

**RULEMAKING ISSUE  
NEGATIVE CONSENT**

SECY-01-0021

February 2, 2001

**FOR:** The Commissioners

**FROM:** William D. Travers  
Executive Director for Operations

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

- [PURPOSE](#)
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**PURPOSE:**

To inform the Commission of the input received on an Advance Notice of Proposed Rulemaking (ANPR) and to request, by negative consent, Commission approval of the subject rulemaking plan.

**BACKGROUND:**

To amend U.S. Nuclear Regulatory Commission (NRC) rules to (1) extend the advance notification and Safeguards Information protection requirements that now apply to States, to cover Federally recognized Tribal governments regarding shipments of spent fuel and high-level radioactive wastes (HLW) through their lands, and (2) allow up-to-date means of communication of Safeguards Information related thereto.

10 CFR Parts 71 and 73 require a licensee to inform a State governor, or the governor's designee, of certain shipments of spent fuel and HLW passing through the boundary of the State. The NRC promulgated these regulations in 1982 to comply with Public Law No. 96-295. This statute was enacted to deal with concerns States expressed about their abilities to fulfill their responsibilities to protect public health and safety, while shipments of HLW pass through their jurisdictions.

In a Staff Requirements Memorandum dated November 13, 1996, responding to SECY 96-187, "Policy Issues Raised in Meeting with Prairie Island Dakota Indian representatives," 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." The presidential guidance encouraged each Executive department and agency to ". . . apply the requirements of Executive Order (EO) Nos. 12875<sup>(1)</sup> and 12866<sup>(2)</sup> to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs to Tribal communities." This direction from the President was also reiterated in EO 13084<sup>(3)</sup>, "Consultation and Coordination With Indian Tribal Governments," issued on May 14, 1998. Subsequently, EO 13175, "Consultation and Coordination With Indian Tribal Governments," was issued on November 6, 2000, re-emphasizing the need to work closely with Tribal governments on matters that may affect them; it also provides for new procedures for rulemaking processes.

To obtain input from stakeholders, the NRC published an ANPR on December 21, 1999<sup>(4)</sup> for a 90-day public comment period. The comment period was extended to July 5, 2000, in response to a request from the National Congress of American Indians, which represents 210 Tribal governments.

**DISCUSSION:**

Summary of Responses to the ANPR. Forty-eight comment letters were received from Tribal governments, Tribal associations, private citizens, a State, a licensee, and an industry association.

- Virtually all the commenters favored providing advance notification to Tribal governments, with some disagreement on the details of implementation.
- Most commenters were in favor of treating Tribal and State governments on the same basis.
- Commenters encouraged the NRC to make it possible to use more up-to-date means of communication of advance notification, e.g., via the Internet.
- Tribal representatives and others encouraged the NRC to communicate directly with Tribal governments during the rulemaking process, as well as when implementing procedures for advance notification.

- Some Tribal governments have declared lands to be "nuclear free zones" and are opposed to shipments through Tribal lands; however, even they were in favor of advance notification.

Public comments were taken into account while developing the rulemaking plan (Attachment 1). A summary and discussion of the public comments are contained in Attachment 2.

Staff Evaluation and Rationale for Recommended Changes to Rules. An interoffice working group (WG) was established to prepare a rulemaking plan. After evaluation of responses to the ANPR, the WG recommends that regulations should be amended to extend to Federally recognized Tribal governments the advance notification requirements now applicable to States. Changes should also be made to allow for more up-to-date, protected means of electronic communications of advance notification. WG members also identified the need to extend to Tribal governments an exclusion from fingerprinting requirements (granted to State officials) for access to Safeguards Information.

Anticipated rule changes: The attached draft rulemaking plan recommends: (1) amending 10 CFR 71.97, 73.21, 73.37 and 73.57, to extend the advance notification and Safeguards Information protection requirements that now apply to States to also cover Federally recognized Tribal governments; (2) amending 71.97 and 73.21 to permit the use of more up-to-date methods for communicating the advance notification information; and (3) amending 10 CFR 73.57(b)(2) to exempt Tribal officials from fingerprinting requirements (for purposes of criminal history checks) that currently apply to State officials.

