to Receive Advance Notifications?

After the final rule has been approved by the Commission, the NRC staff would contact each Federally recognized Tribe to provide them information on the rule. As part of the information, the Tribe would be asked if they would like to receive advance notifications of irradiated reactor fuel and other nuclear wastes listed in § 71.97 before crossing the border of the Tribal reservation. The Tribe can then notify NRC whether they would like to receive the advance notifications and certify that the SGI information will be appropriately protected. Tribes would be able to change their decision to receive or not receive the advance notifications by informing the NRC. In addition, the NRC would periodically contact all Federally recognized Tribes to give Tribes an opportunity to change their status in regards to receiving notifications.

F. Does a Tribe's Decision to Receive Advance Notification Affect Whether Shipments Pass Through that Tribe's Reservation?

No. This rulemaking would only give the Tribe a voluntary opportunity to receive advance notification of shipments that cross their reservation. A Tribe's decision to receive or not receive advance notifications does not affect shipment routes.

G. How Would Licensees Determine Who the Tribal Contacts Are?

The NRC would maintain a list of Tribal contacts as is done for State governmental contacts. The NRC would work with the Tribes to complete and maintain the list. The Tribal official would designate who is intended to represent the Tribe. The NRC staff currently intends to annually publish a list of Tribal contacts in the *Federal Register* and post it on the web site maintained by the NRC's Office of Federal and State Materials and Environmental Management Programs.

H. How Would Advance Notifications be Made to Tribal Officials?

The methods permitted for communication of advance notifications are detailed in § 71.97(c), "Procedures for submitting advance notification." Notifications would be made in writing. The notifications could be sent by mail or courier. SGI may not be transmitted over the phone, by e-mail, or by facsimile unless it is transmitted and received by NRC-approved secure electronic devices.

I. Would Tribes be Required to Protect the Advance Notifications?

Tribes would be required to protect the schedule and itinerary information contained in the advance notification as SGI as specified by §§ 73.21 and 73.22. Only individuals that have a "need-to-know" the information and have undergone both a Federal Bureau of Investigation (FBI) criminal history records check and a background check for determination of trustworthiness and reliability or have been relieved from these checks under §§ 73.57 or 73.59 may be provided access to the SGI. Basic protection requirements include storing unattended SGI in a locked security storage container. Access to the lock information, such as a combination, must be strictly controlled to prevent disclosure to an individual not authorized

access to SGI. Documents containing SGI must be destroyed by burning, shredding, or any other method that precludes reconstruction by means available to the public at large. The specific requirements for the protection of SGI are located in § 73.22. Failure to comply with these regulatory requirements could result in civil or criminal penalties.

The NRC is specifically inviting comment as to the best method for informing the Tribes of the obligations of possessing SGI. The obligations would include how to handle and protect SGI and who could be provided access to the information, as well as potential civil or criminal penalties that could result in failure to comply with the regulatory requirements. Possible mechanisms include an information packet, a webinar, or a training course.

J. Would Tribal Officials Need to be Fingerprinted and Undergo a Background Investigation for Access to SGI?

Section 149 of the AEA requires fingerprinting and submission of fingerprints to the Attorney General for identification and criminal history records check for any individual permitted access to SGI, unless the Commission, by rule, has relieved that individual from the fingerprinting, identification, and criminal history records check requirements. The Commission may relieve individuals from these regulatory requirements “if the Commission finds that such action is consistent with its obligations to promote the common defense and security and protect the health and safety of the public.” As allowed by Section 149 of the AEA, NRC enacted § 73.58 to relieve specific categories of individuals from fingerprinting and criminal history record checks prior to receiving SGI. The categories of individuals covered by this regulation include the governor of a State or his or her designated State employee representative; Federal, State, or local law enforcement personnel; and representatives of foreign government organizations that are involved in planning for, or responding to, nuclear or radiological emergencies or security incidents who the Commission approves for access to SGI.

