

RULEMAKING ISSUE AFFIRMATION

October 7, 2011

SECY-11-0142

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: FINAL RULE: ADVANCE NOTIFICATION TO NATIVE AMERICAN
TRIBES OF TRANSPORT OF CERTAIN TYPES OF NUCLEAR WASTE
(RIN 3150-AG41)

PURPOSE:

To request Commission approval to publish a final rule in the *Federal Register* that would amend Parts 71 and 73 of Title 10 of the *Code of Federal Regulations* (10 CFR). Under the final rule, licensees must provide advance notification to participating Federally-recognized Tribal governments prior to shipping irradiated reactor fuel and certain radioactive wastes through Tribal reservations. Also, the rule extends to Tribal officials, their designee, and Tribal law enforcement personnel, relief from fingerprinting requirements required for access to Safeguards Information (SGI).

SUMMARY:

The U.S. Nuclear Regulatory Commission (NRC) staff is recommending that the Commission approve a final rule that would require licensees to provide advance notification to participating Federally-recognized Tribal governments prior to shipping irradiated reactor fuel and certain radioactive wastes through Tribal reservations. The rule also extends to Tribal officials, their designee, and Tribal law enforcement personnel, relief from fingerprinting requirements required for access to SGI. The purpose of the rule is to inform Tribes that choose to receive advance notification of shipments of irradiated reactor fuel and other nuclear wastes passing across their reservation, which recognizes Tribal sovereignty, and to recognize Tribal governments' interest in being informed of activities occurring on Tribal reservations.

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BACKGROUND:

Current NRC regulations require licensees to inform State governors, or the governors' designees, of certain shipments of irradiated reactor fuel and certain radioactive wastes listed in 10 CFR 71.97 that pass through or across the boundary of States. The NRC first developed regulations in 1982 for the advance notification of state governors to comply with the NRC Authorization Act for Fiscal Year 1980. Neither the Atomic Energy Act of 1954, as amended (AEA), nor the notification regulations required licensees to notify Native American Tribes of this type of shipment passing through Tribal reservations. Tribal officials have sought similar notification.

On December 21, 1999 (64 FR 71331), the NRC published an Advance Notice of Proposed Rulemaking (ANPR) to solicit stakeholder input on a possible rulemaking that would consider requiring advance notification to Native American Tribes of transportation of certain types of nuclear waste. In SECY-01-0021, dated February 2, 2001, the staff provided a summary of the ANPR comments and a rulemaking plan to proceed with a proposed rule. The staff suspended the rulemaking following the terrorist attacks of September 11, 2001. In SECY-10-0095, dated July 23, 2010, the staff provided the proposed rule for Commission approval. The Commission approved publication of the proposed rule in a Staff Requirements Memorandum dated October 6, 2010 (Agencywide Documents Access and Management System Accession No. ML102790267). On December 8, 2010 (75 FR 75641), the NRC published the proposed rule for public comment. As part of the Tribal outreach, the NRC sent a copy of the proposed rule to all 565 Federally-recognized Tribes. The comment period ended on February 22, 2011, and 10 comment letters were received. The commenters on the proposed rule included Tribes, a Tribal organization, individuals, companies, and a Federal agency. Commenters supported the rule but did have several questions related to implementation. The comments and the NRC's responses are discussed in detail in the *Federal Register* notice (Enclosure 1).

DISCUSSION:

The purpose of the rule is to inform Tribes that choose to receive advance notification of shipments of irradiated reactor fuel and other nuclear wastes passing across their reservation, which recognizes Tribal sovereignty, and to recognize Tribal governments' interest in being informed of activities occurring on Tribal reservations.

Regulations under 10 CFR 73.37 require advance notifications to State governors for shipments of irradiated reactor fuel in excess of 100 grams in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding. Regulations under § 71.97 require advance notice for shipments of irradiated reactor fuel in quantities less than that subject to § 73.37 and certain licensed material that is required to be transported in Type B packaging and is being transported to a disposal facility or a collection point for transport to a disposal facility. The advance notification provisions apply if the quantity of licensed material exceeds the least of: (1) 3000 times the A_1 value of the radionuclides as specified in 10 CFR Part 71, Appendix A, Table A-1, for special form radioactive material; (2) 3000 times the A_2 value of the radionuclides as specified in Appendix A, Table A-1, for normal form radioactive material; or (3) 1000 Terabequerel (TBq) (27,000 curies).

Certain information provided for shipments of irradiated reactor fuel is considered to be SGI under the NRC regulations and must be protected in accordance with the requirements in §§ 73.21 and 73.22. The NRC staff is proposing to amend these regulations to include a provision that will require licensees to provide participating Tribal officials, or their designees, advance notice of shipments of irradiated reactor fuel and other radioactive wastes listed in § 71.97 before crossing the border of Tribal reservations. The changes also include revising § 73.59 to provide relief for Tribal officials, Tribal officials' designees, and Tribal law enforcement personnel from the criminal history checks, fingerprinting, and other elements of background checks that are required for access to SGI.

The proposed rule as written would have provided relief from the elements of the background investigation only for access to the SGI contained in the advance notifications and not to all SGI. However, the NRC also invited comment on whether the relief should be expanded to include all types of SGI. Only one commenter actually addressed this issue in their comments, and the individual recommended that the relief be expanded to all SGI. After careful consideration of the issue and the potential future needs of the NRC to share other forms of SGI with Tribal officials, the NRC staff is recommending that the relief be expanded to include any SGI and not just the advance notifications. Revising the regulations permits the Commission to more efficiently provide SGI to Tribes when it is determined that the Tribe has a need-to-know. The NRC staff believes that exempting Tribal officials, Tribal official designees, or Tribal law enforcement personnel from the fingerprinting requirement is analogous to exempting the State governor, State governor designees, or State law enforcement personnel from the fingerprinting and background check requirements. Providing the relief also recognizes the right of Indian tribes to self-government and supports Tribal sovereignty and self-determination. Relief from the fingerprinting requirement cannot be provided by Commission order; it can only be provided by rule. By including the relief in this rulemaking for all types of SGI, a future rulemaking will not need to be conducted, thus saving agency resources. Tribal officials will still need to have an established need-to-know before they would be given access to any other types of SGI. This rulemaking establishes need-to-know for the advance notifications for irradiated reactor fuel and nuclear waste shipments that pass within or across the boundary of a Tribal reservation.