This rulemaking would directly address the public health and safety concerns of the Federally recognized Native American Tribes by providing for advance notification of shipments of HLW and spent fuel through Tribal lands. Promulgation of the amendments would increase public confidence in the NRC and increase regulatory efficiency by extending the requirements for advance notification to Tribal governments. For those Tribal governments that elect to receive advance notification, public health and safety may be improved by making it possible for Tribal governments to more effectively carry out their responsibilities in protecting their citizens by promptly responding to any incidents involving these shipments. Notification requirements across Federal agencies would be more consistent by making the NRC's regulations more like the policies of the U.S. Department of Energy and the Department of the Navy, providing for greater efficiency and effectiveness. There may be a small increase in burden on some stakeholders by requiring: (1) Tribal governments to provide contact information and to protect Safeguards Information, if they elect to receive advance notification, and (2) licensees to notify affected Tribal governments of shipments of spent fuel and HLW. The staff does not believe this rulemaking imposes an unnecessary burden on stakeholders and does believe that the rulemaking will help to ensure that the rights of sovereign Tribal governments are fully respected, in the spirit of EOs related to furthering cooperation between Federal and Tribal governments.

#### **COORDINATION:**

The OGC has no legal objection to this paper and the attached rulemaking plan. The Office of the Chief Information Officer has reviewed this paper 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 objections.

#### **RECOMMENDATION:**

It is my intent to approve this rulemaking plan within 10 days after the date of this paper, in the absence of further direction from the Commission. Action will not be taken until the SRM is received. We consider this action to be within the delegated authority of the EDO.

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Enclosures: [1. Rulemaking Plan](#)  
[2. "Summary and Discussion of Public Comments"](#)

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ATTACHMENT 1

## **Rulemaking Plan**

10 CFR PARTS 71 & 73, ADVANCE NOTIFICATION TO NATIVE AMERICAN  
TRIBES OF TRANSPORTATION OF CERTAIN TYPES OF NUCLEAR WASTE

- [Regulatory Issue](#)
- [Background](#)

- Existing Regulatory Framework
- How Regulatory Issue Would be Addressed By Rulemaking
- Rulemaking Options
  - Option 1 - No action
  - Option 2 - Amend Regulations to Provide for Advance Notification of Tribal Governments
  - Recommended Option

## Regulatory Issue

Nuclear Regulatory Commission (NRC) regulations currently require NRC licensees who ship spent fuel or high-level radioactive waste (HLW) to provide advance notification of such shipments to governors of States or their designees. This rulemaking would amend these regulations to extend the provision for advance notification to Tribal governments. This action would further Federal efforts to consult and coordinate with Tribal governments with regard to Federal affairs that are of concern to them, in recognition of the right of Native American Tribes to self-government, thereby supporting Tribal sovereignty and self-determination.

## Background

Current NRC regulations require licensees to inform State governors, or the governor's designee, of certain shipments of irradiated reactor fuel and HLW passing through or across the boundary of the State (see [10 CFR 71.97](#) and [73.37](#)). The NRC developed these regulations in 1982 to comply with Public Law No. 96-295, which was enacted to deal with concerns expressed by States about their abilities to fulfill their responsibilities to protect public health and safety while shipments of high-level radioactive wastes pass through their jurisdictions. Schedule information provided to States for shipments in excess of 100 grams of spent fuel is treated as Safeguards Information under NRC regulations; current NRC regulations do not permit the release of Safeguards Information except to those persons specified in §73.21(c)<sup>(5)</sup>. The regulatory issue of concern to the Commission is to determine if the requirement for advance notification of States should be extended to Federally recognized Native American Tribes.

The NRC sought input from stakeholders on this issue by publishing an advance notice of proposed rulemaking (ANPR) for public comment (64 FR 71331; December 21, 1999). In a letter to the Secretary of the Commission, dated March 1, 2000, the National Congress of American Indians (NCAI), which represents 210 Tribal governments, requested a 90-day extension of the comment period. The request was granted and the comment period was extended from March 22 to July 5, 2000. The comments received in response to the ANPR were taken into account while developing this rulemaking plan.

In 1994, the U.S. Department of Energy (DOE [EXIT](#)) notified the NRC of its intent to implement a policy of Tribal notification of waste shipments for its shipments of spent nuclear fuel and HLW. The DOE indicated that implementation of this policy would allow it to better integrate transportation planning activities within DOE. A DOE order<sup>(6)</sup> and implementation guide<sup>(7)</sup>, in-place since 1995, provide for "pre-notification" (DOE's term for advance notification) and access by Tribal governments to information about shipments. Federal grants are made to various Tribes under transportation programs by DOE, the Department of the Navy, and other Federal agencies. The Department of the Navy also provides advance notification to Tribal governments of shipments of certain types of high-level radioactive wastes.

A Presidential memorandum dated April 29, 1994, entitled "Government-to-Government Relations with Native American Tribal Governments" [59 FR 22951; May 4, 1994], 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.

