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General Comment

See attached file(s)

Attachments

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Chief, Rules, Announcement, and Directives Branch
Office of Administration, Mail Stop 3WFN-06-44M
U.S. Nuclear Regulatory Commission Washington, DC 20555-0001

RE: Draft NRC Tribal Protocol Manual (Rulemaking Docket NRC-2012-0235)

Dear Sirs:

On December 1, 2014, the U.S. Nuclear Regulatory Commission ("NRC") requested comments on its proposed Tribal Policy Statement; 79 Fed. Reg. 71,137 (Dec. 1, 2014) ("Policy"). On February 5, 2015, the NRC extended the comment period to May 31, 2015; 80 Fed. Reg. 6,553 (Feb. 5, 2015). The NRC also requested comments on the associated Tribal Protocol Manual by June 1, 2015; 79 Fed. Reg. 71,131 (Dec. 1, 2014) ("Manual"). This letter provides four comments on these documents for your consideration.

1. Section 3.E of the Manual may need to be updated as it does not list any facilities in Michigan. In contrast, the Pokagon Band of the Potawatomi Indians is a Federally-recognized Tribe (P.L. 103-323; 25 USC § 1300j). The relevant counties are listed in 25 USC § 1300j-6. Currently, the trust lands are a 674-acre site located within the New Buffalo consolidation site in Berrien County, Michigan (taken into trust on January 27, 2006), 775 acres of land located within the Hartford consolidation site in Van Buren County, Michigan (taken into trust on June 10, 2008), and 1,434 acres of land located within the Dowagiac consolidation site (taken into trust on June 10, 2008), for a total of approximately 2,883 acres of trust land.

2. Outreach, or other general methods of providing transparency with respect to NRC actions, is applicable to Tribes just like it is to licensees and other members of the public. In contrast, "Consultation," in Government-to-Government relations, usually has a specific meaning. When one Government undertakes to consult with another, a due respect for the sovereignty of the consulted Government means that the position of the consulted Government, within the scope of the consultation, should be adopted unless there is a substantial reason not to do so. See E. O. 13175, § 3(c)(2), Nov. 6, 2000; see generally, 25 USC § 2011(b); 42 USC § 10137(b) (requiring the written position of a consulted Indian Tribe to be considered to the "maximum extent feasible"). While they can be undertaken in many forms and forums, such consultations are generally formal; reflecting that both governments invest substantial resources in the consultation. See examples at <http://www.indianaffairs.gov/WhoWeAre/AS-IA/Consultation/index.htm>

The Policy and Manual generally reflect the differences between outreach and consultation. However, there are several specific spots, discussed below, where the language is unclear or the terms are used interchangeably. Confusion as to whether the NRC is engaged in outreach or consultation or the scope of consultation can result in confusion and delay. The Tribes may even get the impression that the NRC is only pretending to consult; see, for example, the eighth bullet on page 6 of the letter from the Seneca Nation of Indians, dated April 1, 2013, in this docket.

Principles 3 and 4 of the Policy are potentially confusing as they use the terms “consult” and “outreach” interchangeably. In addition, these Principles state that they apply to “regulatory actions” without clarifying whether what is meant are policy setting, rulemaking, issuing guidance, or a licensing action. As reflected in Section 1.D and associated note 25 of the Manual, as a regulatory agency, the NRC fulfills the fiduciary obligation to Tribes by ensuring uniform treatment action in providing protection under its implementing regulations. On the other hand, where the NRC is engaged in setting policy, issuing rules, or providing guidance that directly impact Tribes, consultation on subjects within the scope of the impact may be appropriate where the impact is significant. To minimize confusing ambiguity, the following clarifications are suggested:

A. The Policy

(1) In Principle 3, replace “consult” with “inform” in the first sentence and replace “NRC regulatory actions that have substantial direct impacts on one or more Indian Tribe” with “NRC regulatory actions, including licensing actions, in which one or more Indian Tribes have an interest.” This clarification ensures that outreach to Indian Tribes will include any regulatory action of interest to a Tribe.

(2) In Principle 4, replace “on NRC’s regulatory actions” with “prior to the NRC issuing policies, rules, or guidance” in the first sentence. This clarification reflects that consultation on NRC licensing actions would generally not be consistent with the NRC’s statutory authority. This clarification also harmonizes the Policy with the Presidential directive for agencies to consult on policies with tribal implications. E. O. 13175, § 1(a), Nov. 6, 2000.