IMPLEMENTATION:

The staff is recommending that the final rule be effective 60 days after publication in the *Federal Register* and inserts a date in the regulatory text that is 1 year after publication of the rule, before the licensees are required to implement the regulatory provisions. The 1 year period provides time for the NRC to develop the list of Tribal contacts, develop the map that shows locations of Tribal reservations, provide training on protection of SGI to the Tribes, and provide time for licensees to develop procedures and conduct training on the new requirements. However, the relief from the background investigation for access to SGI will be effective 60 days after publication of the final rule. The staff will be updating the guidance document as part of the separate rulemaking effort on security of spent fuel shipments. Any updates needed to address this rule will be included as part of the larger effort and will not be conducted as a separate task.

In order to receive the advance notifications, Tribes will need to declare that they would like to receive the information and certify that the Tribe will appropriately protect any SGI information. Given the information protection requirements involved, the NRC believes Tribes should have the option to choose whether to receive advance notifications of shipments that pass through

their Tribal reservations. If a Tribe opts to receive the advance notifications, the Tribe will be obligated to protect the schedule of the shipments and itineraries in accordance with SGI information handling requirements in §§ 73.21 and 73.22. If a Tribe opts not to receive the advance notifications, the Tribe will have no SGI information protection obligations relating to the shipments.

The NRC staff is considering several different mechanisms to inform the Tribes of their responsibilities regarding SGI protection. When the final rule is published in the *Federal Register*, the NRC staff plans to contact all 565 Federally-recognized Tribes via letter. This initial contact will include a copy of the final rule and information on the protection of SGI, as well as a request to inform the NRC if the Tribe wants to receive the advance notifications. For those Tribes that express interest, more detailed training will be available by Webinar, meetings, training classes, compact disk, etc. Decisions on the best mechanism to provide the training will depend on such things as the number of Tribes that will need the training, locations of the Tribes, and each Tribe's preference.

The staff will develop a map that shows the reservations of Tribes that notify NRC they would like to receive these advance notifications. The Web site associated with the map will also provide the necessary contact information for the Tribe. Licensees will be able to use the map to determine what Tribes along the route will need to be contacted for the advance notifications. The necessary information will be available on the NRC's Web site before the effective date of the rule.

No change to the enforcement policy should be necessary for implementation.

This final rule, if approved, will revise the advance notification provisions of § 73.37(f). The NRC staff is currently working on another rule, "Physical Protection of Irradiated Reactor Fuel in Transit" that will also revise § 73.37(f). If the Tribal notification rule is approved before the spent fuel transportation security rule, the Tribal notification provisions will need to be added to the spent fuel transportation security rule before publication so that the second rule does not remove the changes made by the Tribal notification rule. In order to accomplish this goal, the Advance Tribal Notification rule will become effective 60 days after publication in the Federal Register so the spent fuel transportation security rule can incorporate these changes into subsequent regulatory revisions of 73.37(f). A specific date, 1 year after publication in the Federal Register, will be added to the regulatory text in §71.97(c)(3) and §73.37(f) stating when the licensee must comply with the Advance Tribal Notification regulatory requirements. This revision provides notice of when the licensees must send out advance notifications to participating tribes. The 1 year delay in implementation provides the Tribes adequate time to decide whether to participate in the program, NRC time to implement the program, and NRC time to train Tribes and licensees.

In the unlikely event that the spent fuel transportation security rule is approved before the Tribal notification rule, the Tribal notification rule will be revised to reflect the language from the spent fuel transportation security rule. The spent fuel transportation security rule is due to the Commission in February 2012.

STRATEGIC GOALS AND OBJECTIVES:

The final rule is consistent with the NRC's strategic objectives and performance goals. The rule will continue to ensure the protection of public health and safety and the common defense and security. The rulemaking was conducted in an open process that allowed the public to comment on the advance notification measures.

AGREEMENT STATE ISSUES:

A copy of the draft final rule *Federal Register* notice was provided to the Agreement States so they could have an early opportunity for review. No comments were received from the Agreement States.

The NRC staff has analyzed the final rule in accordance with the procedures established within Part III of the Handbook to Management Directive 5.9, "Categorization Process for NRC Program Elements." The changes to 10 CFR Part 71 are Compatibility Category B and the changes to 10 CFR Part 73 are reserved to the NRC. Compatibility is also addressed in Section V of the Statements of Consideration. The Standing Committee on Compatibility reviewed the proposed rule and agreed that these amendments to the NRC regulations are a matter of compatibility between the NRC and the Agreement States. No changes to the compatibility designations were made in the final rule.

COMMITMENTS:

1. Notify each Federally-recognized Tribe of the publication of the final rule and ask the Tribe if it wants to receive advance notifications of shipments that cross the Tribe's reservation.
2. Develop a list of participating Tribes, Tribal contact information, and a map delineating the participating Tribe's reservation to post on the NRC Web site.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication in the *Federal Register* the notice of final rulemaking (Enclosure 1).
2. To satisfy the requirement of the Regulatory Flexibility Act, 5 U.S.C. 605 (b), certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the enclosed *Federal Register* notice.
3. Note:
 - a. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b);

- b. A final Regulatory Analysis has been prepared for this rulemaking (Enclosure 2);
- c. The staff has determined that this action is not a “major rule,” as defined in the Congressional Review Act of 1996 (5 U.S.C 804(2)) and has confirmed this determination with the Office of Management and Budget (OMB). The appropriate Congressional and Government Accountability Office contacts will be informed;
- d. The appropriate Congressional committees will be informed;
- e. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the Office of the Federal Register; and
- f. The final rule contains amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) that must be submitted to the OMB for its review and approval before publication of the final rule in the *Federal Register*.