While this memorandum does not impose any new obligations on NRC as an independent regulatory agency, it does encourage 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 (EO) Nos. 12875<sup>(8)</sup> and 12866<sup>(9)</sup> to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs to Tribal communities." This direction from the President was also reiterated in EO 13084<sup>(10)</sup>, "Consultation and Coordination With Indian Tribal Governments," issued on May 14, 1998.

The Commission recognized the importance of enhanced government-to-government relations with Tribes as expressed in the President's memorandum as well as 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. It 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."

On November 6, 2000, the President issued EO 13175, "Consultation And Coordination With Indian Tribal Governments" (effective 60 days from the above date). It both revokes EO 13084 (having the same title and which was in effect at the time the ANPR was published for this rulemaking) and provides new direction to Federal agencies. For example, agencies are directed to grant Indian Tribal governments the maximum administrative discretion possible. New rules resulting in

unfunded mandates must be made following special procedures involving consultation with Tribal governments. In addition, certain documents are to be provided to OMB when announcements are published in the Federal Register. Prior to transmittal of a draft final regulation that has Tribal implications to OMB, pursuant to EO 12866, agencies are required to include a certification from the agency official designated to ensure compliance with EO 13175 stating that its requirements have been met in a meaningful and timely manner. Independent regulatory agencies are encouraged to comply with the provisions of this order.

This rulemaking would directly address the public health and safety concerns of the Federally recognized Native American Tribes by providing for advance notification of shipments of HLW and spent fuel through Tribal lands. Promulgation of the amendments will increase public confidence in the NRC and increase regulatory efficiency by extending the requirements for advance notification to Tribal governments. For those Tribal governments that elect to receive advance notification, public health and safety may be improved by making it possible for Tribal governments to more effectively carry out their responsibilities in protecting their citizens by promptly responding to any incidents involving these shipments.

### **Existing Regulatory Framework**

Current NRC regulations require NRC licensees to inform State governors, or the governor's designee, of shipments of spent fuel or HLW passing through a State or across its boundary. The NRC promulgated these regulations pursuant to Pub. L. No. 96-295 to address concerns of the States of their responsibilities to protect public health and safety while shipments of spent fuel and HLW pass through their jurisdictions. These provisions of Title 10 of the CFR are found in the following sections:

§71.97 requires advance notification to States of certain shipments of HLW and small quantities of spent fuel;

- The types of shipments for which notification is required are found in §71.97(b).

§73.37 requires advance notification to States of shipments of more than 100 grams of spent fuel;

- The types of irradiated nuclear fuel shipments are found in §73.37(a).

§73.37(g) establishes requirements for the protection of schedule information that is designated as Safeguards Information from unauthorized disclosure as specified in §73.21.

§73.21 identifies State and local officials who are authorized to have access to Safeguards Information and the protection measures to be used for this information. (Tribal officials are not included therein). Information protection procedures employed by State and local police forces are deemed to meet these protection requirements.

Further, the method by which information is to be communicated to States is covered in:

§71.97(c) and §73.37(f)(1) and (3) provide that the advance notification and Safeguards Information must be in written form, while

§73.21(g)(3) provides for electronic transmission of Safeguards Information via protected telecommunications circuits (including facsimile) approved by the NRC.

Exemption from fingerprinting requirements for individuals with access to Safeguards Information under §73.21 is covered in:

73.57(b)(2) provides for exemption of State governors and their designees from the fingerprinting requirements.

### **How Regulatory Issue Would be Addressed By Rulemaking**

The staff recommends that a proposed amendment to Parts 71 and 73 be developed to require advance notification of Tribal governments who wish to be informed of shipments of certain types of high-level radioactive wastes. The proposed amendments would extend to Tribal governments the advance notification requirements for shipments of spent fuel and HLW that currently apply for States by amending §§ 71.97 and 73.37. Conforming changes also would be made to §73.21 to permit Tribal governments to receive Safeguards Information and to §73.57(b)(2) to extend the exemptions from fingerprinting requirements to Tribal governments and their designees. The amendments to 10 CFR 71.97 and 10 CFR 73.37 would allow for secure, electronic communications of advance notifications, a method suggested by several stakeholders in response to questions posed in the ANPR.

### **Rulemaking Options**

#### **Option 1 - No action**

Under this option, NRC regulations would not be amended to require advance notification to Tribal governments of shipments of spent fuel and HLW through their lands.

#### **Pros:**

- Minimization of expenditure of NRC staff resources consumed during rulemaking efforts and costs of implementation.
- Lessens the perception of potential for unauthorized disclosure and resulting increase in risk of radiological sabotage due to wider dissemination of Safeguards Information.
- Licensees would benefit from not having additional notification requirements placed on them. (The incremental costs associated with notifying Tribal governments would be relatively small, given that advance notification of States is already required.)
- The small increase in costs to Tribal governments associated with protection of Safeguards Information, should they elect to receive it, would be avoided.

