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## FACSIMILE TRANSMITTAL SHEET

TO: *Cindy Bladey*

FROM: *Lenith Waterman, Executive Assistant*

COMPANY: *US Nuclear Regulatory Commission*

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## PRESIDENT'S OFFICE

April 1, 2013

VIA FAX 301-492-3446

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Rules, Announcements, and Directives Branch (RADB)  
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Mail Stop: TWB-05-B01M  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

**RE: Comments on the Nuclear Regulatory Commission's Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement on Consultation with Native American Tribes [Docket ID NRC-2012-0235]**

Dear Ms. Bladey,

On behalf of the Seneca Nation of Indians ("Nation"), a federally-recognized, self-governing Indian tribe located within its aboriginal territory in the State of New York, I hereby submit the attached written comments concerning the U.S. Nuclear Regulatory Commission's ("NRC") draft Tribal Protocol Manual and Scoping for Proposed Policy Statement.

The Seneca Nation consists of more than 8,000 enrolled members, many of whom reside on three Reservations (Cattaraugus, Allegany, and Oil Springs) and additional territories in Erie, Cattaraugus, and Niagara Counties. Our lands were reserved to us in treaties with the United States specifically for the purpose of making a permanent and viable homeland for the members of the Nation. Because Nation lands are finite, our natural resources, which are otherwise abundant in adjacent communities, are potentially scarce or threatened within our territory. The health and existence of resources like native plants, trees, fish and wildlife, water and air, are all critical in supporting our traditional dependency and survival. Therefore, we have a vested

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interest in protecting our lands and the members who live on or near them, and ensuring that our lands exist for future generations.

The Nation is very interested in the NRC's oversight of the transportation, storage, and disposal of nuclear materials and waste, and the decommissioning of nuclear facilities from service, particularly its involvement in the West Valley Demonstration Project ("WVDP"). The Nation's Cattaraugus Territory is located approximately 20 miles downstream of WVDP, a former commercial nuclear fuel reprocessing plant located in Ashford, New York in northern Cattaraugus County. From 1966 through 1972, WVDP processed 640 metric tons of spent reactor fuel, generating over 600,000 gallons of liquid high-level radioactive waste ("HLW").<sup>1</sup> In 1980, Congress authorized the Department of Energy ("DOE") to demonstrate a method for solidifying the HLW at WVDP ("HLW vitrification"), effectively removing it from the NRC's direct purview.<sup>2</sup> As a result, DOE and the NRC entered in to a Memorandum of Understanding ("MOU") establishing specific agency responsibilities and arrangements for informal review and consultation by the NRC regarding activities conducted at WVDP.<sup>3</sup> While the NRC retained an oversight role at WVDP, monitoring and advising DOE on its activities, it put technical specifications of the WVDP license in abeyance to allow DOE to carry out the responsibilities of the 1980 Act. As a result of DOE's role at WVDP, the Nation entered in to a Memorandum of Agreement ("MOA") with DOE, wherein DOE recognized our sovereign status and the need for an effective government-to-government relationship, and ensured that we are consulted on a timely basis. However, no such agreement was entered in to with the NRC.

The NRC continues to be involved in the WVDP through its oversight role and its participation on a "Core Team" responsible for making recommendations to DOE, which is currently working to decommission WVDP through the decontamination and dismantling of the facilities and the managing and disposing of the waste.<sup>4</sup> The NRC even issued "Decommissioning Criteria" for WVDP in 2002.<sup>5</sup> Given the fact that the Nation has no commitment from the NRC to work with us on a government-to-government basis and that the NRC has considered the external regulation of DOE facilities, which would potentially apply the NRC regulatory program to WVDP, we are very interested in the NRC's latest efforts to develop a Tribal Protocol Manual and develop a policy on tribal consultation.<sup>6</sup>

While we understand that the NRC is not required to implement policies and procedures required by Executive Order 13175, we applaud the agency for seeking to meet the underlying goals and objectives of the Order during its interactions with tribes. We believe that the draft Tribal Protocol Manual is a good start in ensuring that the NRC knows how to work with tribes

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<sup>1</sup> West Valley Demonstration Project Annual Site Environmental Report for Calendar Year 2011, prepared by CH2M Hill – B&W West Valley, LLC (September 2012) ("CY2011 Report").

