

POLICY ISSUE
NOTATION VOTE

January 10, 2014

SECY-14-0006

FOR: The Commissioners

FROM: Mark A. Satorius
Executive Director for Operations

SUBJECT: TRIBAL CONSULTATION POLICY STATEMENT AND PROTOCOL

PURPOSE:

This paper provides to the Commission, for review and approval, a proposed policy statement and protocol on consultation with Federally-recognized Tribal governments. This paper also provides a plan and resource estimates to implement the proposed policy statement. The proposed policy statement will be published in the *Federal Register* for public comment upon Commission approval. These actions are in response to SRM-COMWDM-12-0001, "Tribal Consultation Policy Statement and Protocol" (SRM) (May 22, 2012) which can be found under the U.S. Nuclear Regulatory Commission's (NRC) Agencywide Documents Access and Management System (ADAMS) Accession No. ML121430233.

SUMMARY:

In SRM-COMWDM-12-0001, the Commission directed the staff to develop a policy statement and protocol that: (1) uses the existing, "Tribal Protocol Manual: Guidance for NRC Employees" (ADAMS Accession No. ML12261A423), and the staff's ongoing efforts, outlined in SECY-09-0180, "U.S. Nuclear Regulatory Commission Interaction with Native American Tribes" (ADAMS ML092800263), as a starting point; (2) seeks input on how to improve the existing manual from the Tribes and the public; (3) ensures that the policy statement clearly articulates that the NRC's actions must be in accordance with its governing statutes and regulations;

SECY NOTE: THIS SECY PAPER, WITH THE EXCEPTION OF ENCLOSURE 4 WILL BE RELEASED TO THE PUBLIC IN 10 WORKING DAYS.

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(4) ensures that the policy statement and protocol respect and reflect sensitivity between Indian Tribes who are Federally-recognized and those who are not; (5) ensures that the policy statement and protocol indicate that the NRC will conduct outreach to State-recognized Tribes on a case-by-case basis; (6) explores additional opportunities for State-recognized Tribes to participate in the NRC regulatory process; (7) serves as the high level foundation for the protocol and should echo the language and spirit of the relevant presidential memoranda and executive orders; and (8) makes the protocol prominently publicly available on the NRC's public Web site.

The staff completed the items listed in the SRM, developed a proposed policy statement, and revised the protocol manual after reviewing public comments.

BACKGROUND:

As an independent regulatory agency, the NRC is exempt from the requirements of certain Executive Orders (EOs) that direct the implementation of an agency-wide policy statement on Tribal consultation and coordination. The NRC's current practice for government-to-government interaction with Federally-recognized Tribes reflects the spirit of the relevant Presidential EOs and Memoranda, without establishing a formal policy. The NRC interacts with Tribal governments on a case-by-case basis, allowing the NRC and the Tribes to initiate communication and consultation. The NRC staff maintains working relationships with Tribal governments and Tribal organizations that have an interest in NRC regulated activities.

In SECY-09-0180, "U.S. Nuclear Regulatory Commission's Interaction with Native American Tribes," the staff communicated the determination that the NRC's case-by-case approach to Tribal interaction was effective and met the needs of the Commission and the Tribes (December 11, 2009) (ADAMS Accession No. ML092920384). The staff concluded that Tribal interactions would not benefit from a formal Tribal policy at that time. Since then, an increase in NRC uranium recovery license reviews has resulted in more Tribes participating in these licensing actions and requesting consultation with the NRC on these activities. In particular, the Office of Federal and State Materials and Environmental Management Programs (FSME) staff has expended considerable resources on Tribal consultation to comply with the procedural requirements of Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA), during the licensing of uranium *in-situ* recovery (ISR) facilities. As of October 2013, the staff has conducted outreach with 32 Tribes regarding 8 ongoing licensing actions for new or existing ISR facilities. FSME anticipates receipt of an additional 8 to 12 applications for ISR licensing actions in Fiscal Years 2014 and 2015.

In COMWDM-12-0001, "Tribal Consultation Policy Statement and Protocol," Commissioner Magwood suggested that the increase in consultation activity for ISR licensing, along with a Commission meeting regarding the Generic Environmental Impact Statement for license renewal of uranium recovery facilities, "... have highlighted the lack of clarity that sometimes exists with respect to NRC consultations with Tribal governments" (January 18, 2012) (ADAMS Accession No. ML120180132). The Memorandum noted that this issue has been recognized within the Federal government through Executive Memoranda and Orders as well as a variety of other laws and regulations that require Tribal consultation and coordination. The Memorandum proposed that the Commission direct the staff to prepare a proposed policy statement and protocol on consultation with Tribal governments. In SRM-COMWDM-12-0001, the Commission

endorsed the COM and directed the staff to develop the proposed policy statement for Commission consideration.