**Cons:**

- The Commission's direction to implement the spirit and letter of Presidential guidance on fostering government-to-government relations with Tribes, as expressed in SECY 96-187 and EOs 13084 and 13175, would not be fully implemented.
- Tribes would not be treated on an equal basis with States. Responses to questions posed in the ANPR indicate strong support by Tribes and others for requiring advance notification.
- Failure to require advance notification to Tribal governments would be inconsistent with the existing policies of other Federal agencies. The Department of the Navy and DOE already provide advance notification to Tribal governments.
- Tribal governments would be denied information necessary to plan for and conduct operations such as emergency planning and response if they have such capability .
- The NRC sought opinions in the ANPR on how licensees could effectively and efficiently provide notification to Tribes; in response, Tribal representatives and others encouraged the use of more advanced methods of communication and the opportunity to effect this change through this rulemaking would be lost should it not go forward.

**Option 2 - Amend Regulations to Provide for Advance Notification of Tribal Governments**

Under this option, the NRC would conduct a rulemaking to: (1) Amend §§71.97, 73.21 and 73.27 of Title 10 CFR to extend to Federally recognized Tribal governments the advance notification requirements that now apply to State governments for spent fuel and HLW that cross the boundaries of their lands. (2) Extend to Tribal governments requirements to protect Safeguards Information. (3) Amend §§71.97 and 73.21 to permit the use of up-to-date, protected means of electronic communication, e.g., encrypted Internet transmission. (4) Amend §73.57 to extend the exemption for fingerprinting requirements of State governors and their designees who may receive Safeguards Information to Tribal governments by extending the exemptions in §73.57(b)(2) to Tribal governments.

**Pros:**

- Increase in regulatory efficiency. The rulemaking would enhance coverage of Parts 71 and 73 regulations as they apply to the notification requirements for the shipments of radioactive material across State boundaries and Federally recognized Native American lands. The need to resolve, on a case-by-case basis, questions that arise as to the applicability of these regulations to governing Tribal Nations would be avoided.
- Increase the consistency of regulations across Federal agencies by making the NRC's regulations consistent with policies of the DOE and the Department of the Navy.
- Public awareness and public confidence in the NRC's regulatory scheme would be enhanced.
- Increased public safety. The amendments would enhance the ability of Tribal governments to prepare for emergencies and escort shipments, should they choose to, thereby increasing the security of shipments across their lands. The ability to respond in case of an incident would be enhanced.
- The rulemaking would add to the Federal Government's efforts to recognize and work with Tribal governments, in concert with Executive Orders<sup>(11)</sup>, by furthering Federal/Tribal government-to-government relations and enhancing Indian Tribal self-government. It would contribute to increase levels of sovereignty and respect for Tribal self-government, in recognition of responsibilities that arise from the unique legal relationship between the Federal Government and Tribal governments. This is in concert with SECY 96-187.

**Cons:**

- Tribal governments would have the increased burden of protecting Safeguards Information, if they participate. (Tribes asked for funding in responses to the ANPR; the DOE now funds Tribal governments as does the U.S. Environmental Protection Agency.)
- Places some additional burden on licensees.
- NRC resources would be necessary to complete the rulemaking.

- NRC resources would be required to obtain and update a list of contacts for Federally recognized Tribal Governments as well as to identify Tribal lands through which NRC licensees may ship spent fuel and HLW.
- Increased potential for a perception by the public of unauthorized disclosure of Safeguards Information due to wider dissemination, as expressed by some commenters in response to the ANPR.

### **Recommended Option**

The NRC Staff recommends Option 2 using the standard, two-step process of a proposed and final rulemaking.

### **Impacts On Licensees**

- Licensees would have the burden of identifying Tribal governments prior to shipping.
- Licensees would need to provide additional training to staff to implement the rule. It is likely that communications equipment needed to provide the notification would already be possessed by licensees, so expenditures to conduct notification would likely represent a small increment to existing programs and facilities.

### **Impacts on Other Federal Agencies**

A small impact may be on the U.S. Department of Interior's Bureau of Indian Affairs (BIA) resulting from the NRC's and licensee's dependence upon them for listing of Federally recognized Tribal governments. Some increase in costs may be realized by the DOE if NRC's licensees are dependent upon this agency for maps and other information about Tribal boundaries and their relationship to routes for shipping of hazardous materials. Given that the BIA and DOE already conduct these activities, the incremental cost to these agencies is expected to be negligible.