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Indian tribes exercise inherent sovereign powers over their members and territory. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination. As a result, the NRC has determined that exempting Tribal officials, Tribal official designees, or Tribal law enforcement personnel is analogous to exempting the State governor, State governor designees, or State law enforcement personnel from the fingerprinting and background check requirements. Furthermore, some Tribes have emergency response responsibilities similar to States. Revising the regulation would permit the Commission and licensees to more efficiently provide SGI relating to advance notification of shipments to Tribes who determine this information would enable them be more effective in their day-to-day efforts to ensure the protection of nuclear materials and respond to emergencies within their territories. Therefore, the Commission has determined that the proposed rule helps the Commission fulfill its obligations to promote the common defense and security and to protect the health and safety of the public.

The Tribal official, Tribal official designee, and Tribal law enforcement personnel are considered trustworthy and reliable to receive SGI by virtue of their occupational status and have either already undergone a background or criminal history check as a condition of their employment, or are subject to direct oversight by Government authorities in their day-to-day job functions. Under the proposed rule, if the Tribe decides to participate in the advance notification of shipment program, the Tribal official, Tribal official designee, or Tribal law enforcement personnel that needs to know this SGI information to perform their job function, may have access to SGI information regarding advance notification of shipments affecting their territories without undergoing fingerprinting or a criminal history check.

At this time, the NRC is not proposing to provide relief to Tribal officials, Tribal official's designees, or Tribal law enforcement officials for access to all types of SGI because the scope of this rule is limited to advance notifications. Therefore, the relief being proposed in this rulemaking is only for receipt of the SGI contained in advance shipment notifications. The NRC invites comments on whether the proposed relief should be applied generally to access other types of SGI.

The proposed rule would add Tribal official, his or her designee, and Tribal law enforcement personnel for the purpose of advance notifications to the list of categories of individuals that are granted relief from the fingerprinting, identification and criminal history records checks, and other elements of background checks. Those individuals granted access to SGI are required to abide by the requirements in §§ 73.21 and 73.22 for proper management and protection of SGI.

K. When Do These Actions Become Effective?

The NRC is recommending that the final rule be effective one year after publication in the *Federal Register*. This would provide time for NRC to work with the Tribes and 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.

L. What Should I Consider as I Prepare My Comments to the NRC?

When submitting your comments, remember to:

- i. Identify the rulemaking (RIN 3150-AG41; [NRC-1999-0005]).
- ii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- iii. Describe any assumptions and provide any technical information and/or data that you used.

- iv. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- v. Provide specific examples to illustrate your concerns, and suggest alternatives.
- vi. Explain your views as clearly as possible.
- vii. Make sure to submit your comments by the identified comment period deadline.
- viii. The NRC is particularly interested in your comments concerning (a) the best method for informing the Tribes of the obligations of possessing SGI (Section III I.); (b) whether the proposed relief should be applied generally to access other types of SGI (Section III J.); (c) the compatibility designations for the proposed rule (Section V); (d) the use of plain language (Section VI); (e) the environmental assessment (Section VIII); (f) the information collection requirements (Section IX); and (g) the draft regulatory analysis (Section X).

IV. Discussion of Proposed Rule by Section

Section 71.4 Definitions.

Definition for *Indian tribe* is proposed based on the term as defined in Executive Order 13175. The definition of *Tribal official* describes the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

Section 71.97 Advance notification of shipment of irradiated reactor fuel and nuclear waste.

Current paragraph (a) would be renumbered as paragraph (a)(1) and revised to reflect shipments within or across the State boundary instead of through or across. This change is made for consistency of rule language. Paragraph (a)(2) would be added to require licensees to provide advance notification to Tribal officials or their designee of the shipment of licensed material within or across the boundary of the Tribe's reservation.

Paragraph (c) would be revised to require notifications to be made to the office of each appropriate Tribal official or his/her designee. Paragraph (c) would also be revised to indicate how the list of Tribal officials would be made available.

Paragraph (d) would be revised to include arrival at Tribal reservation boundaries.

Paragraph (e) would be revised to require that revision notices be provided to Tribal officials or their designee if schedule information previously provided will not be met.

