



POLICY ISSUE (Notation Vote)

August 10, 2022

SECY-22-0074

FOR: The Commissioners

FROM: Daniel H. Dorman
Executive Director for Operations

SUBJECT: PETITION FOR RULEMAKING AND RULEMAKING PLAN ON
ADVANCE TRIBAL NOTIFICATION OF CERTAIN RADIOACTIVE
MATERIAL SHIPMENTS (PRM-37-2; NRC-2021-0051)

PURPOSE:

The purpose of this paper is to request Commission approval to consider a petition for rulemaking (PRM) in the rulemaking process. The PRM requested that the U.S. Nuclear Regulatory Commission (NRC) amend its regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 37, "Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material." The amendment would require NRC and Agreement State licensees to provide advanced notification to participating Federally recognized Tribal governments when shipments of Category 1 quantities of radioactive material pass within or across the boundaries of the reservations. This paper also requests the Commission to delegate authority to the Executive Director for Operations (EDO) to issue this rule. A rulemaking plan is included in this paper.

SUMMARY:

The NRC received a PRM submitted in accordance with 10 CFR 2.802, "Petition for rulemaking—requirements for filing," from Richard Arnold and Ron Johnson, on behalf of the Tribal Radioactive Materials Transportation Committee, on December 4, 2020 (Agencywide

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Enclosure 3 transmitted herewith contains
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Documents Access and Management System (ADAMS) Accession No. ML21042B011). The petition requested that the NRC amend the regulations in 10 CFR Part 37 to include advance Tribal notification of certain radioactive material shipments. In accordance with 10 CFR 2.803, “Petition for rulemaking—NRC action,” the staff docketed the petition on February 11, 2021, as PRM-37-2 and reviewed the petition under 10 CFR 2.803(h)(1). The staff recommends considering the issue raised in the petition within the NRC’s rulemaking process.

BACKGROUND:

In PRM-37-2, the petitioner requested that the NRC revise its regulations at 10 CFR Part 37 to ensure consistency with 10 CFR Part 71 and 10 CFR Part 73 for advance Tribal notification of certain radioactive material shipments. The regulations in 10 CFR 71.97, “Advance notification of shipment of irradiated reactor fuel and nuclear waste,” and 10 CFR 73.37, “Requirements for physical protection of irradiated reactor fuel in transit,” require Agreement State and NRC licensees to provide advance notification to States and Tribes for their applicable shipments. However, 10 CFR 37.77 requires only State notification.

The NRC published a notice of docketing of the petition and request for comment in the *Federal Register* on April 9, 2021 (86 FR 18477). The NRC received 10 public comment submissions during the 75-day public comment period. Nine comment submissions supported the petition, while one comment submission and individual comments within other comment submissions were out of scope of the issue raised in the petition.

Advance Notification Rule

The NRC published the final rule “Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste” (Advance Notification Rule) in 2012.¹ The Advance Notification rule established the regulations in 10 CFR Part 71, “Packaging and Transportation of Radioactive Material,” and 10 CFR Part 73, “Physical Protection of Plants and Materials,” requiring the NRC and Agreement State licensees to provide advance notification to participating Federally recognized Tribal governments before their irradiated reactor fuel and certain nuclear wastes shipments pass within or across the boundary of Tribal reservations. The Advance Notification rule also provided relief from fingerprinting requirements to access safeguards information for Tribal officials, designees, and law enforcement personnel.

The rulemaking resulted in advance notifications for shipments passing within or across participating Tribal reservations that are similar to the 1982 requirements to notify States.² The rule’s preamble also stated that the purpose of the rule was to recognize Tribal sovereignty and the Tribal governments’ interest in being informed of activities occurring on Tribal reservations.³ Currently, six Federally recognized Tribes participate in the Tribal Advance Notification program.

In March 2013, the NRC published the final rule “Physical Protection of Byproduct Material” to establish security requirements for the use and transport of Category 1 and Category 2 quantities of radioactive material.⁴ The regulations in 10 CFR 37.77, “Advance notification of

¹ See 77 FR 34194 (June 11, 2012).

² *Id.*

³ *Id.*

⁴ See 78 FR 16921 (March 19, 2013).

shipment of category 1 quantities of radioactive material,” require NRC and Agreement State licensees to provide advance notification to States of the shipment of licensed material in a category 1 quantity through or across the boundary of a State. During the public comment period on the proposed rule, the NRC received a comment stating that the rule should provide for advance notification to Tribes for shipments that cross their reservations (ADAMS Accession No. ML102660025). The NRC’s response in the final rule stated that the NRC may consider providing advance notification of these materials to Tribes in the future.⁵ The final 10 CFR Part 37 rule, however, did not include provisions for Tribal notifications at that time.