### **Office of General Counsel Legal Analysis**

The proposed amendments to rules would provide for advance notification to Tribal governments of shipments of spent fuel or HLW. Currently, licensees are required to inform a State's governor, or the governor's designee, of certain shipments of irradiated reactor fuel and HLW passing through or across the boundary of the State. The proposed rule would extend the requirement for advance notification to Tribal governments.

The purpose of this rulemaking should be described as an action to further Federal efforts to consult and coordinate with Tribal governments with regard to Federal affairs that are of concern to them. This action is in recognition of the right of Native American tribes to self-government, thereby supporting Tribal sovereignty and self-determination. As a result of public comments to the ANPR, an issue that would need to be addressed is the increased potential for public perception of unauthorized disclosure of Safeguards Information due to wider dissemination.

The proposed rule will not require preparation of either an environmental assessment or an environmental impact statement, as the amendments to Parts 71 and 73 fall under the categorical exclusion for recordkeeping and reporting requirements found at [10 CFR 51.22\(c\)\(3\)](#).

It appears that the rule is not a "major rule" under the Small Business Regulatory Enforcement Fairness Act, inasmuch as it does not appear that the rule is likely to result in: a \$100,000,000 impact upon the economy; a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. Because the rule is not a major rule, the mandated 60-day period prior to effectiveness of major rules is not applicable.

The backfit rules ([10 CFR 50.109](#), [70.76](#), [72.62](#)) do not apply to this rulemaking. Amendments to NRC regulations resulting from this rulemaking would not impose a backfit as defined in the regulations; therefore, a backfit analysis is not required.

The proposed rule will require licensees and Tribal governments to generate and maintain records related to the advance notification of shipments of spent fuel or HLW to Tribal governments. Accordingly, the changes will require OMB review for purposes of the Paperwork Reduction Act, and cannot be promulgated through direct final rulemaking.

In conclusion, OGC has determined that there are no known bases for legal objection to the contemplated rulemaking.

### **Category of Rule**

In accordance with NRC guidance (Section 5.23 of the NRC "Regulations Handbook," NUREG BR-0053, Rev. 4, 1997), this rulemaking would not constitute a major rule under the Small Business Regulatory Enforcement Fairness Act.

### **Regulatory Analysis**

The staff intends to provide a regulatory analysis of the costs and benefits associated with the proposed rulemaking, which would also provide the basis for determining the impact of the proposed changes on small entities as required by the Regulatory Flexibility Act.

**Coordination with Other Federal Agencies**

The NRC staff expects that coordination with the BIA, DOE, DOT, and US Geologic Survey may be required to identify contacts for Federally recognized Tribal governments and shipping routes in relation to Tribal boundaries.

**Backfit Analysis**

The backfit rules (10 CFR 50.109, 70.76, 72.62) do not apply to this rulemaking because amendments to NRC regulations pertaining to advance notification requirements which result from this rulemaking would not impose a backfit as defined in the regulations. Therefore, a backfit analysis is not required.

**Agreement State Implementation Issues**

There are no Agreement State issues: The NRC staff has determined that this rule addresses a regulatory area which is reserved to the NRC and cannot be relinquished to Agreement States under the Atomic Energy Act.

**Supporting Documents Needed**

An OMB Paperwork Reduction Act clearance package, to be submitted when the proposed rule is forwarded to the Office of the Federal Register for publication, would be necessary because the rule would impose additional reporting and record keeping requirements on licensees and Tribal governments. NRC staff will review findings of OGC with regard to new record keeping and reporting requirements that may result from EO 13175 and incorporate them into proposed rules. No environmental assessment or environmental impact statement is needed as these amendments to Parts 71 and 73 fall under the categorical exclusion in Part 51 for Record keeping and Reporting requirements found at §51.22(c)(3). Existing guidance related to advance notification of States, and protection of Safeguard Information, if needed, for new methods of transmission of advance notification, would be updated to reflect this rule change.

**Issuance by Executive Director of Operations or Commission**

The NRC staff recommends that the Commission issue proposed and final rules because of the changes in policy associated with changes to the regulations.

**Management Steering Group**

No need for a steering group has been identified at this time.

**Public Participation**

Public participation will be sought through normal rulemaking procedures, including use of NRC's interactive web site, the "Rulemaking Forum." However, directed communications will be used to contact Tribal governments. STP has received estimates that approximately 16 to 30 of the 556 Federally recognized Tribal governments might be affected. The staff will send copies of the proposed rule to all Federally recognized Tribal governments in the continental United States, as well as Tribal associations, when it is published in the Federal Register (NRC staff does not anticipate that HLW and spent fuel shipments will take place in Alaska and Hawaii). The Staff will consider holding a public meeting during the comment period for the proposed rule. This rulemaking plan will be placed on the NRC's Rulemaking Forum web site following the Commission's approval.