Paragraph (f) would be revised to require that cancellation notices be provided to each Tribal official or his/her designee that had previously been notified of an advance shipment.

Section 73.2 Definitions.

Definition for *Indian tribe* is proposed based on the terms as defined in Executive Order 13175. The definition for *Tribal official* is added to describe the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

Section 73.21 Protection of Safeguards Information: Performance Requirements.

Paragraph (a)(2) would be revised to include Tribal law enforcement agencies in the list of agencies whose information protection procedures are presumed to meet the general performance requirements for the protection of SGI.

Section 73.37 Requirements for physical protection of irradiated reactor fuel in transit.

Paragraph (f) would be revised to require that advance notification of irradiated fuel shipments be provided to participating Tribes if a shipment crosses Tribal reservation boundaries.

Section 73.59 Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals.

New paragraph (l) would be added to include Tribal official, Tribal official's designee, and Tribal law enforcement personnel that receive the advance notifications to the categories of individuals that are relieved from the requirement for fingerprinting, identification and criminal records checks, and other elements of background checks.

V. Criminal Penalties

For the purpose of Section 223 of the AEA, the Commission is proposing to amend 10 CFR Parts 71 and 73 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule would be subject to criminal enforcement.

VI. Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the *Federal Register* (62 FR 46517; Sept. 3, 1997), this proposed rule would be a matter of compatibility between the NRC and the Agreement States, thereby providing consistency among the Agreement States and the NRC requirements. The NRC staff analyzed the proposed rule in accordance with the procedure established within Part III, "Categorization Process for NRC Program Elements," of Handbook 5.9 to Management Directive 5.9, "Adequacy and Compatibility of Agreement State Programs" (a copy of which may be viewed at <http://www.nrc.gov/reading-rm/doc-collections/management-directives/>).

NRC program elements (including regulations) are placed into four compatibility categories (see the Draft Compatibility Table in this section). In addition, the NRC program elements can also be identified as having particular health and safety significance or as being reserved solely to the NRC. Compatibility Category A are those program elements that are basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt Category A program elements in an essentially identical manner to provide uniformity in the regulation of agreement material on a nationwide basis. Compatibility Category B are those program elements that apply to activities that have direct and significant effects in multiple jurisdictions. An Agreement State should adopt Category B program elements in an essentially identical manner. Compatibility Category C are those program elements that do not meet the criteria of Category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. An Agreement State should adopt the essential objectives of the Category C program elements. Compatibility Category D are those program elements that do not meet any of the criteria of Category A, B, or C, above, and, thus, do not need to be adopted by Agreement States for purposes of compatibility.

Health and Safety (H&S) are program elements that are not required for compatibility but are identified as having a particular health and safety role (i.e., adequacy) in the regulation of agreement material within the State. Although not required for compatibility, the State should adopt program elements in the H&S category based on those of the NRC that embody the essential objectives of the NRC program elements because of particular health and safety considerations.

Compatibility Category NRC are those program elements that address areas of regulation that cannot be relinquished to Agreement States under the AEA, or provisions of

10 CFR. These program elements are not adopted by Agreement States. The following table lists the parts and sections that would be revised and their corresponding compatibility categorization under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs."

The NRC invites comment on the compatibility category designations in the proposed rule and suggests that commenters refer to Handbook 5.9 of Management Directive 5.9 for more information (a copy of which may be viewed at <http://www.nrc.gov/reading-rm/doc-collections/management-directives/>). The NRC notes that, like the rule text, the compatibility category designations can change between the proposed rule and final rule, based on comments received and Commission decisions regarding the final rule. The NRC encourages anyone interested in commenting on the compatibility category designations to do so during the comment period.