Subsequently, the NRC published a *Federal Register* notice in June 2013 that discussed Agreement State licensees’ implementation of the Advance Notification rule.⁶ The notice only addressed implementation of 10 CFR Part 71 and 10 CFR Part 73 advance tribal notification requirements. The notice did not mention advance Tribal notifications under 10 CFR Part 37.

Tribal Policy Statement

In January 2017, the NRC published its Tribal Policy Statement⁷ and thereby established the NRC’s principles to promote effective Government-to-Government interactions with Federally recognized Tribes, and to encourage and facilitate Tribal involvement in the areas over which the Commission has jurisdiction. Tribal Policy Statement Principle 2 states that the NRC recognizes the right of each Indian Tribe to self-governance and supports Tribal sovereignty and self-determination.⁸ Additionally, Principle 2 states that the NRC recognizes Tribal governments as independent from State governments, with separate and distinct authorities with inherent sovereign powers over their members and territory, consistent with applicable statutes and authorities.⁹

DISCUSSION:

In its review of PRM-37-2, the staff considered that advance Tribal notifications are required in the regulations in 10 CFR Part 71 and 10 CFR Part 73 and are consistent with the principles of the agency’s Tribal Policy Statement. Based on its review of the petition, Tribal Policy Statement, current regulatory requirements, and NRC’s Principles of Good Regulation, the staff recommends considering the issue raised in the petition in the rulemaking process. The staff also considered the comments received on the petition in its decision to recommend rulemaking to the Commission. The *Federal Register* notice in Enclosure 1 summarizes and responds to the comments received on the petition and provides further details of the administrative record.

The staff presented this recommendation to the petition review board on September 29, 2021. The board unanimously agreed with the staff’s recommendation to consider the petitioner’s request in rulemaking.

⁵ See *Id.* at 1661, col. 1.

⁶ See the final rule and implementation “Advance Notification to Native American Tribes of Transportation of Certain Shipments of Nuclear Waste” (78 FR 35746; June 14, 2013).

⁷ The Advance Tribal Notification Rule was enacted before the NRC adopted the Tribal Policy Statement, but the preamble cites to Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments,” which is one of the bases for the NRC’s Tribal Policy Statement.

⁸ *Id.*

⁹ *Id.*

RULEMAKING PLAN:

Consistent with Management Directive 6.3, "The Rulemaking Process," dated July 3, 2019 (ADAMS Accession No. ML19211D136), the staff is submitting this rulemaking plan. The staff's proposed rulemaking would be limited in scope; the change to the regulations would not raise a significant policy issue and would not substantially modify the existing precedent. Therefore, the NRC staff requests that the Commission delegate issuance of the proposed and final rules to implement the proposed changes for advance Tribal notifications in 10 CFR Part 37 to the EDO. The staff does not plan to develop a regulatory basis for this rulemaking due to the limited scope.

Title

Advance Tribal Notification of Category 1 Quantities of Radioactive Material Shipments

Regulation

10 CFR 37.77, "Advance notification of shipment of category 1 quantities of radioactive material"

Regulatory Issue

The 10 CFR 37.77 provisions require advance notification for State governments but not Tribal governments for shipments of Category 1 quantities of radioactive material. In comparison, 10 CFR Part 71 and 10 CFR Part 73 provisions require advance notification for both State and Tribal governments for shipments of certain types of radioactive material. Therefore, the current requirements in 10 CFR Part 37 are inconsistent with requirements in 10 CFR Part 71 and 10 CFR Part 73, and the Tribal Policy Statement that recognizes Tribal sovereignty and the Tribal governments' interest in being informed of activities occurring on Tribal reservations. The NRC's regulations should consider Tribal interests in a consistent manner.

Existing Regulatory Framework

The regulations in 10 CFR 37.77 require licensees to inform State governors, or the governor's designee, of shipments of Category 1 quantities of radioactive material. Similar regulations in 10 CFR 71.97 and 10 CFR 73.37 require licensees to inform both State and participating Federally recognized Tribal governments of shipments of certain radioactive material. The staff intends to align the following regulations and guidance:

- 10 CFR 37.77, "Advance notification of shipment of category 1 quantities of radioactive material," requires advance State notification but not Tribal notification.
- 10 CFR 71.97, "Advance notification of shipment of irradiated reactor fuel and nuclear waste," requires advance State and Tribal notifications.
- 10 CFR 73.37, "Requirements for physical protection of irradiated reactor fuel in transit," requires advance State and Tribal notifications.