RESOURCES:

The estimated resources to complete the rule are included in the fiscal year (FY) 2011 President’s Budget and FY 2012 budget request (1.1 FTE across all the offices in FY 11 (0.7 for the Office of Federal and State Materials and Environmental Management Programs) and about 0.1 in FY 12 (0.1 for the Office of Nuclear Material Safety and Safeguards and less than 0.1 for the Office of the General Counsel)). The resources for developing the Tribal list and the map delineating the location of Tribal reservations are included in the FY 2012 budget request (about 0.8 FTE in FY12). Neither effort has contract dollars associated with it.

COORDINATION:

The Office of the General Counsel has no legal objection to the rulemaking. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections.

/RA by Michael F. Weber for/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

- 1. [Federal Register Notice](#)
- 2. [Regulatory Analysis](#)

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 71 and 73

RIN: 3150-AG41

[NRC-1999-0005]

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

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) is amending its regulations that govern packaging and transportation of radioactive material and physical protection of plants and materials. Specifically, the amendments require licensees to provide advance notification to participating Federally-recognized Tribal governments regarding shipments of irradiated reactor fuel and certain nuclear wastes for any shipment that passes within or across their reservations. The rule extends to Tribal officials, his or her designee, and Tribal law enforcement personnel relief from fingerprinting requirements required for access to Safeguards Information (SGI). The participating Tribal government is required to protect the shipment information as SGI.

DATES: *Effective Date:* This final rule is effective on **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Compliance Date: Compliance with the Tribal advance notification provisions of 10 CFR 71.97(c)(3) and 73.37(f) is required on **[INSERT DATE 1 YEAR AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You can access publicly available documents related to this final rule using the following methods:

- **NRC's Public Document Room (PDR):** The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- **NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are available online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.
- **Federal Rulemaking Web Site:** Public comments and supporting materials related to this final rule can be found at <http://www.regulations.gov> by searching on Docket ID

NRC-1999-0005. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668; e-mail: Carol.Gallagher@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Merri Horn, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone: 301-415-8126; e-mail: Merri.Horn@nrc.gov.

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I. Background

Current NRC regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) require licensees to inform State governors, or the governor's designee, of certain shipments of irradiated reactor fuel and certain nuclear waste passing through or across the boundary of their States. Section 73.37, "Requirements for physical protection of irradiated reactor fuel in transit," requires licensees to provide advance notifications for shipments of irradiated reactor fuel in excess of 100 grams in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding. Section 71.97, "Advance notification of shipment of irradiated reactor fuel and nuclear waste,"

requires licensees to provide advance notice for 1) shipments of irradiated reactor fuel in quantities less than that subject to § 73.37; and 2) certain licensed material that is required to be transported in Type B packaging and is being transported to a disposal facility or a collection point for transport to a disposal facility. The advance notification provisions apply if the quantity of licensed material in a single package exceeds the least of the following: 1) 3000 times the A_1 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, "Packaging and Transportation of Radioactive Material," for special form radioactive material; 2) 3000 times the A_2 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for normal form radioactive material; or 3) 1000 Terabequerel (TBq) (27,000 curies). Certain information provided for shipments of irradiated reactor fuel is considered to be SGI under the NRC regulations and must be protected under the requirements in § 73.21, "Protection of Safeguards Information: Performance requirements," and § 73.22, "Protection of Safeguards Information: Specific requirements."

The NRC first developed these advance notification regulations in 1982 to comply with the NRC Authorization Act for Fiscal Year 1980. The NRC Authorization Act for Fiscal Year 1980 was enacted to deal with concerns expressed by States about their abilities to fulfill their responsibilities to protect public health and safety while waste shipments pass through their jurisdictions. Neither the Atomic Energy Act of 1954, as amended (AEA), nor the notification regulations required licensees to notify Native American Tribes of this type of shipment passing through their Tribal reservations. Tribal officials requested similar notification in the 1990s.

On December 21, 1999 (64 FR 71331), the NRC published an Advance Notice of Proposed Rulemaking (ANPR) to solicit stakeholder input on a possible rulemaking that would consider requiring advance notification to Native American Tribes of transportation of certain

types of nuclear waste. Information was sought on minimizing the burden to licensees, identifying the location of Tribal reservations in relationship to shipment routes, and the sharing and protecting of SGI. A total of 44 comment letters were received. Thirty-six of the letters received were from Tribes and Tribal organizations; four letters were received from private citizens; and letters were received from a licensee, an industry association, a State agency, and a Federal agency. Virtually all the commenters favored providing advance notification to Tribal governments with some disagreement on the details of the implementation. Most commenters were in favor of providing Tribal governments the same advance notification that State governments receive regarding high-level radioactive waste shipments. Commenters encouraged the NRC to provide advance notification through more up-to-date means of communication, 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. The comments received in response to the ANPR were taken into account during the development of this rule.

On November 6, 2000, President Clinton issued Executive Order (E.O.) 13175, "Consultation and Coordination with Indian Tribal Governments." The E.O. 13175 emphasized the importance of respecting the sovereignty of Tribal governments and working with them on a government-to-government basis.¹ On November 5, 2009, President Obama expressed his commitment to E.O. 13175 at the White House Tribal Nations Conference and Interactive Discussion with Tribal Leaders. During the conference, the President signed an Executive Memorandum on Tribal consultation for the heads of Executive Departments and Agencies,

¹ These ideas were previously emphasized in a Presidential Memorandum dated April 29, 1994, entitled "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951; May 4, 1994) and Executive Orders 12875 and 12866.

directing Cabinet agencies to take steps to develop regular and meaningful consultation with Tribal governments regarding the implementation of E.O. 13175. While the Executive Memorandum does not directly apply to independent agencies, the NRC has adopted agency practices that are consistent with the principles of consultation and cooperation with Indian Tribal governments articulated in President Clinton's April 29, 1994, guidance and E.O. 13175. The NRC's practice is to conduct its activities in a manner that respects the rights of sovereign Tribal governments, and involves consultation and cooperation with Federally-recognized Tribes on a government-to-government basis.

