

November 2, 1999

FOR: The Commissioners

FROM: William D. Travers /s/  
Executive Director for Operations

SUBJECT: ADVANCE NOTICE OF PROPOSED RULEMAKING: 10 CFR PARTS 71 AND 73 - "ADVANCE NOTIFICATION TO NATIVE AMERICAN TRIBES OF TRANSPORTATION OF CERTAIN TYPES OF NUCLEAR WASTE"

## PURPOSE:

This paper requests Commission approval to publish an advance notice of proposed rulemaking (ANPR) indicating that the U.S. Nuclear Regulatory Commission (NRC) is considering the development of a proposed rule. The contemplated rule would require licensees to notify Federally recognized Native American Tribes of certain radioactive waste shipments, including spent nuclear fuel, before the shipments are transported to or across the boundary of Tribal lands.

## BACKGROUND:

Current NRC regulations require licensees to inform State governors of certain radioactive waste shipments passing through or across the boundary of the State (see [10 CFR 71.97](#) and [73.37](#)). NRC developed these regulations in 1982, pursuant to Pub. L. No. 96-295. This legislation was enacted in response to States' concerns about their abilities to fulfill their responsibilities to protect the public health and safety while these waste shipments passed through the States. Neither the statute nor the notification regulations required licensees to notify Native American Tribes of this type of shipment passing through Tribal land. However, Tribal officials have requested similar notification.

In 1994, the U.S. Department of Energy (DOE [EXIT](#)) notified NRC of its intent to implement a DOE policy of Tribal notification of waste shipments for its shipments of spent nuclear fuel and high-level waste. DOE stated that the implementation of this policy would allow it to better integrate transportation planning activities within DOE. NRC did not comment formally on DOE's decision.

NRC's current notification requirements may create some potential confusion to stakeholders who compare DOE's implementation of its notification policy for DOE shipments with the NRC requirements for NRC-regulated shipments. For instance, schedule information for spent fuel shipments is currently designated as Safeguards Information under [10 CFR 73.37\(f\)\(2\)\(iv\)](#). Except as authorized, Safeguards Information may only be provided to persons listed in [10 CFR 73.21\(c\)\(1\)](#). Title 10 of the Code of Federal Regulations, [10 CFR 73.21\(c\)\(1\)](#), does not list Tribal officials nor has the Commission authorized that Safeguards Information be provided to them.

On April 29, 1994, President Clinton issued a Memorandum entitled, "Government-to-Government Relations with Native American Tribal Governments." [[59 FR 22951](#); May 4, 1994] This memorandum stated, in part:

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. The President's memorandum does not impose any new obligations on NRC, as an independent regulatory agency, or on other Executive departments and agencies. However, among other things, this memorandum encourages Federal agencies to consult with Tribal governments before engaging in activities that may affect Tribes, and to remove any procedural impediments to agencies being able to work directly with Tribal governments.

To accomplish this, the memorandum encourages each Executive department and agency to "apply the requirements of Executive Order Nos. 12875 ('Enhancing the Intergovernmental Partnership') and 12866 ('Regulatory Planning and Review') to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities."

NRC has no formal Native American Tribal policy. However, the Commission has recognized the priority expressed in the President's memorandum. In a Staff Requirements Memorandum responding to SECY 96-187 "Policy Issues Raised in Meeting With Prairie Island Dakota Indian Representatives," dated November 13, 1996, the Commission directed the staff to "...continue to implement the spirit and letter of the President's 1994 guidance to ensure that the rights of sovereign Tribal governments are fully respected and to operate within a government-to-government relationship with Federally recognized Native American Tribes."

## DISCUSSION:

The staff believes that it is desirable to begin consideration of a Tribal notification rulemaking. A notification requirement would be consistent with the President's 1994 guidance by requiring licensees to inform Native American Tribes of certain radioactive waste shipments passing to or across the boundary of Tribal lands. The proposed rule would add an explicit Tribal notification requirement to [10 CFR 71.97](#), which currently requires advance notification to States of shipments of certain types of radioactive waste. The proposed rule would also add an explicit Tribal notification requirement to [10 CFR 73.37](#), which currently requires advance notification to States of shipments of certain quantities of irradiated reactor fuel. In addition, the proposed rule would address the need of Tribal access to Safeguards Information under [10 CFR 73.21\(c\)\(1\)](#).