Draft Compatibility Table for Proposed Rule

Section	Change	Subject	Compatibility	
			Existing	New
Part 71				
71.4	New	Definition Indian tribe	-	B
71.4	New	Definition Tribal official	-	B
71.97	Amend	Advance notification of shipment of irradiated reactor fuel and nuclear waste	B	B
Part 73				
73.2	New	Definition Indian tribe	-	NRC
73.2	New	Definition Tribal official	-	NRC
73.21	Amend	Protection of Safeguards Information: Performance Requirements	NRC	NRC
73.37	Amend	Requirements for physical protection of irradiated reactor fuel in transit	NRC	NRC

Section	Change	Subject	Compatibility	
			Existing	New
73.59	Amend	Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals	NRC	NRC

VII. Plain Language

The Presidential Memorandum “Plain Language in Government Writing” published June 10, 1998 (63 FR 31883), directed that the Government’s documents be in clear and accessible language. The NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent as indicated under the “ADDRESSES” heading of this document.

VIII. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104-113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this proposed rule, the NRC would require that advance notification be provided to Tribal governments for shipments of irradiated reactor fuel and other nuclear wastes listed in § 71.97 that pass within or across Tribal reservations. The NRC is not aware of any voluntary consensus standards that address the subject matter of this proposed rule. The NRC will consider using a voluntary consensus standard if an appropriate

standard is identified. If a voluntary consensus standard is identified for consideration, the submittal should explain why the standard should be used.

IX. Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(3). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

X. Paperwork Reduction Act Statement

This proposed rule contains new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule has been submitted to the Office of Management and Budget (OMB) for review and approval of the information collection requirements.

Type of submission, new or revision: revised

The title of the information collection: 10 CFR Parts 71 and 73, "Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste."

The form number if applicable: NA

How often the collection is required: On occasion; each time a shipment of irradiated reactor fuel or certain other nuclear wastes listed in § 71.97 is made that crosses Tribal reservation borders.

Who will be required or asked to report: Licensees that are shipping irradiated reactor fuel or certain other nuclear wastes listed in § 71.97.

An estimate of the number of annual responses: 386 (380 responses plus 6 record keepers).

The estimated number of annual respondents: 18.

An estimate of the total number of hours needed annually to complete the requirement or request: 163 (6.4 recordkeeping hours plus 156.4 third party hours) all of which is associated with Part 73.

Abstract: The NRC is proposing to amend its regulations to put in place a new requirement for licensees to provide advance notification to participating Tribes of any shipments of irradiated reactor fuel or certain other nuclear wastes listed in § 71.97 that pass within or across Tribal reservations.

The NRC is seeking public comment on the potential impact of the information collections contained in this proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Is the estimate of burden accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

A copy of the OMB clearance package may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1F21, Rockville, MD 20852. The OMB clearance package and rule are available at the NRC worldwide website <http://www.nrc.gov/public-involve/doc-comment/omb/index.html> for 60 days after the signature date of this notice.

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden and on the above issues, by **(INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*)** to the Information Services Branch (T-5F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail to INFOCOLLECTS.Resource@NRC.gov and to the Desk Officer Christine J. Kymn, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0008, 0002), Office of Management and Budget, Washington, DC 20503. Comments on the proposed information collections may also be submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>, Docket Number NRC-1999-0005. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. You may also e-mail comments to Christine J. Kymn at Christine.J.Kymn@omb.eop.gov or comment by telephone at 202-395-4638.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

XI. Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission.

The Commission requests public comment on the draft regulatory analysis. Comments on the draft analysis may be submitted to the NRC as indicated under the “**ADDRESSES**” heading of this document. The analysis is available for inspection in the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1F21, Rockville, MD 20852 and can be found at <http://www.regulations.gov> by searching on Docket ID NRC-1999-0005.

XII. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. The amendments will apply to reactor licensees and a few licensees who possess large sources of byproduct materials. The majority, if not all, of these licensees are not “small entities” under either the Regulatory Flexibility Act or NRC’s size standards (10 CFR 2.810).

XIII. Backfit Analysis

The NRC has determined that the backfit rule, which is found in the regulations at 10 CFR §§ 50.109, 70.76, 72.62, 76.76, and in 10 CFR Part 52, does not apply to this proposed rule because this amendment would not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required.