II. Discussion

A. What action is the NRC taking?

The NRC is amending its regulations to require licensees to provide to participating Tribal officials, or their designees, advance notice of shipments of irradiated reactor fuel under § 73.37 and other nuclear wastes listed in § 71.97 before crossing the border of Tribal reservations. For the purposes of these regulatory provisions, "Tribal official" is defined as the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership of an Indian Tribe. This action would only affect commercial shipments being made by the NRC and Agreement State licensees. This action does not include shipments that are not subject to NRC regulation, including many shipments made by the U.S. Department of Energy (DOE) or the U.S. Department of Defense (DOD).

B. What is the purpose of the final rule?

The purpose of the final rule is to recognize Tribal sovereignty by informing Tribes that choose to receive advance notification of shipments of irradiated reactor fuel and other nuclear wastes passing across their reservations and to recognize Tribal governments' interest in being informed of activities occurring on Tribal reservations.

C. Whom would this action affect?

The final rule would apply to any NRC licensee that ships irradiated reactor fuel. The final rule also affects any licensee that ships other nuclear wastes listed in § 71.97, namely, certain licensed material that is: a) required to be transported in Type B packaging; b) being transported to or across a State boundary enroute to a disposal facility or to a collection point for transport to a disposal facility; and c) the quantity of licensed material in a single package exceeds the least of the following: 1) 3000 times the A_1 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for special form radioactive material; 2) 3000 times the A_2 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for normal form radioactive material; or 3) 1000 TBq (27,000 curies).

Finally, the rule affects any Tribe that chooses to receive the advance notifications of shipments passing within or across its Tribal reservation.

D. Would all Tribes receive advance notifications?

No. Given the information protection requirements involved, the NRC believes that Tribes should have the option to decide whether to receive advance notifications of shipments that pass across their Tribal reservations. If a Tribe opts to receive the advance notifications,

the Tribe is obligated to protect the schedule and itineraries of the shipments under the SGI requirements in §§ 73.21 and 73.22. If a Tribe opts not to receive the advance notifications, the Tribe has no information protection obligations relating to the shipments. For the purposes of the advance notifications, an “Indian tribe” is defined as an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994. There are currently 565 Federally-recognized Tribes.

E. How and when would Tribes be given the option to receive advance notifications?

The NRC staff will contact each Federally-recognized Tribe to provide them information on the rule. As part of the information, the Tribe will be asked if they would like to receive advance notifications of irradiated reactor fuel and other nuclear wastes listed in § 71.97 before crossing the border of the Tribal reservation. The Tribe can then notify the NRC as to whether it would like to receive the advance notifications and certify that the SGI information will be appropriately protected. Tribes will be able to change their decision to receive or not receive the advance notifications by informing the NRC at any time. Information will be available on the NRC Web site on how a Tribe can change its decision. In addition, the NRC plans to contact all Federally-recognized Tribes every 5 years to give Tribes an opportunity to change their status in regards to receiving notifications.

F. Does a Tribe’s decision to receive advance notification affect whether shipments pass through that Tribe’s reservation?

No. This rulemaking would only give the Tribe a voluntary opportunity to receive advance notification of shipments that cross their reservation. A Tribe's decision to receive or not receive advance notifications does not bear upon shipment routes, which are reviewed and approved subject to different NRC requirements.

G. How would licensees determine who the Tribal contacts are?

The NRC will maintain a list of Tribal contacts as is done for State governmental contacts. The NRC will work with the Tribes to complete and maintain the list. The Tribal official will designate who is intended to represent the Tribe. The NRC staff currently intends to annually publish a list of Tribal contacts in the *Federal Register* and post the list on the Web site maintained by the NRC's Office of Federal and State Materials and Environmental Management Programs. The NRC also plans to have a map on the Web site that shows the location of the Tribal reservations. The Web site associated with the map will also provide the necessary contact information for the Tribe.

H. How would advance notifications be made to Tribal officials?

The methods permitted for communication of advance notifications are detailed in § 71.97(c), "Procedures for submitting advance notification." Notifications are made in writing. The written notifications could be sent by mail or courier. The SGI may not be transmitted by unprotected telecommunication circuits. Requirements for the transmittal of SGI are contained in § 73.22(f) "External transmission of documents and material."

I. Would Tribes be required to protect the advance notifications?

Tribes are required to protect some of the information contained in the advance notification as SGI as specified by §§ 73.21 and 73.22. Only individuals that have a “need-to-know” the information and have undergone both a Federal Bureau of Investigation criminal history records check and a background check for determination of trustworthiness and reliability or have been relieved from these checks under § 73.57, “Requirements for criminal history records checks of individuals granted unescorted access to a nuclear power facility or access to Safeguards Information,” or § 73.59, “Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals,” may be provided access to the SGI. Basic protection requirements include storing unattended SGI in a locked security storage container. Access to the lock information, such as a combination, must be strictly controlled to prevent disclosure to an individual not authorized to access SGI. Documents containing SGI must be destroyed by burning, shredding, or any other method that precludes reconstruction by means available to the public at large. The specific requirements for the protection of SGI are located in § 73.22. Failure to comply with these regulatory requirements could result in civil or criminal penalties.