Before preparing the proposed rule, the staff wishes to publish this ANPR to solicit advice and recommendations on this matter from all interested persons, including recommendations on the feasibility of proceeding with the rulemaking. The ANPR particularly solicits information on the following aspects of Tribal notification:

- Preparation of a list of Tribal contacts;
- Updating Tribal contact information, particularly with regard to smaller Tribes;
- Notification of Tribes, particularly smaller Tribes, in case of a schedule change that would require updated notification;
- Minimizing licensees' administrative burden; and
- Identifying the location of Tribes along shipment routes.

The ANPR poses questions on the risks and benefits associated with broadening the NRC's current regulations on the "need-to-know" advance information of spent fuel shipments (see 10 CFR 73.21). Staff believes wider dissemination of shipment information may increase the risk to safeguarding spent fuel shipments (i.e., protecting public health and safety). The ANPR specifically requests comments on this potential increase in risk in the context of Tribal notification.

Additionally, the ANPR does not request interested persons to address the issue of emergency preparedness. Because there may be questions relating to a Tribes' ability to prepare for an emergency when receiving notification, it is possible that comments may be received on this issue. However, the purposes of a Tribal notification rule would be to inform Tribes of shipments passing through their lands as a recognition of their sovereignty, and as recognition of the Tribal governments' interest in being informed of activities occurring on Tribal land, regardless of the emergency response capability of the individual Tribe. The rule will certainly aid those Tribes that have an emergency response capability in discharging that function.

#### RESOURCES AND OTHER RULEMAKING ISSUES:

The resources needed to complete the ANPR are in the current budget. The staff plans to inform the Commission of the total resources that will be required to develop and update the list of affected Tribes and Tribal contacts coincident with providing the rulemaking plan, as well as the total resources necessary to engage in a rulemaking on this issue. A formal rulemaking plan has not been prepared at this time because the purpose of this ANPR is to gather information to determine whether a proposed rule should be developed. A full rulemaking plan for the Commission's approval would be prepared should the staff determine rulemaking should be considered.

#### COORDINATION:

The Office of the General Counsel (OGC) has written the initial draft of the ANPR to help the staff expedite this action for Commission review. OGC has reviewed this Commission paper and has no legal objection. The Office of the Chief Information Officer has reviewed the ANPR for information technology and information management implications and concurs in it. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection.

#### RECOMMENDATION:

That the Commission:

1. Approve the publication of the ANPR ([Attachment 1](#)).
2. Note that the appropriate Congressional committees will be informed ([Attachment 2](#)).
3. Note that the Office of State Programs will notify the Bureau of Indian Affairs, U.S. Department of the Interior, of this ANPR.
4. Approve early release of this document to support a Commission meeting on November 9, 1999, which is of interest to affected stakeholders.

William D. Travers  
Executive Director for Operations

CONTACTS: Tony DiPalo, NMSS/IMNS  
(301) 415-6191  
Stephanie R. Martz, OGC  
(301) 415-1520

Attachments: 1. [Draft Federal Register notice](#)  
2. [Congressional Letters](#)

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 71 and 73**

**RIN 3150-AG41**

**Advance Notification to Native American Tribes of Transportation of  
Certain Types of Nuclear Waste**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is considering an amendment to its regulations that would require NRC licensees to notify Native American Tribes of shipments of certain types of high-level radioactive waste, including spent nuclear fuel, prior to transport to or across the boundary of Tribal lands. Current NRC regulations require advance notification of these shipments to States. In recognition of Tribal sovereignty and the need for Tribes to be informed about activities that occur on Tribal lands, the NRC seeks to extend these regulations to include advance notification of these shipments to Federally recognized Native American Tribes. This advance notice of proposed rulemaking is issued to invite early input from affected parties and the public on the issue of advance notification.

**DATES:** The comment period expires (insert 90 days after publication). Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

**ADDRESSES:** Mail comments to: The Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

You may also provide comments via the NRC's interactive rulemaking website (<http://ruleforum.llnl.gov>). This site provides the availability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher (301) 415-5905; e-mail [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov).

Certain documents related to this rulemaking, including comments received, may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. These same documents also may be viewed and downloaded electronically via the rulemaking website.

**FOR FURTHER INFORMATION CONTACT:** Tony DiPalo, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6191, e-mail [Anthony.DiPalo@nrc.gov](mailto:Anthony.DiPalo@nrc.gov) or Stephanie R. Martz, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-1520, e-mail [Stephanie.Martz@nrc.gov](mailto:Stephanie.Martz@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

Background

Current NRC regulations require that licensees inform State governors of certain radioactive waste shipments passing through or across the boundary of the State.