Executive Orders and Presidential Memoranda

Executive Orders and Presidential Memoranda dating from President Nixon's "Special Message on Indian Affairs" in 1970 have addressed legislative and policy-making implications related to Federally-recognized Tribes. Presidents Ronald Reagan, George H.W. Bush, William J. Clinton, and George W. Bush issued EOs or Presidential Memoranda concerning the Federal government's relationship with Tribes. The Obama administration has also demonstrated a commitment to engaging the Tribal community, issuing a Presidential Memorandum on Tribal consultation in November 2009, and holding annual Tribal summits at the White House.

President Obama's 2009 Memorandum renewed the Federal government's commitment to EO 13175, "Consultation and Coordination with Indian Tribal Governments,"¹ issued by President Clinton (November 2000). This EO established the guiding principles for agencies forming and implementing policies with potential Tribal implications. In 2009, President Obama underscored the administration's commitment to EO 13175 by requiring Executive Departments and Agencies to report to the Office of Management and Budget their plan of action to implement the policies and directives of the EO 13175, and to submit annual progress reports regarding Tribal consultation activities. On June 26, 2013, President Obama issued an EO 13647, "Establishing the White House Council on Native American Affairs," to require certain Federal agencies to engage in nation-to-nation relationships with Tribes in a coordinated and effective manner to comply with Federal government obligations and trust responsibilities.

NRC Case-by-Case Interaction with Tribes

Although EO 13175 encourages independent agencies like the NRC to comply with its provisions, Section 1 of the EO excludes from its requirements "independent regulatory agencies, as defined in 44 U.S.C. §3502(5)." The NRC has demonstrated a commitment to achieve the EO's objectives by implementing a case-by-case approach to interactions with Federally-recognized Tribes. This case-by-case approach has established a foundation for government-to-government relationship that respects the right for Tribal self-government and self-determination. This approach has contributed to several successful consultations with Tribal governments. For example, the NRC entered into two Memoranda of Understanding (MOU) with the Prairie Island Indian Community (PIIC) for license renewal of the reactor units and the specifically-licensed independent spent fuel storage installation at the Prairie Island Nuclear Generating Plant. The PIIC participated as a cooperating agency on these reviews, which serve as examples of successful consultation. As noted previously, the NRC staff continues to consult with Tribal governments related to uranium recovery licensing activities.

¹ See <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>

DISCUSSION:Development of Proposed Tribal Policy Statement and Revised Tribal Protocol Manual

Since SRM-COMWDM-12-0001 was issued, the staff has developed a proposed NRC Tribal Policy Statement (Tribal Policy Statement) that could be issued for public comment following completion of Commission review. Enclosure 1 contains the draft *Federal Register* Notice issuing the proposed Tribal Policy Statement for public comment. Enclosure 2 contains the Tribal Protocol Manual, revised by the staff following consideration of public comments. The staff is not seeking further public comment at this time on the revised Tribal Protocol Manual.

Enclosures 1 and 2 were prepared by the Tribal Policy Working Group, led by FSME staff, with representatives from the Office of Nuclear Material Safety and Safeguards (NMSS), the Office of New Reactors (NRO), the Office of Nuclear Reactor Regulation (NRR), the Office of Nuclear Security and Incident Response (NSIR), the Office of the General Counsel (OGC), and NRC Region III. In an October 12, 2012 *Federal Register* notice (FRN), the NRC solicited public comments on the draft Tribal Protocol Manual and solicited suggestions on the development of the proposed Tribal Policy Statement (77 FR 62269). The NRC received six comment letters from two Tribal governments, two mining associations, one inter-Tribal organization, and a Tribal college. The staff also engaged in outreach with Tribal governments and other interested parties, including collaborating with the National Congress of American Indians to conduct mass mailings to 566 Federally-recognized Tribes, and participating in Tribal meetings hosted by Tribal organizations and other Federal agencies that included attendees from Federally-recognized and State-recognized Tribes. The draft FRN in Enclosure 1 includes comments and responses related to the proposed Tribal Policy Statement. Comments and responses related to the Tribal Protocol Manual are included as background information for this paper and will be published in a separate FRN with the revised Tribal Protocol Manual, as approved by the Commission.