J. Would Tribal officials need to be fingerprinted and undergo a background investigation for access to SGI?

Section 149 of the AEA requires fingerprinting and submission of fingerprints to the Attorney General for identification and criminal history records check for any individual permitted access to SGI, unless the Commission, by rule, has relieved that individual from the fingerprinting, identification, and criminal history records check requirements. The Commission

may relieve individuals from these regulatory requirements “if the Commission finds that such action is consistent with its obligations to promote the common defense and security and protect the health and safety of the public,” 42 U.S.C. §149(b). As allowed by Section 149 of the AEA, the NRC enacted § 73.59 to relieve specific categories of individuals from fingerprinting and criminal history record checks prior to receiving SGI. The categories of individuals covered by this regulation include the governor of a State or his or her designated State employee representative; Federal, State, or local law enforcement personnel; and representatives of foreign government organizations that are involved in planning for, or responding to, nuclear or radiological emergencies or security incidents who the Commission approves for access to SGI.

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Indian tribes exercise inherent sovereign powers over their members and territory. The United States recognizes the right of Indian tribes to self-government and supports Tribal sovereignty and self-determination. As a result, the NRC has determined that exempting Tribal officials, Tribal official designees, or Tribal law enforcement personnel is analogous to exempting the State governor, State governor designees, or State law enforcement personnel from the fingerprinting and background check requirements. Furthermore, some Tribes have emergency response responsibilities similar to States. Revising the regulations permits the Commission and licensees to more efficiently provide SGI relating to advance notification of shipments to Tribes who determine this information enables them to be more effective in their day-to-day efforts to ensure the protection of nuclear materials and respond to emergencies within their territories. Therefore, the Commission has determined that the rule helps the

Commission fulfill its obligations to promote the common defense and security and to protect the health and safety of the public.

The Tribal official, Tribal official designee, and Tribal law enforcement personnel are considered trustworthy and reliable to receive SGI by virtue of their occupational status and have either already undergone a background or criminal history check as a condition of their employment, or are subject to direct oversight by Government authorities in their day-to-day job functions. Under the final rule, if the Tribe decides to participate in the advance notification of shipment program, the Tribal official, Tribal official designee, or Tribal law enforcement personnel who need-to-know this SGI information to perform their job function, may have access to SGI information regarding advance notification of shipments affecting their territories without undergoing fingerprinting or a criminal history check. In addition, the NRC has extended the relief to cover other types of SGI. Revising the regulations permits the Commission to more efficiently provide SGI to Tribes when it is determined that the Tribe has a need-to-know. The NRC believes that exempting Tribal officials, Tribal official designees, or Tribal law enforcement personnel from the fingerprinting requirement is analogous to exempting the State governor, State governor designees, or State law enforcement personnel from the fingerprinting and background check requirements. Providing the relief also recognizes the right of Indian tribes to self-government and supports Tribal sovereignty and self-determination. Relief from the fingerprinting requirement cannot be provided by Commission order, it can only be provided by rule. By including the relief in this rulemaking for all types of SGI, a future rulemaking will not need to be conducted, thus saving NRC resources. Tribal officials will still need to have an established need-to-know before they would be given access to any other types of SGI. This

rulemaking establishes need-to-know for the advance notifications for irradiated reactor fuel and nuclear waste shipments that pass within or across the boundary of a tribal reservation.

The final rule adds Tribal official, his or her designee, and Tribal law enforcement personnel to the list of categories of individuals that are granted relief from the fingerprinting, identification and criminal history records checks, and other elements of background checks. All individuals granted access to SGI are required to abide by the requirements in §§ 73.21 through 73.23 for proper management and protection of SGI.

K. When do these actions become effective?

The final rule will be effective 60 days after publication in the *Federal Register*. However, licensees will not need to comply with the Tribal advance notification provisions in 10 CFR 71.97 and 73.37(f) for 1 year after the rule is published in the *Federal Register*. This date will be inserted into the regulatory text. This provides time for the NRC to work with the Tribes and develop the list of Tribal contacts, develop a map showing the location of Tribal reservations, provide training on protection of SGI to the Tribes, and provide time for licensees to develop procedures and conduct training on the new requirements.

III. Summary and Analysis of Public Comments on the Proposed Rule

The proposed rule was published on December 6, 2010, (75 FR 75641) for a 75-day public comment period that ended on February 22, 2011. The NRC received comments from 10 entities. The commenters on the proposed rule included Tribes, a Tribal organization,

individuals, companies, and a Federal agency. Copies of the public comments are available in the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD or at

<http://www.regulations.gov> under Docket ID NRC-1999-0005.

In general, most of the commenters expressed support for the rulemaking. There were no comments received in opposition of the rule. Many of the comments received were related to implementation. The Commission specifically requested input on two subjects: 1) the best method for informing Tribes of the obligations of possessing SGI; and 2) whether the relief from fingerprinting should be applied generally to access other types of SGI. A discussion of the comments and the NRC's responses follow.

Comment 1: In the proposed rule, the NRC specifically invited comment on the best method for informing Tribes of the obligations of possessing SGI. Two commenters addressed this topic directly, and two other commenters addressed the training aspect. One commenter noted that when working with Indian tribes, there is no "one size fits all" approach. The commenter noted that once this rule is final, it will be important to first identify Tribes that would likely be impacted by shipments from NRC licensees to inform them of the rule change and their ability to receive advance notifications. The commenter stated that once the interested Tribes are identified, the NRC should convene a meeting (or training course) for the interested Tribes to inform them of their options for participating, the obligations of possessing SGI should the Tribe choose to receive the advance notifications, and to develop a range of options to inform the Tribes. Another commenter indicated that the NRC should carefully consider the methods used to inform the Tribal governments of their responsibility in possessing SGI, as failure to comply with these requirements could result in civil or criminal liability. The commenter noted that the mechanisms should be reasonable, effective, and based on further research. The