B. The Manual

(1) In Section 1.F, under “Power Reactor Inspections and License Renewal -- Prairie Island Indian Community”, add a clarifying paragraph to the end that explains, “These MOU reflect effective cooperation and communication outreach by the NRC to the PIIC. Such outreach would not be in lieu of formal consultation when appropriate.”

(2) In Section 1.F, under “Uranium Recovery and Legacy Waste Associated with Uranium Mining and Milling – Located in New Mexico, Wyoming, Nebraska, and South Dakota”, add a clarifying paragraph to the end that states, “Effective communications on these six projects were hampered by confusion and delays arising in part from inadequate definition of the scope of formal consultations. Both to reflect the requirement under the National Historic Preservation Act to consult with affected Tribes and to respond when outreach identified historic

preservation issues of potential significant impact to the Tribes, the NRC should have initiated formal consultations with a clearly defined scope that described the subjects of such impacts. The NRC could have performed its consultation in parallel with continuing its outreach activities but minimized the associated confusion and resulting delays by more clearly defining the scope of the consultation.” Explaining how the scope of consultation could be better defined would capture lessons learned from these consultations where the consultation focused on historic properties, but the outreach was broader to cover the licensing action in general.

(3) In Section 2.B, in the penultimate paragraph, replace “Through consultation, the NRC obtains Tribal views on proposed NRC actions and policies that have a direct substantial effect on one or more Indian Tribes” with “Through consultation, the NRC obtains Tribal written input on matters within the scope of the consultation and implements that input unless there is a substantial reason not to do so. The scope of such consultations are defined in writing in advance and specify the aspects of the proposed NRC policies, rules and guidance that have a direct substantial effect on one or more Indian Tribes”. The current sentence seems to confuse the objectives of outreach, such as “obtaining views,” with the objectives of consultation, such as obtaining agreement on decisions.

(4) In Section 2.D, replace “consultation” with “dialog”, reflecting that consultation is not generally applicable to a licensing action.

3. Section 2.E of the Manual includes a discussion on the restrictions on using Federal Funds to provide food and drink. For clarity, add “without an appropriation” after “Federal funds” in the first paragraph under “Refreshments.” Some Federal agencies have budgetary exceptions to allow food and drink at meetings; such as a Representational Fund; for example, HHS Acquisition Policy, exception 2.2.3 http://www.hhs.gov/asfi/ogapa/acquisition/appfundspol_att2.html . Use of such a Representational Fund may be appropriate in performing Government to Government relations, such as in Tribal or international in-person meetings.

4. Consistent with the practices of other agencies, the Policy designates an official to facilitate meaningful and timely consultations with Indian Tribes. See generally, E. O. 13175, § 5(a), Nov. 6, 2000. The designated official is to work with other NRC personnel to ensure Tribal implications have been considered. The conclusions from these intra-agency considerations should be documented in the papers provided to the Commission (SEC’Y papers), much the way the conclusions of the Chief Financial Officer or legal office are reflected now. Such documentation would serve to provide timely feedback to the Commission, to be mindful with the resource implications associated with formal Tribal consultations, and to show respect for the solemnity of conducting Tribal consultations on a Government-to-Government basis. Also, the second sentence of the first paragraph under “Designated Official and Tribal Liaisons” is an ambiguous, run-on sentence that does not clarify that where the NRC is engaged in setting policy, issuing rules, or providing guidance that directly impact Tribes, consultation on subjects within the scope of the impact may be appropriate where the impact is significant as reflected in Comment 2, above. It is suggested that sentence be split into four sentences that read:

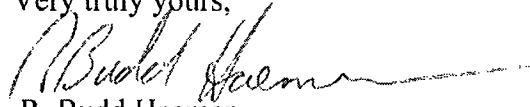
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The designated Official shall ensure that agency program personnel have considered the Tribal implications related to their responsibilities within the NRC's scope of jurisdiction. Where programs, policies, rulemaking or guidance are proposed to the Commission, the conclusions from review of these considerations shall be briefly discussed; specifically whether or not there potentially are direct effects on one or more Indian Tribes. The designated official shall facilitate meaningful and timely consultation concerning the development, administration, and enforcement of NRC's policy, rulemaking, or guidance actions that have a substantial direct effect on one or more Indian Tribes, including obtaining Commission approval to initiate formal consultation with one or more Indian Tribes on subjects within the scope of such substantial direct effects. Prior Commission approval to initiate consultation is not required where consultation is required by a Federal statute."

If you have any questions on this letter, please contact the undersigned.

Very truly yours,



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cc: C. Gallagher, USNRC