

POLICY ISSUE
NOTATION VOTE

RESPONSE SHEET

TO: Brooke P. Clark, Secretary
FROM: COMMISSIONER CAPUTO
SUBJECT: SECY-22-0074: Petition for Rulemaking and Rulemaking Plan on Advance Tribal Notification of Certain Radioactive Material Shipments (PRM-37-2; NRC-2021-0051)

Approved Disapproved Abstain Not Participating

COMMENTS: Below Attached None

Entered in STAR

Yes

No

Signature

Date

I approve staff's recommendation on SECY-22-0074 and start the NRC's rulemaking process to amend 10 CFR Part 37 to include advance Tribal notification of shipment of Category 1 quantities of radioactive material. The petition requests that NRC to examine discrepancies and modify the language consistent with Parts 71 and 73 to provide advance notification to tribes of Category 1 radioactive materials shipment. In anticipation of potential future request, the staff should also consider whether to extend advance notification to shipments of Category 2 quantities of radioactive material during the rulemaking process.

Since this will be a limited scope rulemaking providing consistency with existing regulations and the changes to the regulations would not raise significant policy issues, I approve delegating issuance of the proposed and final rules to the EDO. Additionally, I approve the publication of the *Federal Register* notice, subject to the attached edits.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 37

[Docket No. PRM-37-2; NRC-2021-0051]

Advance Tribal Notification of Certain Radioactive Material Shipments

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; consideration in the rulemaking process.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will consider in its rulemaking process the issue raised in a petition for rulemaking (PRM), PRM-37-2, submitted by Richard Arnold and Ron Johnson, on behalf of the Tribal Radioactive Materials Transportation Committee, dated December 4, 2020. The petitioner requests that the NRC amend its regulations to ensure consistency regarding advance Tribal notification of certain radioactive material shipments with similar NRC regulations for State notification.

DATES: The docket for the petition for rulemaking, PRM-37-2, is closed on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Please refer to Docket ID NRC-2021-0051 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- **Federal Rulemaking Website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2021-0051. Address questions about NRC dockets to Dawn Forder; telephone: 301-415-3407; email: Dawn.Forder@nrc.gov. For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, at 301-415-4737, or by email to PDR.Resource@nrc.gov. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the "Availability of Documents" section.

- **NRC's PDR:** You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8:00 a.m. and 4:00 p.m. Eastern Time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Vanessa Cox, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001; telephone: 301-415-8342, email: Vanessa.Cox@nrc.gov.

SUPPLEMENTARY INFORMATION:

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I. The Petition

The NRC received and docketed a petition for rulemaking (ADAMS Accession No. ML21042B011) dated December 4, 2020, filed by Richard Arnold and Ron Johnson, on behalf of the Tribal Radioactive Materials Transportation Committee (TRMTC). On April 9, 2021, the NRC published a notice of docketing and request for comment in the *Federal Register* (86 FR 18477). The petitioner requests that the NRC amend its regulations in part 37 of title 10 of the *Code of Federal Regulations* (10 CFR), “Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material,” to ensure consistency regarding advance Tribal notification of certain radioactive material shipments with similar NRC regulations for State notification.

The NRC identified one issue in the petition, as follows:¹

Issue: In 10 CFR part 37, advance notification of certain radioactive material shipments only applies to States and does not include Tribal governments as required in 10 CFR part 71 and 10 CFR part 73 advance notification provisions. TRMTC is concerned with “the divergence that exists in 10 CFR part 37 in contrast to the content that is provided in 10 CFR parts 71 and 73.” The petitioner also believes that consistent

¹ The petitioner also stated that NRC’s amendment to Part 37 may encourage the U.S. Department of Energy (DOE) to revise DOE Order 460.2A, Department Materials Transportation and Packaging Management, to have tribes eligible to receive the same advanced notifications for applicable DOE shipments. Potential changes to DOE orders are outside the NRC’s legal authority.

notification standards must be applied to States and Tribal governments as well as constituencies under their respective jurisdictions.

II. Public Comments on the Petition

~~On April 9, 2021, the NRC requested comments from the public on the The notice of receipt and docketing for the PRM invited interested persons to submit comments.~~ The comment period closed on June 23, 2021. The NRC received 10 comment submissions comprising of 63 comments from interested stakeholders, including the Nuclear Energy Institute, Midwestern Radioactive Materials Transportation Committee, Western Interstate Energy Board, High-Level Radioactive Waste Committee, Tribal Radioactive Materials Transportation Committee, Oneida Nation, The Navajo Nation, Pueblo of Sandia, and two private citizens.