**Resources Needed to Complete Rulemaking**

The estimated resources entailed in this rulemaking would be on the order of 2.1 FTEs. These resources will come principally from NMSS, OGC, and STP. These resources are within FY 2001 budget allocations and the proposed FY 2002 budget.

NMSS . . . . .	1.0 FTE
OGC . . . . .	0.2 FTE
STP . . . . .	0.3 FTE
ADM . . . . .	0.1

**Staff Level Working Group**

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## Schedule

1 year after approval of plan

Proposed Rulemaking Package to Commission  
(and OMB clearance package for submittal to  
OMB)

1 year after end of public comment period

Final Rule to the Commission (with supporting  
documents)

ATTACHMENT 2

**Summary and Discussion of Public Comments  
on  
Advance Notice of Proposed Rulemaking  
Advance Notification to Native American Tribes  
of Transportation of Certain Types of Nuclear Waste  
10 CFR Parts 71 and 73  
(64 FR 71331)**

## Executive Summary

An ANPR was published in the [Federal Register](#) **EXIT** on December 21, 1999, to solicit stakeholder input on how to effectively and efficiently communicate advance notification to Native American Tribes about shipments of high-level waste (HLW) and spent fuel through their lands. Information was sought on minimizing the burden on licensees, identifying location of Tribal lands in relationship to shipment routes, and the sharing and protection of Safeguards Information. Forty-eight comment letters were received on the seventeen questions posed. Several key issues are summarized below:

- Comments supporting advance notification to Tribal governments were nearly unanimous, including support by thirty Tribes, four Tribal Groups/Associations, industry (NEI and one utility), one State, the Department of Energy ([DOE](#) **EXIT**), and four private citizens.
- Comments from Tribal governments, DOE, private industry, one State, and citizens were generally in favor of treating Tribal governments on the same basis as State governments.
- Many commenters support use of up-to-date electronic communication of advance notifications, e.g., via the Internet; use of the Internet to make information readily available to licensees.
- Several Tribal governments oppose shipments through Tribal lands. Some have adopted "nuclear free zone" resolutions but are in favor of advance notification. (One of the Tribal governments was mute on the subject of support for advance notification.)

## Public Comments and Discussion

### Question A. Developing a List of Native American Tribe Contacts

Four questions were posed in the ANPR regarding issues on development of a list of contacts, including: the appropriateness of using the Bureau of Indian Affairs' (BIA) listing of Federally recognized Native America Tribes, keeping the data up-to-date, and how licensees can effectively and efficiently provide advance notification to Tribes, including schedule changes that would require updated notification by telephone at any time of day.

Commenters suggested several alternatives to obtaining contact information from the BIA and how to keep the data up-to-date. The BIA's listing of Federally recognized Tribes was generally seen as a good starting point to identify contacts. Commenters suggested inclusion of Tribes that are recognized by States but not by the Federal government. The [NRC](#) staff believes the NRC is bound to work with Federally recognized Tribes in government-to-government relations, as identified in the Federal Register and maintained by the BIA.

Commenters indicated that BIA lists of contacts are sometimes not up-to-date. For this and other reasons, the NRC was urged to contact Tribes directly to obtain contact information. Stakeholders suggested that, as with States, allowance for contact with Tribal police should be provided for in NRC regulations, particularly in case of sudden changes in scheduling of shipments. Commenters urged review and/or use of methods used by the DOE for advance notification to identify Tribal

contacts. The NRC staff believes that BIA lists may serve as a starting point for identifying contacts and that, to keep information up-to-date, mechanisms should be established to keep contact lists up-to-date by direct contact with Federally recognized Tribal governments. The Office of State and Tribal Programs has mechanisms in-place to accomplish this on an annual basis for States and they may be extended to Tribal governments.

Several comments from Tribal representatives and others indicated that communications may be made more efficiently and effectively by using up-to-date methods, e.g., facsimile or Email. Other commenters suggested continued use of surface mail and telephone. These methods were suggested for routine communication of advance notification as well as last-minute schedule changes. The NRC included in the rulemaking plan proposed amendments to enable this option use of electronic means to communicate advance notification; allowing for up-to-date methods of communications that would be in line with strategic goals of increasing efficiency and effectiveness.

#### **Question B. Minimizing the Licensees' Administrative Burden**

This series of questions sought input on minimizing burden on licensees and whether a shipment should proceed if contact with a Tribe can not be made.