In particular, 10 CFR 71.97 requires advance notification to States of shipments of certain types of radioactive waste and small quantities of irradiated reactor fuel. The types of shipments covered by the Part 71 notification requirements are specified in 10 CFR 71.97(b).

In 10 CFR 73.37, advance notification to States of shipments of certain quantities of irradiated reactor fuel is required. The notification requirements in Part 73 apply to most shipments of irradiated reactor fuel. The types of shipments covered by the Part 73 notification requirements are detailed in 10 CFR 73.37(a). NRC regulations (10 CFR 73.37(g)) require State officials and other individuals to protect schedule information related to these fuel shipments from unauthorized disclosure as specified in 10 CFR 73.21. The NRC was directed to promulgate these regulations by the NRC Authorization Act for Fiscal Year 1980 (Sec. 301(a), Pub. L. 96-295).

In accordance with the notification procedures in Part 71, a licensee must notify the governor of a State, or the governor's designee, in writing, prior to a shipment of radioactive waste or nuclear fuel. If the notification is delivered by mail, it must be postmarked at least 7 days before the beginning of the 7-day period during which it is estimated that the shipment will depart from its point of origin. If the notification is hand-delivered, it must be delivered at least 4 days before the beginning of the 7-day period during which it is estimated that the shipment will depart from its point of origin.

In accordance with 10 CFR 71.97, a list of the names and mailing addresses of the governor's designees receiving advance notification is published in the Federal Register and is updated on a yearly basis (see, e.g., 64 FR 35197 (June 30, 1999)).

The notification for shipments under Part 71 must contain the following information:

- (1) The name, address, and telephone number of the shipper, carrier, and receiver of the irradiated reactor fuel or nuclear waste shipment;
- (2) A description of the irradiated reactor fuel or nuclear waste contained in the shipment;
- (3) The point of origin of the shipment and the 7-day period during which the shipment is estimated to depart;
- (4) The 7-day period during which the shipment is estimated to arrive at the State boundary;
- (5) The shipment's destination and the 7-day period during which the shipment is estimated to arrive at its destination; and
- (6) A point of contact, with a telephone number, for current shipment information.

If the schedule of the shipment changes by more than 6 hours from the information furnished, the licensee must notify the governor or the governor's designee ("the responsible party") of the schedule change by telephone (or other means), and must inform the responsible party of the number of hours that the schedule has changed (i.e., advanced or delayed) relative to the previously furnished information.

The notification for shipments under 10 CFR 73.37(f)(2) must contain the following information:

- (1) The name, address, and telephone number of the shipper, carrier, and receiver;
- (2) A description of the shipment;
- (3) A listing of the routes to be used within the State; and
- (4) A statement that certain information, which is provided as a separate enclosure to the written notification, is required by NRC regulations in 10 CFR 73.21 to be protected as Safeguards Information.

The information to be provided as a separate enclosure to the notification under Part 73 is as follows:

- (1) The estimated date and time of departure from the point of origin of the shipment;
- (2) The estimated date and time of entry into the State;
- (3) For a single shipment whose schedule is not related to the schedule of any subsequent shipment, a statement that schedule information must be protected in accordance with the provisions of 10 CFR 73.21, as Safeguards Information, until at least 10 days after the shipment has entered or originated within the State; and
- (4) For a shipment in a series of shipments whose schedules are related, a statement that schedule information must be protected in accordance with the provisions of 10 CFR 73.21, as Safeguards Information, until at least 10 days after the last shipment in the series has entered or originated within the State, and an estimate of the date on which the last shipment in the series will enter or originate within the State.