Explanation of Why Rulemaking is the Preferred Solution

In its evaluation of the petition, the staff considered whether to maintain the status quo or conduct a limited scope rulemaking. Under the rulemaking option, the staff would (1) revise 10 CFR 37.77 to include advance Tribal notification and (2) update NUREG-2155 “Implementation Guidance for 10 CFR Part 37, “Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material,” as needed. The alternative to rulemaking is to deny the petition and maintain the status quo. Rulemaking is the preferred solution because it would provide parity between Tribes and States and ensure consistency across regulations. Amending 10 CFR 37.77 to have consistent advance notification standards between Tribes and States would also be consistent with Tribal Policy Statement Principle 2 by recognizing Tribal sovereignty and recognizing Tribal governments’ interest in being informed of activities occurring on Tribal reservations. The amendment would also further the Principles of Good Regulation (openness and clarity). Additionally, the staff previously stated in a response to a comment concerning the proposed 10 CFR Part 37 rulemaking that the NRC might consider provisions for advance Tribal notification in the future (78 FR 16922, 16991 (March 19, 2013)).

Description of Rulemaking: Scope

The staff’s recommended rulemaking would be limited in scope to two sections in 10 CFR Part 37 and the proposed revisions would be minor. The rulemaking would revise 10 CFR 37.77 to include advanced notification to participating Federally recognized Tribes for shipments of Category 1 quantities of radioactive materials. The staff would not develop a regulatory basis for this rule as the rulemaking would be limited in scope. If approved, the staff would prepare the proposed and final rules for signature and issuance by the EDO.

Description of Rulemaking: Preliminary Backfitting and Issue Finality 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 rulemaking 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.

Description of Rulemaking: Estimated Schedule

The staff estimates the following schedule for the recommended rulemaking:

- Submit the proposed rule to the EDO—approximately 10 months after Commission approval of this rulemaking plan.
- Submit the final rule to the EDO—approximately 10 months after the proposed rule comment period ends.

This schedule includes time to coordinate a review with the Agreement States. The Agreement States typically receive 30 to 90 days to review the proposed and final rule packages (including guidance documents). Consistent with the plans for rulemaking innovation,¹⁰ the staff will continue to look for opportunities to increase efficiency as the work proceeds. The staff also will

¹⁰ “Rulemaking Process Innovation at the U.S. Nuclear Regulatory Commission,” issued July 2020 (ADAMS Accession No. ML20198M408).

conduct Tribal outreach and consultation activities that will not require travel. The staff will discuss this rulemaking during the monthly call of the Organization of Agreement States/Conference of Radiation Control Program Directors, send a GovDelivery Subscription Services email and State and Tribal Communications Letter, and update the public website to provide information on the rule change.

Description of Rulemaking: Preliminary Recommendation on Priority

Based on the Common Prioritization of Rulemaking methodology (ADAMS Accession No. ML18263A070), the preliminary priority for this rulemaking activity is medium. The proposed rule scores 22 out of 45 points (medium priority) because (1) it would be a moderate contributor toward the NRC Strategic Plan safety goal and would implement several of the plan's safety strategies, (2) it would be a moderate contributor toward implementation of the Principles of Good Regulation, (3) it would be a moderate contributor toward governmental priorities by addressing a regulatory inconsistency in notifying Tribes of Category 1 radioactive material shipments, and (4) it would be a moderate contributor toward public priorities, because it would resolve a petition for rulemaking and would be of interest to Tribes and members of the public. This estimate is consistent with the priority assigned to rulemakings that do not raise an immediate safety, environmental, or security concern. The priority for a rulemaking activity can change over time. Common reasons for a change in priority are new Commission or senior management direction or changes in the rulemaking scope.

Description of Rulemaking: Estimate of Resources

The proposed action is estimated to require a low level of costs to the NRC and licensees. Licensees would be required to provide Tribes with advance notification of shipments of Category 1 quantities of radioactive material under 10 CFR 37.77. Based on recent experience, approximately nine Category 1 shipments cross Tribal reservations each year. The staff estimates a licensee would generate one notification for each shipment. The reporting cost to generate and distribute advance Tribal notifications for nine shipments is estimated to be less than \$25,000 per year because the processes for generating and distributing these notifications are used regularly for currently required notifications to States and Tribes for other types of shipments. The primary cost for this action would be the NRC's one-time rulemaking costs outlined in Enclosure 3. The proposed action is estimated to provide the following benefits:

- Provide parity between Tribes and States.
- Ensure consistency across regulations.

Cumulative Effects of Regulation

The staff's preliminary assessment of the cumulative effects of regulation concludes that no known activities or affected entities would be impacted significantly by implementing the proposed changes. To ensure adequate identification of potential effects not currently foreseen, the staff plans to solicit Agreement State input on this issue during the proposed and final rule phases of this rulemaking.