commenter suggested that the NRC should first determine whether this material is the type that would lend itself to Webinars or short-term orientation training. The commenter suggested that after selecting a mechanism in which to disseminate the material, the NRC should attempt to gain insight into the Tribal governments' prospective on the material by conducting surveys to determine if the material is comprehensible, or alternatively, whether it contains complex legal provisions and unclear obligations. The commenter noted that both parties should anticipate the appropriate costs and the time commitments involved with such training. Another commenter noted that training is likely to be the biggest expense. The commenter noted that Tribes should be afforded opportunities for training as to the obligations for possessing SGI, and the NRC should consider developing both distant learning opportunities and a training of trainers program, to share with Tribal leaders and Tribal law enforcement agencies. One commenter noted that effective security training is as important as the decision to share the information itself. The commenter suggested that the NRC use Web-based mechanisms as well as more traditional methods of communication, such as information packets and training courses. The commenter pointed out that the NRC should customize its outreach to each Tribal government based on the Tribal government's capacity and level of engagement. The commenter pointed out that the NRC's outreach effort could be incorporated into existing procedures where an NRC staff member contacts individual Tribes. The commenter indicated that the NRC should offer each participating Tribe training options. Participating Tribes could choose from a range of training options, including technologically advanced options, like Webinars, and more traditional options such as training packets and training courses. The commenter noted that Tribes are willing to make a good-faith effort to carry out their obligations

regarding SGI possession and that while training courses may require more resources, the nature of the responsibility involved justifies such attention to training.

Response: The NRC agrees that there is no one-size-fits-all approach that will work. The NRC is considering several different mechanisms to inform the Tribes of the Agency's SGI protection responsibilities. Initially, the NRC plans to contact by letter all 565 Federally-recognized Tribes when the final rule is published in the *Federal Register*. This initial contact will include a copy of the final rule and information on the protection of SGI, as well as a request to inform the NRC if the Tribe wants to receive the advance notifications. For those Tribes that express interest, more detailed training will be available by Webinar, meetings, training classes, compact disk, etc. Decisions on the best mechanism to provide the training will depend on such things as the number of Tribes that will need the training, locations of the Tribes, and the Tribe's preference.

Comment 2: In the proposed rule, the NRC specifically invited comment on whether the relief from fingerprinting should be applied generally to access other types of SGI. Only one commenter addressed this topic. The commenter felt that the relief from fingerprinting should be expanded and should be applied generally to other types of SGI based on the presumption that the established information protection procedures employed are presumed to meet the general performance requirement.

Response: The NRC has decided to expand the relief to all types of SGI. SGI includes security-related information such as security plans, alarm information, lock combinations, information related to response forces, adversary characteristics, and other types of information listed in §§ 73.22 and 73.23. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive

Orders, and court decisions. Indian tribes exercise inherent sovereign powers over their members and territory. The United States recognizes the right of Indian tribes to self-government and supports Tribal sovereignty and self-determination. As a result, the NRC has determined that exempting Tribal officials, Tribal official designees, or Tribal law enforcement personnel is analogous to exempting the State governor, State governor designees, or State law enforcement personnel from the fingerprinting and background check requirements. Furthermore, some Tribes have emergency response responsibilities similar to those of States. Revising the regulation permits the Commission to more efficiently provide SGI to Tribes when it is determined that the Tribe has a need-to-know. Need-to-know is determined on a case-by-case basis. Factors in the decision can include a determination that the information enables the Tribe to be more effective in its day-to-day efforts to ensure the protection of nuclear materials and respond to emergencies within its territories. Therefore, the Commission has determined that the rule helps the Commission fulfill its obligations to promote the common defense and security and to protect the health and safety of the public. Individuals would still need to have an established need-to-know before they would be given access to any other types of SGI. This rulemaking establishes need-to-know for the advance notifications for irradiated reactor fuel and nuclear waste shipments that pass within or across the boundary of a tribal reservation.

Relief from the fingerprinting requirement cannot be provided by Commission order; it can only be provided by rule. By including the relief in this rulemaking, a future rulemaking will not need to be conducted. As noted elsewhere in the Statement of Considerations, the Tribal

official would have to certify that the Tribe has the necessary protection measures in place and that they will protect the SGI in accordance with the requirements in 10 CFR part 73 (§§ 73.21 through 73.23).

Comment 3: Most of the commenters expressed support for the rulemaking. One commenter noted that the transportation of nuclear waste shipments has always been of concern to Tribal government officials and community members as the potential long-term effects of a transportation accident and possible contamination of tribal ecosystems poses a high risk to cultural continuity. One commenter noted that the rule is meaningful because it will increase the Tribal government's ability to perform their responsibilities in protecting public health and safety, as well as recognize Tribal sovereignty. Another commenter expressed support because the NRC's approach acknowledges that sovereign Tribal nations require the same information provided to the States in order to protect health and the environment. The commenter noted that the Tribe's all-hazard Fire Department can be more prepared for very unlikely incidents involving nuclear waste if the Tribe is informed of the shipments. One commenter commends the NRC for its understanding of the unique legal relationship between the Federal government and Tribal governments as the basis for amending the regulations, and for adhering to the principles of consultation and cooperation articulated in E.O. 13175. Commenters noted that Tribal governments exercise regulatory jurisdiction over a broad range of activities on their lands and that Tribal government officials, just like State officials, are charged with protection of the public and have a need-to-know the type and amount of hazardous materials that traverse through their jurisdictions. Commenters noted that notification to Tribal authorities will acknowledge the rights and sovereignty of Tribal governments as well as the responsibility that tribes have for the welfare and safety of natives

and non-natives within their jurisdictional boundaries. Commenters noted that notification to Tribal governments will allow Tribal law enforcement and other officials to prepare for safety and security of shipments as well as develop emergency preparedness plans in the event of a transportation accident. One commenter noted that the rule acknowledges Tribe's sovereign right to be notified of these risks in order to protect the health and safety of their citizens. Several Tribes indicated that they wanted to receive the advance notifications.

Response: The NRC acknowledges the support for the rule. No additional response is necessary.