Several comments indicated that the same methods used to provide advance notification to States be used for Tribal governments, continuing the theme of treating Tribal and State governments alike. Use of the Internet was suggested as a means of lessening the burden on licensees. Commenters suggested both communication of advance notification information via the Internet and using an NRC or DOE maintained web site to aid licensees in identifying Tribes to be contacted, Tribal contacts, and information about Tribal lands in relation to shipment routes. Commenters suggested that the NRC should be responsible for lessening the burden on licensees while others suggested that the NRC provide advance notification rather than licensees. Others suggested that the burden would be small for many reasons, among which were few of the lands of the 556 Federally recognized Tribes would be expected to be on spent fuel shipping routes. The NRC staff believes that minimizing unnecessary administrative burden on licensees is consistent with the NRC's strategic goals.

*Should shipments proceed if a Tribe can not be contacted?* The Nuclear Energy Institute (NEI) commented that "the course of regulated commerce" should not be altered if a Tribe is either unwilling or unable to make available a contact to exercise the "option of receiving notification." A private citizen indicated that no Tribe should have the opportunity to block or delay a shipment by failing to acknowledge a notification. Others indicated that Tribal governments, like States, should not be able to block shipments. Several Tribal governments argued that shipments should not be made through their lands unless they received funding to cover the cost of receipt and handling of Safeguards Information. Two Tribal governments and three Tribal associations indicated that shipments should not proceed if contact can not be made. Arguments in support of blocking shipments did not include rationales based on safety or other reasons sufficient to impede the progress of shipments of HLW or spent fuel. NRC staff believes that Tribal governments should not be in a position to block shipments. Stakeholders will have an additional opportunity to comment on this issue during the proposed rulemaking stage should the Commission approve the rulemaking plan.

#### **Question C. Identifying the Location of Tribes Along Shipment Routes**

Questions posed in the ANPR sought input on how licensees may effectively and comprehensively identify the location of Native American Tribes along routes of shipment, development of a central database by the DOE and/or the NRC, and use of Geographic Information System (GIS) resources to provide licensees with information about the location of Tribal lands, and to what types of Tribal lands should the advance notification rule apply.

Many comments indicated that a combination of resources should be used by the NRC to identify Tribal lands in relation to routes for shipment and advance notification. These included maps provided by the BIA, supplemented by maps and a database maintained by the DOE. Many comments indicated that use of the GIS would be helpful. Commenters noted that some Tribes are already using DOE's systems and have GIS capability, as part of their participation in DOE's advance notification program. Several suggested that the NRC use the DOE's systems. Use of the Internet was recommended to communicate advance notifications as well as to make available lists of Tribal contacts and information to aid shippers in identifying when shipments would cross Tribal boundaries and trigger notification requirements. The NRC staff would consider these options for communications as well as examining resources available at the DOE, BIA as well as other agencies, e.g., resource maps from the National Geologic Survey and the Department of Transportation (**DOT EXIT**) during the rulemaking process.

The question on which Tribal lands should be included if advance notification is implemented led to a wide variety of responses, especially from Tribal representatives. Example of lands for which advance notification was suggested included: on or near Tribal lands; trust lands; all of "Indian Country;" lands for which Tribes have a "vested interest;" requests for Tribes to be able to participate in route selection and to avoid densely populated areas as well as traverses of shallow aquifers; lands received under claims settlements and claimed under aboriginal title; trust plus fee lands; lands that might contain Traditional Cultural Properties and other sacred sites. The DOE commented that the NRC should use BIA maps to identify lands and consult with DOE on technical details of GIS and route modeling; further, that the rule should apply to reservation lands of Federally recognized Tribes. The NRC staff believes that notification should be applied to reservations of Federally recognized Tribes. Similarly, NRC staff believes that, in the same manner as for States, notification should only be required for shipments to or crossing Tribal territory, not for shipments merely "near Tribal lands," as requested by some of the commenters.

#### **Question D. Safeguards Information**

Eight questions were asked regarding the sharing and protection of Safeguards Information.

Commenters placed strong emphasis on treating Tribal governments like State governments in responses to this and other questions posed in the ANPR. Commenters emphasized the need to work with Tribes on a government-to-government basis and to work within the spirit of Executive Orders on Federal relations with Tribal governments, including treating them with respect and recognizing their sovereignty. In the ANPR, the question was raised: "If a Tribal government receives Safeguards Information, should the NRC review the Tribe's actions to control and protect Safeguards Information?" The opinions voiced in response were varied. Many Tribal representatives argued that Tribal governments should be treated as responsible governments, like States. Some expressed concern about increased risk to public safety, indicating the NRC should review the capability of Tribal governments to protect Safeguards Information. The NEI suggested that the NRC should review each Tribes ability to protect Safeguards Information and conduct periodic inspections of this capability; further, that the NRC conduct an outreach program to ensure that concerns of Tribes may be addressed. The NRC staff plans to consider these suggestions during the proposed rulemaking process.