List of Subjects

10 CFR Part 71

Criminal penalties, Hazardous materials transportation, Import, Nuclear materials, Packaging and containers, Reporting and record keeping requirements.

10 CFR Part 73

Criminal penalties, Export, Hazardous materials transportation, Import, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; the NRC is proposing to adopt the following amendments to 10 CFR Parts 71 and 73.

PART 71--PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

1. The authority citation for Part 71 continues to read as follows:

AUTHORITY: Secs. 53, 57, 62, 63, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201, 2232, 2233, 2297f); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). Section 71.97 also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789-790.

2. In § 71.4, new definitions for *Indian tribe* and *Tribal official* are added in alphabetical order to read as follows:

§ 71.4 Definitions.

* * * * *

Indian tribe means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

* * * * *

Tribal official means the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

* * * * *

3. In § 71.97, paragraphs (a), (c)(1), (c)(3), (d)(4), (e), and (f)(1) are revised to read as follows:

§ 71.97 Advance notification of shipment of irradiated reactor fuel and nuclear waste.

(a)(1) As specified in paragraphs (b), (c), and (d) of this section, each licensee shall provide advance notification to the governor of a State, or the governor's designee, of the

shipment of licensed material, within or across the boundary of the State, before the transport, or delivery to a carrier, for transport, of licensed material outside the confines of the licensee's plant or other place of use or storage.

(2) As specified in paragraphs (b), (c), and (d) of this section, each licensee shall provide advance notification to the Tribal official of participating Tribes referenced in paragraph (c)(3)(iii) of this section, or the official's designee, of the shipment of licensed material, within or across the boundary of the Tribe's reservation, before the transport, or delivery to a carrier, for transport, of licensed material outside the confines of the licensee's plant or other place of use or storage.

* * * * *

(c) *Procedures for submitting advance notification.* (1) The notification must be made in writing to:

- (i) The office of each appropriate governor or governor's designee;
- (ii) The office of each appropriate Tribal official or Tribal official's designee; and
- (iii) The Director, Division of Security Policy, Office of Nuclear Security and Incident Response.

* * * * *

(3) A notification delivered by any other means than mail must reach the office of the governor or of the governor's designee or the Tribal official or Tribal official's designee at least 4 days before the beginning of the 7-day period during which departure of the shipment is estimated to occur.

(i) A list of the names and mailing addresses of the governors' designees receiving advance notification of transportation of nuclear waste was published in the *Federal Register* on June 30, 1995 (60 FR 34306).

(ii) The list of governor's designees and Tribal official's designees of participating Tribes will be published annually in the *Federal Register* on or about June 30th to reflect any changes in information.

(iii) A list of the names and mailing addresses of the governors' designees and Tribal officials' designees of participating Tribes is available on request from the Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

* * * * *

(d) ***

(4) The 7-day period during which arrival of the shipment at State boundaries or Tribal reservation boundaries is estimated to occur;

* * * * *

(e) *Revision notice.* A licensee who finds that schedule information previously furnished to a governor or governor's designee or a Tribal official or Tribal official's designee, in accordance with this section, will not be met, shall telephone a responsible individual in the office of the governor of the State or of the governor's designee or the Tribal official or the Tribal official's designee and inform that individual of the extent of the delay beyond the schedule originally reported. The licensee shall maintain a record of the name of the individual contacted for 3 years.

(f) *Cancellation notice.* (1) Each licensee who cancels an irradiated reactor fuel or nuclear waste shipment for which advance notification has been sent shall send a cancellation notice to the governor of each State or to the governor's designee previously notified, each Tribal official or to the Tribal official's designee previously notified, and to the Director, Division of Security Policy, Office of Nuclear Security and Incident Response.

* * * * *

PART 73 -- PHYSICAL PROTECTION OF PLANTS AND MATERIALS

4. The authority citation for Part 73 continues to read as follows:

AUTHORITY: Secs. 53, 161, 149, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2169, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 594 (2005).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99-399, 100 Stat. 876(42 U.S.C. 2169).