<sup>2</sup> West Valley Demonstration Project Act, Pub.L. 96-368, 94 Stat. 1347 (October 1, 1980) ("1980 Act"). DOE is largely exempt from regulation by the NRC and historically has self-regulated the safety of its facilities through implementation of DOE orders, directives, and contractual arrangements.

<sup>3</sup> CY2011 Report, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> 67 FR 5003 (2002).

<sup>6</sup> External Regulation of Department of Energy Nuclear Facilities, A Pilot Program (July 1999) available at [www.orau.org/ptp/PTP%20Library/library/NRC/NUREG/1708.pdf](http://www.orau.org/ptp/PTP%20Library/library/NRC/NUREG/1708.pdf)

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but could be greatly improved. Furthermore, we believe that the development of a consultation policy would ensure that there is mutual cooperation in the future development of NRC policies and licensing actions.

Thank you for providing the Nation an opportunity to submit the attached comments on this important issue. Please contact either myself, at (716) 542-4900, or Kimberlee Dunlop at (716) 393-7722, if you need any additional information.

Sincerely,

**SENECA NATION OF INDIANS**



Barry E. Snyder, Sr.  
President

Enclosure

cc: Deborah John, SNI-EPD  
Kimberlee Dunlop

**COMMENTS RE: NUCLEAR REGULATORY COMMISSION'S  
DRAFT TRIBAL PROTOCOL MANUAL AND  
SCOPING FOR PROPOSED POLICY STATEMENT ON  
CONSULTATION WITH NATIVE AMERICAN TRIBES  
Docket ID NRC-2012-0235**

**I. Comments on the NRC Draft Tribal Protocol Manual**

We understand that the Nuclear Regulatory Commission ("NRC") is an independent agency and therefore not required to implement policies and procedures required by Executive Order ("EO") 13175. We applaud the fact that the NRC has determined that it supports the spirit of the EO and is seeking to meet underlying goals and objectives during its interactions with tribes by revising its internal Tribal Protocol Manual ("Manual"). We believe that it is imperative that all federal agencies emphasize the importance of tribal consultation and work to establish internal protocol for interactions with Native American tribal governments regardless of any mandate to do so. The recent increase in the number of interactions between the NRC and Native American tribes supports the need to establish a consultation policy and to update its internal protocol. Per the NRC's request, we hereby submit the following comments on the NRC's draft Tribal Protocol Manual.

***A. The NRC Manual Should Emphasize that the Federal-Tribal Relationship is Complicated***

While we recognize that the NRC's Manual is intended to serve as a reference tool for the employees of the NRC, and includes a well-intentioned historical background, we do not believe that it accurately reflects the extremely complicated federal-tribal history. The Manual acknowledges that tribes are unique governmental entities and not extensions of State or local governments, advising users of the Manual not to consider tribes as special interest groups or "stakeholders". However, we believe that the Manual should *emphasize* this point rather than merely acknowledging it. In addition, while every tribe that the NRC interacts with now and in the future will have its own point of view and its own history with the federal government, it is difficult to attempt a generalized view that every party will agree upon. We understand that the Manual is intended to serve as a basic education to those unfamiliar with tribes, and as a helpful reminder to those with some experience, but we are concerned that many of the historical generalizations included in the Manual could mislead some to believe that the federal-tribal history is not as complicated as it actually is.

***B. Choose One Term to Describe Native Americans and Be Consistent***

The Manual notes that it uses various terms when describing Native American peoples. While the Manual should continue to include this type of disclaimer upfront, it would be better if the NRC picked one term to describe tribes and used it consistently so as to avoid confusion in the Manual. For example, the Manual uses "tribal governments" and "tribes" interchangeably.