Many commenters were in favor of extending "need-to-know" requirements in §73.21 to Tribes, as well as the assumption that information protection procedures of police forces are "deemed to meet" information protection requirements. Several Tribes and others indicated that Tribes should have the option to opt-out of the advance notification program. Tribal representatives and associations were strongly in favor of continuing requirements contained in §73.37(f) to have licensees release Safeguards Information, i.e., to *not* change this requirement to a permissive form. NRC staff analysis of comments leads to the assessment that most commenters believe that Tribes should be treated like States with regard to sharing of Safeguard Information, meaning, simply, that the provisions of the regulations relating to sharing of this information should be extended to Tribes, without special qualifications. As with States, Tribal governments should be allowed to elect to participate in advance notification programs.

### Other Comments

Several comments submitted in response to the ANPR that went beyond the questions posed, raising issues that deserve attention:

*Nuclear free zones; bans on shipments, route selection.* Several Tribes indicated that they either have declared their lands to be nuclear free zones or prohibit shipments of radioactive wastes through their lands. In cases where State or local governments have attempted to impose absolute bans on shipments or establish pre-notification requirements that are different from those of the Federal government, Federal courts have ruled the regulations to be invalid<sup>(12)</sup>. Federal regulations preempt State and local requirements and States may be challenged on two primary grounds: violation of the Commerce Clause of the Constitution and preemption by federal transportation law. Several Tribal governments also requested the privilege of consultation on preferred routes in their lands. The NRC staff believes that the issue of consultation on routes comes under the DOT's jurisdiction, not the NRC's. The NRC staff will consider issues relating to advance notification of Tribal governments who have declared their lands to be 'nuclear free zones' or otherwise indicated they may prohibit shipments of nuclear wastes during proposed rulemaking.

*Requests for Funding:* Several Tribal representatives suggested that the NRC (or other federal agencies or the licensees) should provide funding to Tribes to cover the costs related to advance notification. The costs cited included for training of staff, development of infrastructure for communication and protection of Safeguards Information, and for administrative needs. A comment from Tribal representatives indicated that protection requirements are relatively simple and should not pose an undue increase in expenses on Tribal governments.

*Consultation With Tribal and State Governments:* The State of Illinois Department of Nuclear Safety commented that the President's 1994 memorandum encourages federal agencies to consult with Tribal governments before engaging in activities that may affect Tribal governments. The NRC ANPR did not address establishment of a consulting mechanism. The commenter recommended the rulemaking be expanded to provide for substantive consultation with the Tribal governments and States for shipments of spent nuclear fuel. Some Tribal governments also urged direct consultation with Tribal governments on nuclear waste shipments. The rulemaking plan contains recommendations to promote communications with Tribal representatives. In addition to the usual mechanisms such as notices in the Federal Register and on the NRC's rulemaking web site, the NRC staff recommends consider holding a public meeting during the comment period for the proposed rule.

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1. EO 12875, "Enhancing the Intergovernmental Partnership," 58 FR 58093, October 26, 1993

2. EO 12866, "Regulatory Planning and Review," 58 FR 51735, September 30, 1993

3. 63 FR 27655

4. 64 FR 71331, December 12, 1999

5. In certain cases when Tribal Police serve as the local law enforcement authority, they have received advance notification of shipments to enable response in case of emergency and to escort shipments through Tribal lands.

6. DOE Order O 460.2, Departmental Materials Transportation and Packaging Management, Chg 1. Approved 9/27/95.

7. Implementation Guide for Use with Doe O 460.2, Departmental Materials Transportation and Packaging Management,

11/15/96.

8. EO 12875, "Enhancing the Intergovernmental Partnership," 58 FR 58093, 10/26/1993.

9. EO 12866, "Regulatory Planning and Review," 58 FR 51735, 9/30/1993.

10. 63 FR 27655, 5/19/1998.

11. EOs 13084 and, EO 13175, discussed above.

12. National Conference of State Legislatures (NCLS), January, 2000. Author: James B. Reed, Program Director, Transportation, NCLS. Environment, Energy and Transportation Program; The State Role in Spent Fuel Transportation Safety: Year 2000 Update. Transportation Series No. 14. <http://www.ncsl.org/programs/ESNR/transer14.htm> **EXIT**; see in particular <http://www.ncsl.org/programs/ESNR/transer14.htm#preempt> **EXIT**.