To help minimize the possibility for radiological sabotage, schedules and itineraries for shipments of irradiated reactor fuel under Part 73 are required to be protected as Safeguards Information. State officials, State employees, and other responsible parties who receive schedule information are required to protect that information from unauthorized disclosure under 10 CFR 73.21 and 73.37(g). Title 10 of the Code of Federal Regulations, 10 CFR 73.21(a), stipulates that information protection procedures employed by State and local police forces are deemed to meet the information protection measures specified in 10 CFR 73.21(b) through (i). Title 10 of the Code of Federal Regulations, 10 CFR 73.21(c), specifically limits information disclosure except to persons with an established "need to know." For State and local governments, these persons are either the governor, the governor's designated representative, or a member of a State or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies. Title 10 of the Code of Federal Regulations, 10 CFR 73.21(d), prescribes protection required while the information is being used or stored, and 10 CFR 73.21(g) specifies the protection required when the information is transmitted outside an authorized place of use or storage. With respect to the provision of 10 CFR 73.37(f)(4) that the governor's representative be notified in the event of a change in the schedule, NRC policy is that the licensee need notify only a single designated individual within each State (47 FR 600; January 6, 1982).

Further information regarding NRC's transportation requirements can be found in NUREG-0725, "Public Information Circular for Shipments of Irradiated Reactor Fuel," Revision 13, October 1998. Single copies are available for purchase from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

### Specific Proposal

The Commission is considering amending Parts 71 and 73 to require that licensees provide timely advance notification to Native American Tribes prior to transport of certain types of nuclear waste, including spent fuel, to or across the boundary of Tribal lands. This amendment would require licensees to provide to the Native American Tribes notification similar to that now required to be provided to the States.

In 1994, the U.S. Department of Energy (DOE) notified the NRC of its intent to implement its Tribal notification policy for DOE's shipments of spent nuclear fuel and high-level radioactive waste. DOE presently accomplishes these shipments under DOE regulations. An amendment to NRC regulations would clarify how DOE, when making shipments under NRC regulations, and NRC licensees would provide notification to Native American Tribes of spent

nuclear fuel and high-level radioactive waste shipments that pass to or across the boundary of Tribal lands. Such an amendment would advance NRC's efforts to recognize the sovereignty of Federally recognized Native American Tribes in accordance with President Clinton's 1994 memorandum entitled, "Government-to-Government Relations with Native American Tribal Governments." [59 FR 22951; May 4, 1994] This memorandum states, in part,

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. The President's memorandum does not impose any new obligations on NRC, as an independent regulatory agency, or on other Executive departments and agencies. However, this memorandum encourages Federal agencies, among other things, to consult with Tribal governments, before engaging in activities that may affect Tribes, and to remove any procedural impediments to agencies being able to work directly with Tribal governments.

To accomplish this, the memorandum encourages each Executive department and agency to "apply the requirements of Executive Order Nos. 12875 ('Enhancing the Intergovernmental Partnership') and 12866 ('Regulatory Planning and Review') to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities."

The primary purpose of the rule contemplated by the Commission would be to inform Native American Tribes of shipments passing to or across the boundary of Tribal lands as a recognition of Tribal sovereignty as well as the need for Tribes to be aware of activities that occur on Tribal lands. While emergency preparedness would not be the main reason for developing such a rule, Tribes that do have emergency preparedness capabilities would benefit from notification.

### Specific Considerations

Before the NRC prepares a proposed rule on the subject, the NRC is seeking advice and recommendations on this matter from all interested persons. Comments accompanied by supporting reasons are particularly requested on the following questions arranged by topic:

#### A. DEVELOPING A LIST OF NATIVE AMERICAN TRIBE CONTACTS.

A.1. In preparing the list of Tribal contacts, the NRC would most likely look to the list of Federally recognized Native American Tribes maintained by the Bureau of Indian Affairs (BIA), U.S. Department of the Interior. Is this an appropriate approach? Are there any other sources that the NRC should consider? (See the BIA website at <http://www.doi.gov/bureau-indian-affairs.html> **EXIT**).

A.2. How can the NRC ensure that contact information is kept current, particularly for smaller Tribes? In maintaining State contacts, the NRC provides each State with the opportunity to update its information annually. Should NRC follow the same approach for Tribal contacts?

A.3. How can licensees effectively and efficiently provide notification to Native American Tribes, particularly smaller Tribes, of a schedule change that would require updated notification by telephone at any time of day?

#### B. MINIMIZING THE LICENSEES' ADMINISTRATIVE BURDEN.

B.1. In what ways can licensees comply with this advance notification requirement, while keeping their administrative burden at a minimum?

B.2. If a shipper is unable to make contact with a Tribe prior to or during a shipment, should the shipment proceed?

#### C. IDENTIFYING THE LOCATION OF TRIBES ALONG SHIPMENT ROUTES.

C.1. How can licensees effectively and comprehensively identify the location of Native American Tribes along a particular vehicle, rail, or vessel shipment route?