Comment 4: There were several questions related to the notifications and how enforcement would occur. One commenter wanted to know: 1) how licensees will know if their shipment will pass through Tribal lands subject to the notification requirements; 2) whether the licensee would be in violation if it notified a Tribe that had originally requested notifications but had recently decided not to receive the advance notifications; and 3) whether a licensee would be in violation for failing to notify a Tribe that had recently decided to receive the notifications.

Response: The NRC will maintain a list of those Tribes that want to receive the notifications. The list will be published annually in the *Federal Register* and posted on the NRC Web site. The NRC plans to place a map on the Web site that will denote the location of the Tribal reservations of those Tribes that decide to participate and receive the advance notifications. A licensee will need to check the map to see if the route traverses any of the reservations in order to determine whether it will need to contact any Tribes. A licensee would be in violation if it provided safeguards information to a Tribe that was not participating in the advance notification program. A licensee would also be in violation if it did not provide information to a Tribe that should receive notifications. If the map had not been updated before

the notifications were or were not provided, the licensee would not be in violation, as it would have had no method of knowing. The NRC will update the list and map promptly upon receiving notification from a Tribe of any change in the decision to receive advance notifications.

Comment 5: Several commenters expressed support for the provision that allows flexibility for the Tribe to decide if it wants to receive the advance notifications or not, particularly as there is a resource requirement for safeguarding the information. One commenter noted that this option should be explained clearly to the Tribal governments. Another commenter noted that accommodations should be made to assist the Tribes in implementing this rule. These accommodations would include assistance with implementing personnel safeguard protocols. One commenter noted that the provision presents implementation challenges. The commenter suggested that the NRC should contact the Tribes at preestablished times, perhaps once a year, to confirm whether the Tribe would like to continue receiving notifications. The commenter noted that if a Tribe decides to opt out that licensees should be notified and the change reflected in the annual *Federal Register* notice. The commenter also noted that if a Tribe decides to receive the advance notifications, the NRC should establish a clear procedure for notifying licensees and scheduling training on the protection of the information. The commenter noted that Tribal boundaries should be clearly defined and conveyed to both the licensee and the participating Tribe.

Response: The NRC plans to initially contact the Tribes when the final rule is published in the *Federal Register*. This initial contact will include a copy of the final rule and information on the protection of SGI, as well as a request to inform the NRC if the Tribe wants to receive the advance notifications (possibly by utilizing a prepaid, self-addressed postcard). Once a year, the NRC will contact those Tribes that choose to receive the notifications. The NRC outreach

will include a request to update any contact information and ask if the Tribe wishes to continue to receive the advance notifications. Every 5 years, the NRC plans to contact all of the Federally-recognized Tribes to inform them of the option to receive the advance notifications and the associated responsibilities that accompany those notifications. The NRC will also contact non-participating Tribes when a newly approved route crosses the Tribal reservation. The NRC Web site will also contain detailed instruction on how a Tribe can choose to opt in or opt out. The list of participating Tribes will be published in the *Federal Register* once a year and will be posted on the NRC Web site. Additionally, a map will be posted on the NRC Website that shows the location of the Tribal reservations and the routes that surround them. The Web site will also have Tribal contact information. As soon as the NRC receives information from a Tribe on the Tribe's decision to participate and receive the advance notifications or the decision to stop receiving the advance notifications, the NRC will promptly update the information on the NRC Web site. Information addressing training concerns is detailed in the response to Comment 1.

Comment 6: The NRC received several questions related to route approvals. One commenter wanted to know: 1) for future route approval requests, whether the Tribes will be identified similar to counties and be listed under individual states or treated similar to states; 2) for future route surveys, how the jurisdictions will be determined as not all counties and Tribes are marked along interstate and secondary routes; 3) whether the Tribal emergency response contacts will be listed; and 4) whether current approved routes will need to be resurveyed and amended to show each Tribe. Another commenter noted that the NRC must clearly outline procedures for route changes and enforcement.

Response: The Tribes will be identified and listed separately as is done for the States. The licensee should provide the 24-hour contact information that is available for the Tribe's local law enforcement agency in each county along the route. The route plan must be segmented by counties and Tribal reservations for each state. The NRC will have a map on its Web site that denotes the locations of the Tribal reservations. The Tribal emergency contacts will be listed. The currently approved routes will not be resurveyed, but will be amended if a Tribe along the route opts to be notified.

Comment 7: One commenter noted that a letter, post-marked 7 days prior to the 7-day window of transport, is sufficient to constitute notice. The commenter noted that it is unclear what constitutes sufficient notice if the designated Tribal point of contact cannot be reached for schedule changes as schedule changes are typically made via telephone. The commenter indicated that the rule should be clearer about what constitutes notice in these cases and the options for recourse if notice is not provided. The commenter also noted that the rule needs to be explicit on e-mail notification as this is not addressed in the proposed rule.

Response: If the Tribal contact cannot be reached for a schedule change, the licensee can leave a non-SGI voice mail message. E-mail notification of schedule changes is not prohibited under the rule. Note that if the notification contains SGI, the e-mail must meet the requirements of § 73.22(f).

Comment 8: One commenter noted that the Tribe's law enforcement agency has in place measures to protect SGI and can conduct proper planning, training, and coordination in support of state, local, and railroad police departments once a notification system is in place. The commenter also expressed support for the NRC's requirement to manage this information as SGI on a "need-to-know" basis.

Response: No response is necessary.

Comment 9: One commenter noted that the best method for notification is a phone call to a previously designated individual. The commenter noted that this prevents the creation of an unnecessary paper trail or computer access that may be compromised, and assures the information is provided to the correct individual.

Response: The rule requires that the notification be conducted in writing because it contains SGI, and SGI cannot be transmitted using non-secure devices. Any Tribe deciding to receive the advance notifications would not be required to retain the notification; the Tribe could destroy the notice upon receipt, as long as the destruction is conducted in accordance with § 73.22(i). The notifications of schedule changes may be made by phone, as they typically do not contain SGI.