Agreement State Considerations

The Agreement State Program Policy Statement approved by the Commission on October 2, 2017, and published as corrected in the *Federal Register* on October 18, 2017 (82 FR 48535), identifies those NRC program elements required for adequacy and that have a particular health and safety (H&S) component as those that are designated as compatibility categories A, B, C, D, NRC, and H&S. Those program elements required for compatibility with the NRC's regulatory program (i.e., regulations and other legally binding requirements) are designated as compatibility categories A, B, and C. The Agreement States adopted portions of the Advance Tribal Notification Rule that required Agreement State licensees to provide advanced notification to participating Tribes for shipments of irradiated reactor fuel and specific types of nuclear waste. The regulations defining "Indian Tribe," "Tribal Official" and 10 CFR § 71.97, "Advance Notification of the Shipment of Irradiated Reactor Fuel and Nuclear Waste" were designated a compatibility category "B" in the rulemaking. (See 77 FR 34194, 34203, June 11, 2012). In comparison, the advance notification provisions in 10 CFR Part 73 are compatibility category "NRC" and only apply to NRC licensees. The Agreement States cannot adopt these regulatory requirements. The NRC anticipates that the associated requirements in this proposed rulemaking (i.e., 10 CFR 37.77(a)) will remain as compatibility category B, requiring the Agreement States to adopt essentially identical provisions.

Agreement States would need to adopt compatible regulations for the revised subparts that would be affected by this proposed rulemaking. The staff has coordinated with the Agreement States in developing this rulemaking plan. An Agreement State representative participated in the petition review and rulemaking plan development working group. The staff provided the Agreement States 30 days to review and comment on a draft of this rulemaking plan, and the staff has considered their comments in finalizing the document. If the Commission approves the rulemaking, the staff will continue to work with the Agreement States throughout the stages of rule development, in accordance with SA-801A, "Agreement State Participation in Rulemaking Working Groups," dated January 16, 2019 (ADAMS Accession No. ML18263A239).

Advance notification for Category 1 material shipments to the participating Tribes would be provided by licensees, similar to the advance notification already being provided to States for these shipments. Although they would need to adopt compatible regulations, Agreement States would not be providing advance notification to the participating Tribes. The NRC would be applying the principles of the Tribal Policy Statement to the NRC's regulatory activities, which include having consistency between the advance notification provisions between States and Tribes for 10 CFR Part 37 Category 1 materials.

Guidance

The staff does not recommend development of a new guidance document. The rulemaking changes would be available on the public website and included in a later revision of NUREG-2155.

Advisory Committee on Reactor Safeguards Review

The staff recommends that a review by the Advisory Committee on Reactor Safeguards would not be necessary as this rulemaking to require advance Tribal notification would be considered outside the scope of the committee's charter.

Committee to Review Generic Requirements Review

The staff recommends that a review by the Committee to Review Generic Requirements would not be necessary because the backfit regulations do not apply, as described in the "Description of Rulemaking: Preliminary Backfitting and Issue Finality Analysis" section of this rulemaking plan.

Advisory Committee on the Medical Use of Isotopes Review

The staff recommends that a review by the Advisory Committee on the Medical Use of Isotopes would not be necessary as this rulemaking to require advance Tribal notification would be considered outside the scope of the committee's charter.

Analysis of Legal Matters

The Office of the General Counsel has reviewed this rulemaking plan and has not identified any issues necessitating a separate legal analysis at this time.

COMMITMENT:

If the Commission approves initiation of the rulemaking, in accordance with SECY-16-0042, "Recommended Improvements for Rulemaking Tracking and Reporting," dated April 4, 2016 (ADAMS Accession No. ML16075A070), the staff will add the rulemaking activity to the agency's rulemaking tracking tool and will add resources for this activity during the next appropriate budget cycle.

RECOMMENDATION:

The staff recommends that the Commission approve the initiation of rulemaking to amend 10 CFR Part 37 to require advance Tribal notification of shipments of Category 1 quantities of radioactive material. The staff also recommends that the Commission approve the delegation of signature authority to the EDO.

RESOURCES:

Enclosure 3 includes an estimate of the resources needed to complete this rulemaking.

The Commissioners

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COORDINATION:

The Office of the General Counsel has no legal objection to this action. The Office of the Chief Financial Officer has reviewed this paper and has no concerns with the estimated resources in Enclosure 3.

Daniel H.
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Daniel H. Dorman
Executive Director
for Operations

Enclosures:

1. *Federal Register* notice
2. Letter to the Petitioner
3. Estimated Rulemaking Resources
(non-public)

SUBJECT: PETITION FOR RULEMAKING AND RULEMAKING PLAN ON ADVANCE
 TRIBAL NOTIFICATION OF CERTAIN RADIOACTIVE MATERIAL SHIPMENTS
 (PRM-37-2; NRC-2021-0051) DATED: August 10, 2022

**ADAMS Accession Numbers: Pkg: ML22056A316, SECY: ML22056A326, Enclosure 1:
 ML22056A366, Enclosure 2: ML22056A436, and Enclosure 3: ML22056A327**

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