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***C. The Historical Summary Is Inaccurate And Fails To Explain Why The Federal-Tribal Relationship is Fragile***

The historical summary of U.S. and tribal relations included in the Manual is very general and comes across as being more positive than it actually was for tribes. It also fails to go in to the complicated details of the history of the U.S. and tribal relationship. We are concerned that the discussion of treaties is very general and it is unclear how or why certain treaties were selected as examples of "historically significant" treaties. For example, we have entered in to several treaties with the U.S. government that we believe are all important and worthy of discussion in an historical overview of U.S. and tribal relations. In addition, the overview of different periods in the federal-tribal relationship is a very romanticized view of an otherwise turbulent and tarnished history. The brief discussion of "Reservations (1850-1871)" fails to point out that this period was vehemently opposed by tribes. Likewise, the "Assimilation (1871-1928)" discussion quickly glosses over the policy of removal, whereby children were taken away from their families and educated in government-run boarding schools. This is a huge issue that tribes experienced and continue to suffer from that is overlooked by the NRC's discussion of the federal-tribal relationship. In discussing "Termination", the NRC acknowledges that "[t]ermination greatly undermined the trust relationship between the Federal government and Native Americans." In reality, nearly all of the federal government's policies undermined its trust relationship with tribes and helps to explain why many tribes are hesitant to work with the federal government even to this day.

The Manual attempts to smooth out the rough edges of the history of the federal-tribal relationship by stating that "[t]oday, Native American tribes are achieving greater assertion of their sovereign rights and experiencing greater political and economic potential through tribal self-determination. Much of this has occurred through heightened tribal cultural awareness, cultural assertiveness and supportive Federal Executive Orders and Court rulings." However, the Manual fails to acknowledge that struggles for tribes continue to exist in the form of poverty, poor health conditions, and lack of supportive educational systems. Much work remains in order to develop a trusting, beneficial relationship between the U.S. and tribes. Moreover, Court cases have not always been supportive of tribes, and frustration continues to exist in terms of various policies issued by the Federal government, lack of appropriations for Indian programs, and a general lack of understanding for tribes.

***D. The NRC's Case-by-Case Approach Should Serve as a Basic Starting Point for Formulating Policy***

The Manual generally discusses the NRC's Case-by-Case approach to interactions with tribes, but it may be more helpful in developing relationships with tribes in the future if the Manual expanded the discussion on how the NRC actually interacted with the tribes. In discussing the four interactions with tribes, the Manual should set forth a list of positives that the NRC took away from those interactions and develop its own list for tribal protocol, instead of merely summarizing the interaction itself. Although it is useful for tribes and the NRC staff to know that a tribe was able to develop a Memorandum of Understanding ("MOU") with the NRC, it may be more beneficial to know what steps led to that point, what things worked and what did not work. It is also important for the NRC to streamline such a process. Similarly, the special rights of notice, participation, consultation and financial assistance that resulted

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from the proposed waste repository at Yucca Mountain should be used in developing a tribal consultation or protocol manual. The NRC's ability to work with the Department of Interior, or any other federal agency, should also be incorporated wherever possible in assisting tribes and the NRC should engage in interagency working groups wherever possible to develop ways to share information. The NRC should also formulate ways to identify opportunities for Native American tribes to participate, through the formulation of a process for notice, consultation, participation and financial assistance. Likewise, it would be more useful if the Manual described the formation and operation of the Tribal Consultative Team ("Team") that the NRC established in working with representatives of the Yukon River Inter-Tribal Watershed Council (YRITWC), rather than just knowing that such a team was formed. For example, the Manual should set forth the formation of the Team, its goals, how it operates, who is on it, how it can be improved and how it can be made applicable to future interactions with tribes. In addition, it should spell out what types of communications are held by the Team and how often such communications occurred.

***E. The Manual Should Emphasize The Cultural Differences Between Tribes***

Under Section 2.A, it is important for the Manual to note that, although generalized statements about the cultural differences between tribes are accurate for some, they do not necessarily apply to all tribes. The Manual should instead acknowledge that each tribe is different, has a different history and some have a different relationship with the federal government. The Manual should, however, continue to emphasize the importance of respect, for culture, elders, and points of view offered by tribal officials when working with tribes and when discussing communications and interactions with tribes.