5. In § 73.2, new definitions for *Indian tribe* and *Tribal official* are added in alphabetical order to read as follows:

§ 73.2 Definitions.

* * * * *

Indian tribe means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

* * * * *

Tribal official means the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

* * * * *

6. In § 73.21, paragraph (a)(2) is revised to read as follows:

§ 73.21 Protection of Safeguards Information: Performance Requirements.

(a) ***

(2) Information protection procedures employed by Federal, State, Tribal, and local law enforcement agencies are presumed to meet the general performance requirement in paragraph (a)(1) of this section.

* * * * *

7. In § 73.37, paragraphs (f) and (g) are revised to read as follows:

§ 73.37 Requirements for physical protection of irradiated reactor fuel in transit.

* * * * *

(f) Prior to the transport of spent fuel within or across a State or Tribal reservation, a licensee subject to this section shall notify the governor or the governor's designee and the Tribal official of each participating Tribe referenced in § 71.97(c)(3) of this chapter or the Tribal official's designee. The licensee shall comply with the following criteria in regard to a notification:

(1) The notification must be in writing and sent to the office of each appropriate governor or the governor's designee and each appropriate Tribal official or the Tribal official's designee. A notification delivered by mail must be postmarked at least 7 days before transport of a shipment within or across the State or Tribal reservation. A notification delivered by messenger must reach the office of the governor or the governor's designee and any Tribal official or Tribal official's designee at least 4 days before transport of a shipment within or across the State or Tribal reservation. A list of the mailing addresses of governors and governors' designees and

Tribal officials and Tribal officials' designees is available upon request from the Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

(2) The notification must include the following information:

(i) The name, address, and telephone number of the shipper, carrier and receiver.

(ii) A description of the shipment as specified by the Department of Transportation in 49 CFR §§ 172.202 and 172.203(d).

(iii) A listing of the routes to be used within the State or Tribal reservation.

(iv) A statement that the information described in paragraph (f)(3) of this section is required by NRC regulations to be protected in accordance with the requirements of §§ 73.21 and 73.22.

(3) The licensee shall provide the following information on a separate enclosure to the written notification:

(i) The estimated date and time of departure from the point of origin of the shipment.

(ii) The estimated date and time of entry into the governor's State or Tribal reservation.

(iii) For the case of a single shipment whose schedule is not related to the schedule of any subsequent shipment, a statement that schedule information must be protected in accordance with the provisions of §§ 73.21 and 73.22 until at least 10 days after the shipment has entered or originated within the State or Tribal reservation.

(iv) For the case of a shipment in a series of shipments whose schedules are related, a statement that schedule information must be protected in accordance with the provisions of §§ 73.21 and 73.22 until 10 days after the last shipment in the series has entered or originated within the State or Tribal reservation and an estimate of the date on which the last shipment in the series will enter or originate within the State or Tribal reservation.

(4) A licensee shall notify by telephone or other means a responsible individual in the office of the governor or in the office of the governor's designee and the office of the Tribal official or in the office of the Tribal official's designee of any schedule change that differs by more than 6 hours from the schedule information previously furnished in accordance with paragraph (f)(3) of this section, and shall inform that individual of the number of hours of advance or delay relative to the written schedule information previously furnished.

(g) State officials, State employees, Tribal officials, Tribal employees, and other individuals, whether or not licensees of the Commission, who receive schedule information of the kind specified in paragraph (f)(3) of this section shall protect that information against unauthorized disclosure as specified in §§ 73.21 and 73.22.

8. In § 73.59, new paragraph (l) is added to read as follows:

§ 73.59 Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals.

* * * * *

(l) Tribal official or the Tribal official's designated representative, and Tribal law enforcement personnel to whom access has been granted for the purpose of advance notification of shipments under provisions of § 73.37(f).

Dated at Rockville, Maryland, this 1st day of December 2010.

For the Nuclear Regulatory Commission.

/RA/

Annette Vietti-Cook,
Secretary of the Commission.