The NRC binned the comments related to the petition into two categories. The following discussion provides a summary of each comment and the NRC's response to the comment. Within each bin, the NRC further grouped the comments by topic. The following discussion also provides a summary of each group of comments and the NRC's response to that group of comments.

A. Comments Supporting the Petition

Comment: The NRC received several comments that supported the assertion made by the petitioner that consistent notification standards must be applied to States and Tribal governments. The commenters urged the NRC to examine these discrepancies and to take appropriate action to modify the language in 10 CFR part 37

to be consistent with 10 CFR part 71 and 10 CFR part 73 advance Tribal notification provisions.

NRC Response: The NRC agrees with this comment. As stated above, the NRC is planning to conduct rulemaking to revise 10 CFR part 37 to be consistent with advance Tribal notification standards provided in 10 CFR part 71 and 10 CFR part 73. This action is also supported by NRC's Tribal Policy Statement, which 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.

Comment: Several commenters described the importance of consistency between regulations applicable to States and Tribes and stated that this concept reinforces NRC's Principles of Good Regulation.

Response: The NRC agrees with this comment. As stated above, the NRC is planning to conduct rulemaking to revise 10 CFR part 37 to be consistent with advance Tribal notification standards provided in 10 CFR part 71 and 10 CFR part 73.

Comment: Two commenters stated they believed the proposed rulemaking would benefit all stakeholders. Another commenter stated that the proposed amendment would benefit licensees by creating predictability in planning for conducting radioactive material transportation.

Response: The NRC agrees with these comments. Consistency and predictability of regulations is a goal stated in the NRC's Principles of Good Regulations, which is beneficial to the regulated community and the public.

Comment: One commenter supported the petition, stating that they believed the current petition is based on an apparent oversight of ensuring complete and rigorous efforts in the notification process.

Response: The NRC disagrees with the comment. The NRC specifically said that it may consider providing advance Tribal notification for 10 CFR part 37 radioactive material in the future when responding to a public comment concerning the “Physical Protection of Byproduct Material” rule. See 78 FR 16922, 16991 (March 19, 2013).

Comment: One commenter stated that a shipment of radioactive material that was subject to the 10 CFR part 37 notification requirements to the States went through Tribal land in 2020 without notification to Federally recognized Tribes. The lack of notice caused significant concerns for the Tribe and its residents

Response: The NRC understands this concern. The proposed rulemaking would address notification of participating Tribes.

Comment: One commenter discussed implementation of the rule, such as requiring Tribes to submit a letter to the NRC to “opt in” to receive advance notification or requiring Tribes to comply with safeguards information training requirements that are currently in place for participation in the 10 CFR part 71 and 10 CFR part 73 advance Tribal notification program.

Response: The NRC will consider these comments during the rulemaking process.

Comment: Several commenters stated that Tribes govern themselves and the NRC needs to recognize them as sovereign governments.

Response: The NRC agrees with this comment. The NRC recognizes the right of each Indian Tribe to self-governance and supports Tribal sovereignty and self-determination. In the Tribal Policy Statement, 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. The NRC also acknowledges that

Tribal governments have the inherent right and responsibility to uphold their fiduciary authority to protect their people and land.

Comment: Two commenters stated that Tribal governments need to be recognized and acknowledged with the same treatment and respect as States, and that they have the right to be notified if radioactive materials are being shipped through their lands.

Response: The NRC agrees with this comment. The NRC recognizes the need for States and Tribes to have consistent treatment for advance notification for Category 1 radioactive material shipments and plans to conduct rulemaking to address this issue,

Comment: The NRC received several comments underlining the importance of advance Tribal notification of radioactive shipments in order to allow the Tribes adequate time to prepare to respond in the event of an incident or accident. Several commenters also stated the importance of the Tribes' emergency support function, participation in emergency training, and commitment to protecting their Tribal lands as reasons for receiving advance notification of shipments across Tribal lands.

NRC Response: The NRC agrees with these comments and plans to conduct rulemaking to amend its regulations to improve consistency for advance Tribal notifications for Category 1 radioactive material. In accordance with Tribal Policy Statement, Principle 2, the NRC recognizes Tribal sovereignty and the Tribal governments' interest in being informed of activities occurring on Tribal lands and Tribal governments' inherent right and responsibility to uphold their fiduciary authority to protect their people and land.

Comment: Several commenters identified the importance for States and Tribes to coordinate and communicate for successful planning of shipments. Other commenters indicated effective communication is paramount in the instance of hazardous, radioactive material transport. Another comment stated that the public's

perception of these shipments is not materially altered by the different regulatory categories, and thus the Tribes' public information responsibilities would be much the same as for irradiated reactor fuel and special nuclear material, regardless of the different types of materials being moved.