***F. The Manual Should Provide Some Guidance on Tribal Consultation***

Under Section 2.B, the Manual should include a definition of "consultation", such as:

*"[C]onsultation includes, but is not limited to: prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with the government-to-government relationship."*

This should also provide a statement to ensure that tribes are consulted, that their views are received and responded to, and spell out ways in which consultation can take place (i.e. via conference call or email, in person, etc.). It should also stress the importance of dialogue and follow up.

***G. The Manual Should Set Forth Better Tribal Contacts and Reference Tools for the NRC Staff and Management***

The Manual states that the Intergovernmental Liaison Branch of the Department of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental ("FSME") Management Programs shall serve as the tribal liaison for the NRC. We believe that the NRC

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should have an individual dedicated to tribal issues, familiar with tribes, to serve as the tribal liaison. This may require the NRC to establish a new office for a tribal liaison.

The Manual also provides an instructional guide for the NRC's FSME phone book, which it directs FSME to include tribal contacts. However, it might be better if the NRC used the Department of Interior's listing of tribal leaders, which is updated annually. The Bureau of Indian Affairs ("BIA") Tribal Leaders Directory is available online at:

<http://www.bia.gov/cs/groups/public/documents/text/idc002652.pdf>

Finally, the NRC may want to include a map of all federally recognized tribal lands in addition to Section 3.C (Native American Reservations and Trust Land within a 50-Mile Radius of a Nuclear Power Plant). This would serve as a beneficial reference tool for the NRC management and staff that are unfamiliar with Indian Country in general.

## II. Proposed Policy Statement

In developing a proposed tribal consultation policy, the NRC also sought several suggestions from tribes, to which we have commented on as follows:

### *A. How can the NRC strengthen government-to-government relationships with Native American tribes?*

We believe that the NRC can strengthen its government-to-government relationship with tribes by educating NRC staff on what the "government to government" relationship really entails and what it means to tribes. The NRC should also consider applying the following principles:

- Respect tribes and engage in regular dialogue with tribes wherein NRC staff and management have an open mind and truly listen to and attempt to understand tribal concerns;
- Recognize that tribes retain aspects of inherent sovereignty that Congress has not taken away, that tribes have not negotiated away in treaties and other agreements, and that have not been lost in court cases;
- Consider tribes as a governmental partner rather than a "stakeholder" or special interest;
- Acknowledge the unique legal and political relationship with tribal governments that gives rise to significant federal obligations;
- Affirm the NRC's efforts to work with tribes on a government-to-government basis;
- Recognize tribal governments as sovereign entities with primary authority and responsibility for the protection of the health, safety and welfare of its citizens;

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- Recognize the right of each tribe to set its own priorities and goals in developing, protecting and managing its natural and cultural resources and defer to tribal policies on confidentiality and management of cultural resources;
- Recognize tribes as necessary and appropriate non-federal parties in the federal decision-making process regarding actions potentially impacting Indian country resources, environments and the health and welfare of its citizens;
- Acknowledge that consultation is the cornerstone of the government-to-government relationship;
- Have staff dedicated to working with, and improving, its relations with tribal governments and establish a dedicated position to coordinate tribal consultation and outreach;
- Develop a Tribal Resource Guide that offers tribal elected leadership background information on the NRC and its initiatives, and provides point of contact information;
- Implement a proactive outreach effort of notice and consultation regarding current and proposed actions affecting tribes;
- Provide technical and financial assistance to tribes;
- Comply with current and forthcoming cultural resource protection laws and Executive Orders;
- Include in the Manual and Consultation Policy definitions of the unique relationship between the U.S. and tribes, the federal trust responsibility and "consultation" in general; and
- Implement permanent workshops and programs for field and headquarters staff on tribal cultural awareness and tribal governance.

***B. What practices have the NRC or other Federal agencies employed that have been effective in identifying tribal interests and resolving tribal concerns about proposed agency actions?***

We believe that other federal agencies have been effective in identifying tribal interests and resolving tribal concerns about proposed agency actions by being proactive, including tribes in the conversation early and often, providing adequate notice, and by making consultation a priority. In analyzing whether consultation is necessary on a given topic, the NRC should start with a presumption that it is necessary. Consultation should be mutually-agreed upon by the parties involved and should be *meaningful*. That is, tribes should feel as though they have a strong voice in shaping the federal policies that directly affect our ability to govern ourselves and to provide for the health, safety and welfare of our citizens. It is very frustrating when agencies consult tribes but then provide very little response or consideration of tribal recommendations. Consultation requires tribes to expend significant time and resources, so we want to feel as though we have had a meaningful opportunity to comment on proposed actions.