In preparing the proposed Tribal Policy Statement, the staff reviewed Tribal policy statements of Executive Departments and independent agencies. Enclosure 3 contains the staff's summary of other Federal agency Tribal policies. Most of the policy statements included the following themes: (1) enhancing government-to-government relations; (2) meeting trust responsibilities with Tribes; (3) recognizing and respecting historic properties of religious or cultural importance; (4) recognizing rights of self-governance and determination; and (5) fully integrating the principle and practice of meaningful consultation and communication with Tribes. Most of the policy statements are agency-wide, broad in scope, and not limited to specific regulatory programs or statutory obligations such as NHPA Section 106 consultation. In many cases, the policies were supported at the agency by a designated Tribal official or Tribal office charged with Tribal interactions and consultation. Of the 21 Departments and Agencies that the staff surveyed, all had dedicated Tribal liaison staff and 16 had established a Tribal office.

Proposed Tribal Policy Statement

The proposed Tribal Policy Statement establishes the following six principles to be followed by the NRC to ensure effective government-to-government relations with Tribes, and to encourage and facilitate Tribal involvement in the areas over which the Commission has jurisdiction:

- The NRC recognizes the Federal trust relationship and will seek to uphold its trust relationship with Indian Tribes;
- The NRC recognizes and is committed to a government-to-government relationship with Indian Tribes;
- The NRC will seek to conduct outreach to Indian Tribes;
- The NRC will seek to engage in timely consultation with Indian Tribes on regulatory actions that have substantial direct effects on one or more Indian Tribes;
- The NRC will seek to coordinate with other Federal agencies on NRC regulatory actions that have substantial direct effects on one or more Indian Tribes; and
- The NRC will seek to encourage State-recognized Tribes' participation on a case-by-case basis.

The proposed Tribal Policy Statement accounts for the limited authority NRC has as an independent regulatory agency under the Atomic Energy Act of 1954, as amended (AEA), and identifies the Deputy Executive Director for Materials, Waste, Research, State, Tribal and Compliance Programs as NRC's Designated Tribal Officer. The proposed Tribal Policy Statement identifies the agency's responsibilities for intergovernmental consultation, as described in Management Directive 5.1, "Intergovernmental Consultation."² Finally, the proposed Tribal policy indicates that the NRC will continue to maintain FSME staff who have functional responsibility to serve as intergovernmental liaisons to the Tribes, per Management Directive 5.1.

COMMITMENTS:

- (1) Following Commission review and, as appropriate, publication of the proposed Tribal Policy Statement, the staff will continue outreach and communication to solicit comments from Tribal governments and organizations, the public, and other interested stakeholders.
- (2) The staff will review existing office-level guidance and training programs and determine if additional agency-level guidance and/or procedures will be required before the Commission approves the final Tribal Policy Statement, planned in FY 2015.

RESOURCES:

Resources have been allocated within the Nuclear Materials Users business line to fulfill the commitments above. FSME intergovernmental staff will continue to lead liaison efforts related to the Tribal Policy Statement development and implementation, with support from OGC, NMSS, NRO, NRR, and NSIR. The staff will continue to participate in Tribal meetings hosted by national and regional Tribal organizations. Resources have been allocated to support staff travel and Tribal Invitational Travel to conduct a Commission briefing before issuing the final Tribal Policy Statement. Also, resources have been allocated to cover training costs related to inter-agency collaboration. The resources for future needs beyond FY 2015 would be addressed through the Planning, Budgeting, and Performance Management process.

² See <http://pbadupws.nrc.gov/docs/ML0417/ML041770442.pdf>.

Enclosure 4 provides a preliminary agency-wide implementation plan for the proposed Tribal Policy Statement and revised Tribal Protocol Manual. The plan identifies office level considerations and resources necessary for FY2014-2015 implementation of the Policy Statement, along with near-term considerations. Over the next few years, the NRC Tribal policy implementation activities will be dynamic, and staff plans will be adjusted to satisfy changing demands and continuous improvement.

RECOMMENDATIONS:

The staff recommends that the Commission approve Enclosures 1 and 2, and publication of Enclosure 1 in the *Federal Register* for a 75-day public comment period.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection.

/RA Michael F. Weber for/

Mark A. Satorius
Executive Director
for Operations

Enclosures:

1. Draft *Federal Register* Notice
2. *NRC Tribal Protocol Manual* (revised)
3. Review of Other Federal Agency Tribal Policies
4. Implementation Plan

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