C.2. Should DOE and NRC licensees develop and maintain a central data base regarding the location of Tribal lands? Should NRC look to Geographic Information System (GIS) resources to provide licensees with information regarding the location of Tribal lands?

C.3. What types of Tribal lands should the rule apply to (e.g., Trust Lands, Fee Lands (i.e., lands owned by Native Americans but not held in trust by the Federal government), etc.)?

#### D. SAFEGUARDS INFORMATION.

D.1. Should advance notification of spent fuel shipments be provided to any federally recognized Native American Tribe when spent fuel shipments are transported to or across tribal boundaries?

D.2. The NRC's "need-to-know" requirement for advance notification of spent fuel shipment information is found in 10 CFR 73.21. Should this requirement be broadened to include other entities, such as Federally recognized Native American Tribes?

D.3. Does wider dissemination of shipment information increase the risk to safeguarding spent fuel shipments (i.e., protecting public health and safety)? How should the NRC address any increase in risk compared with the benefits to be gained from Tribal notification?

D.4. How should the rule address the point of contact for Safeguards Information in the context of Tribal notification?

D.5. A recipient of Safeguards Information must expend resources to ensure the information is handled properly. Are there Tribes who may not wish to be recipients of Safeguards Information?

D.6. If a Tribal government receives Safeguards Information, should the NRC review the Tribe's actions to control and protect Safeguards Information?

D.7. 10 CFR 73.21(a) states that "information protection procedures employed by State and local police forces are deemed to meet the information

protection requirements of 73.21(b) through (i)." Should the NRC determine the ability of Tribal governments to protect Safeguards Information and, if so, how?

D.8. Should the contemplated rule include an exemption to the notification requirement if there is reason to believe that a Tribe will not be able to protect the Safeguards Information from disclosure? What basis would the NRC need for granting such an exemption?

D.9. Should 10 CFR 73.37(f) be changed to a permissive form? That is, should the licensee be permitted rather than required to release Safeguards Information to responsible Tribal government officials?

The preliminary views expressed in this notice may change in light of comments received. If the proposed rule is developed by the Commission, there will be another opportunity for additional public comment in connection with that proposed rule.

#### List of Subjects

##### 10 CFR PART 71

Criminal penalties, Hazardous materials transportation, Nuclear materials, Packaging and containers, Reporting and recordkeeping requirements.

##### 10 CFR PART 73

Criminal penalties, Hazardous materials transportation, Exports, Imports, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, and Security measures.

The authority citation for this document is: 42 U.S.C. 2201; 42 U.S.C. 5841.

Dated at Rockville, Maryland, this \_\_\_\_ day of \_\_\_\_, 1999.

For the Nuclear Regulatory Commission.  
Annette L. Vietti-Cook,  
Secretary of the Commission.

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ATTACHMENT 2

The Honorable Joe L. Barton, Chairman  
Subcommittee on Energy and Power  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

The U.S. Nuclear Regulatory Commission (NRC) is considering amending its regulations to require NRC licensees to notify Native American Tribes of shipments of certain types of high-level radioactive waste, including spent nuclear fuel, before transport of such material to or across the boundary of Tribal lands. Current NRC regulations require advance notification of such shipments to States. In recognition of Tribal sovereignty and the need for Tribes to be informed about activities that occur on Tribal lands, NRC seeks to extend these regulations to include advance notification of these shipments to Federally recognized Native American Tribes. This advance notice of proposed rulemaking is being issued to invite early input from affected parties and the public on the issue of advance notification.

Sincerely,  
Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Representative Ralph M. Hall

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The Honorable James M. Inhofe, Chairman  
Subcommittee on Clean Air, Wetlands, Private  
Property and Nuclear Safety  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

The U.S. Nuclear Regulatory Commission (NRC) is considering amending its regulations to require NRC licensees to notify Native American Tribes of shipments of certain types of high-level radioactive waste, including spent nuclear fuel, before transport of such material to or across the boundary of Tribal lands. Current NRC regulations require advance notification of such shipments to States. In recognition of Tribal sovereignty and the need for Tribes to be informed about activities that occur on Tribal lands, NRC seeks to extend these regulations to include advance notification of these

shipments to Federally recognized Native American Tribes. This advance notice of proposed rulemaking is being issued to invite early input from affected parties and the public on the issue of advance notification.

Sincerely,  
Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Senator Bob Graham