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In addition, the NRC might want to consider incorporating the following practices and principles to identify tribal interests and resolve tribal concerns:

- Provide timely notice to all potentially impacted tribes in the early planning stages of the decision-making process, including predraft consultation, so that the NRC can learn about tribal concerns early in the process;
- Provide for alternative communication methods, such as conference calls and other meetings, to discuss draft rules and proposed policies, and to create an "open door" policy;
- Conduct follow up meetings and conference calls before comment periods close, and sometimes after, to better understand tribal positions;
- Address tribal input considered in making final decisions;
- Allow and encourage tribes to request consultation on matters;
- Quickly and consistently communicate with tribes and continually seek to improve upon the agency's means of communication, streamlining communications where necessary;
- Engage tribal leaders in periodic dialogue, providing an opportunity for tribal leaders to assess policy implementation, program delivery and to discuss the NRC's outreach and communication efforts, and other issues;
- Explain the reasons why a tribal suggestion or recommendation is not acceptable or implemented by the NRC - too often federal agencies pretend to consult with tribes and yet proceed as originally planned without any explanation to the tribes the reasons for their actions;
- Establish mechanisms for accountability by developing tracking mechanisms to ensure that the NRC is responding to issues raised through tribal consultation;
- Continuously review the NRC's regional and national functions, policies, procedures, and practices to identify policies with tribal implications and to ensure consistent application of program and policy implementation with tribes;
- Develop a good working relationship with other agencies by participating in interagency working groups to streamline the consultation process and to eliminate or minimize redundant efforts; and
- Pair consultation with training and technical assistance programs for tribes.

***C. Are there specific Tribal Policy Statements in other Federal agencies that could serve as a starting point for the NRC efforts?***

While there is no single tribal policy statement or tribal consultation policy that addresses the concerns of all tribes, we believe that several agencies have made a good attempt. We would suggest that the NRC review the policies of other federal agencies and include the following general principles (in addition to the principles recommended above in Sections II(A) and (B)):

- Recognize the special legal status of tribal governments;

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- Respect tribal sovereignty and support self-determination and self-governance;
- Acknowledge that the federal-tribal relationship is based on the U.S. Constitution, federal treaties, policy, law, court decisions, executive orders, and the ongoing political relationships;
- Acknowledge that part of the federal trust responsibility is to protect tribal sovereignty and self-determination, tribal lands, assets, resources, and treaty and other federally recognized and reserved rights; and
- Improve communications while maximizing tribal input and coordination.

***D. What unique tribal issues should the NRC be aware of as a non-landholding, regulatory agency that issues licenses under the Atomic Energy Act?***

In developing a tribal consultation policy, the NRC should set forth four principles of consultation, including: notification, input phase, follow up, and timing/deadlines, which may be a big concern for tribes. It will be important for the NRC to understand the need for flexibility, particularly given the fact that tribes operate in a different sense of time. Often there is a need for respect of a particular religious calendar, understanding for government operations, etc. The NRC should also consider describing where the decision-making authority will come from and who will serve as the point of contact for the NRC. As discussed in our comments on the Manual, the NRC should consider establishing a tribal liaison. It may be helpful if the NRC developed a model notification or consultation letter that it can use to notify tribes when it intends to engage in tribal consultation.

The NRC should also consider engaging tribes in consultation planning, so that they can work with tribes to understand how each consultation should be conducted. Although consultation may vary by tribe, it can generally follow the same consultation plan. This would enable tribes to be more involved in the consultation process.

Finally, the NRC should consider developing a dispute resolution process to provide a process when a dispute arises.

Thank you for allowing us an opportunity to submit comments on the NRC's draft Tribal Protocol Manual and development of a tribal consultation policy.