Response: The NRC agrees with the comments. The NRC's view is that the importance of communication between the States, Tribes and the public supports the NRC's plan to conduct this rulemaking.

B. Comments Outside the Scope of the Petition

Three comments within the comment submissions were beyond the scope of the petitioner's request. They are summarized below.

Comment: One comment submission discussed the function of fuel rods and how they can be returned to their original state before loading in the nuclear reactor.

Response: This comment is outside the scope of the petitioner's request for the NRC to revise 10 CFR part 37 to require advance Tribal notification for shipments ~~for~~of Category 1 radioactive materials.

Comment: One commenter discussed the lack of consultation regarding the determination of transport routes and availability of resources, training, and infrastructure for Tribal emergency preparedness, response, and risk management in potential incidences of accidental radiological release during shipment.

Response: This comment is outside the scope of the petitioner's request that the NRC revise 10 CFR part 37 to require advance Tribal notification for shipments ~~for~~of Category 1 radioactive materials. Specifically, the commenters' topics regarding consultation for transportation routes, the availability of resources, training and

infrastructure for Tribal emergency preparedness, response, and risk management are outside the scope of the petitioner's request.

Comment: One commenter discussed the importance of advanced notification to States and Tribes for shipments of Category 1 and Category 2 quantities of radioactive material.

Response: This comment is outside the scope of the petitioner's request that the NRC revise 10 CFR part 37 to require advance Tribal notification for shipments ~~for~~of Category 1 radioactive materials. The requirements in 10 CFR part 37 are only for advance notification of Category 1 radioactive materials and do not mention advance notification requirements for Category 2 quantities of radioactive materials. Advance Tribal notification for shipments of Category 2 quantities of radioactive material is outside the scope of the petitioner's request.

III. Reasons for Consideration

The NRC will consider the issue raised in the PRM in its rulemaking process because the NRC recognizes Tribal sovereignty and Tribal governments' interest in being informed of Category 1 radioactive material shipments that would pass through Federally recognized Tribal reservations. Revising 10 CFR part 37 would provide consistency with 10 CFR part 71 and 10 CFR part 73 regarding advance Tribal notification of certain radioactive material shipments, implement the principles in the Tribal Policy Statement, and further the NRC's commitment to its Principles of Good Regulation.

IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS Accession No./Federal Register Citation
PRM-37-2 - R. Arnold & R. Johnson on Behalf of the Tribal Radioactive Materials Transportation on Advance Tribal Notification of Certain Radioactive Material Shipments, December 4, 2020	ML21042B011
PRM-37-2, Notice of Docketing and Request for Comment, April 9, 2021	86 FR 18477
Comment Submission (001) from Brendan VanAntwerp, April 10, 2021	ML21109A268
Comment Submission (002) from the Nuclear Energy Institute, June 15, 2021	ML21168A095
Comment Submission (003) from Valery Andrus, June 16, 2021	ML21168A096
Comment Submission (004) from the Midwestern Radioactive Materials Transportation Committee, June 17, 2021	ML21175A162
Comment Submission (005) from the Western Interstate Energy Board High-Level Radioactive Waste Committee, June 22, 2021	ML21175A160
Comment Submission (006) from the Tribal Radioactive Materials Transportation Committee, June 22, 2021	ML21175A158
Comment Submission (007) from the Oneida Nation, June 23, 2021	ML21175A157
Comment Submission (008) from the Navajo Nation Environmental Protection Agency, June 23, 2021	ML21175A156
Comment Submission (009) from Governor Stuart Paisano on Behalf of Pueblo of Sandia, New Mexico, June 7, 2021	ML21175A357
Comment Submission (010) from the Tribal Radioactive Materials Transportation Committee, June 23, 2021	ML21182A122
Tribal Policy Statement, January 9, 2017	82 FR 2402
Principles of Good Regulation	https://www.nrc.gov/about-nrc/values.html#principles

V. Conclusion

For the reasons cited in this document, the NRC will consider the issue raised in the petition in its rulemaking process. The public can monitor further NRC action on the rulemaking titled, "Advance Tribal Notification of Certain Radioactive Material Shipments," that will address the issue in this petition by searching for Docket ID NRC-2021-0051 on the Federal rulemaking website, <https://www.regulations.gov>. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: 1) navigate to the docket folder (NRC-2021-0051); 2) click the "Subscribe" link; and 3) enter an email address and click on the "Subscribe" link. Publication of this document in the *Federal Register* closes Docket ID NRC-2021-0051 for PRM-37-2.

Dated: Month XX, 2022.

For the Nuclear Regulatory Commission.

Brooke P. Clark,
Secretary of the Commission.