Comment 10: One commenter did not support additional background investigations for the Tribal Chairman or Tribal Vice Chairman because they are elected officials and have already undergone this procedure prior to taking office. The commenter noted that the Tribe is a sovereign nation and the Tribal leaders are analogous to a State Governor who has been exempted from these additional requirements.

Response: The rule relieves the Tribal official or their designee from the fingerprinting requirement as is done for a governor or the governor's designee. The rule defines the Tribal official as the highest ranking individual that represents Tribal leadership such as the Chief, President, or Tribal Council leadership of an Indian tribe.

Comment 11: One commenter noted that the proposed rule did not contain any discussion about how the rule would be enforced by the NRC on its licensees. The commenter wanted to know: 1) how the NRC will be informed that the licensees have, in fact, notified

Tribes of the shipments; and 2) whether there are penalties for non-compliance with the advance notification requirements. The commenter noted that enforcement needs to be addressed before moving forward and that the NRC needs to inform licensees of their obligation to provide the advance notification to the Tribes impacted by their shipments. Two commenters urged the NRC to implement effective oversight mechanisms to ensure compliance by licensees. One of the commenters noted that this should include specific remedies for failure to provide adequate notification.

Response: The licensee is not required to inform the NRC when they have provided the advance notifications to the States and Tribes. The licensee is subject to NRC inspection. As part of routine inspections, the NRC would check records to see if the required notifications have been made. If the required notifications have not been made, the licensee would be subject to a notice of violation. Depending on the severity, the violation could result in a civil penalty.

Comment 12: One commenter stated that the rule should establish a consultation process that provides for timely input from Tribal governments on route planning and disaster preparedness to ensure greater communication and strategic cooperation. The commenter indicated that it is vital that the NRC make every effort to respect the sovereign jurisdiction of Tribal nations and coordinate with them on matters that affect the health and safety of their citizenry.

Response: The NRC is not directly involved in developing the routes and would therefore not engage in a consultation with the Tribes or with the States through which a route crosses. The NRC does verify contact information after a route is submitted to the NRC. The NRC does not currently plan any consultation with the Tribes on disaster preparedness. In the

unlikely case of an accident and release of radioactive material from a waste shipment, the Federal response would include coordination with the affected Tribes.

Comment 13: One commenter requested notification of traditional and currently adjudicated homelands (which would include South Dakota, North Dakota, Minnesota, Nebraska, Wyoming, Montana, Kansas, and Wisconsin). Another commenter requested that Tribal boundaries should be clearly defined and conveyed to both the licensee and the participating Tribe.

Response: For implementation purposes for this rule, the NRC decided to require licensees to give advance notification to participating Federally-recognized Tribes when a shipment of irradiated reactor fuel and other radioactive wastes crosses the external boundary of the Tribal reservation. This definition provides a clearly defined area that can be used by the licensee to evaluate their routes and provide notification to the interested Tribal governments. The NRC expects to provide information (e.g., a map) on the NRC Web site to delineate the locations of Tribal reservations and Tribal contact information to aid the licensee compliance with the regulatory requirements.

The licensee will not be required to provide advance notification to participating Tribal governments for traditional and currently adjudicated homelands outside the external boundary of a Tribal reservation. These are not clearly defined areas, and some cases, are currently under dispute. For areas outside the external Tribal reservation boundaries, the current regulations require that the licensee provide notice to the applicable State government.

Comment 14: One commenter noted that DOE has for more than 27 years recognized the need to include Tribes as necessary parties for radioactive waste management and transportation activities including emergency management planning components. The DOE

indicated that it has provided advance notice of DOE shipments to Tribal officials for a number of years and has not experienced any resulting security problems or concerns. The DOE noted that the NRC's proposed amendments are consistent with DOE's current practice regarding advance notification of DOE shipments. The DOE noted that it supports the NRC's proposal to amend its regulations so that NRC licensees would be required to provide notification to Tribes. The DOE noted that the proposed amendments respect Tribal sovereignty, do not pose an increased threat to security, and can enhance safety. The DOE further indicated that advance notification helps ensure the preparedness of law enforcement and emergency response personnel along a shipping route, and the DOE believes that providing advance notification to States and Tribes enhances the safety of its shipments.

Response: No response is necessary.

Comment 15: One commenter asked if the rule changes will impact emergency response and first responder protocols for the licensee.

Response: The rule should not impact emergency response and the first responder protocols.

Comment 16: One commenter suggested that the NRC should create a system that continually seeks to update any outdated technology, policies, or procedures and that performs an annual review of the system's effect on both the Tribal governments, as well as licensees, to determine whether the regulation is costing either party unexpected financial loss.

Response: The NRC does not plan to conduct such reviews on the rule's ongoing impact. Tribes have the option to opt out and not participate in receiving the advance notifications. If a Tribe felt that receiving the notifications would have too great of a financial impact, the Tribe could decide not to receive the notifications.

Comment 17: One commenter stated that the NRC used plain language effectively and that the rule is clear.

Response: No response is necessary.

Comment 18: One commenter noted that the regulatory analysis is accurate and supports the rule. One commenter noted that the cost and burden to the NRC or its licensees in implementation of a rule change should not be a consideration in amending the regulation. The commenter noted that as an agency of the Federal Government, the NRC has a responsibility to protect Tribal lands and peoples. The commenter noted that licensees must be cognizant of the risks that their activities could pose to every segment of the population, and licensees have an ongoing duty to ensure the safety and security of Tribal communities. The commenter stated that because of the high-risk nature of the licensees' products and activities, notification to appropriate Tribal government officials should be part of the licensees' standard business process.

Response: The NRC prepares a regulatory analysis to support most rulemakings. The analysis lays out both the costs and benefits of the rule so that the NRC can make an informed decision.

Comment 19: One commenter noted that it is not clear whether the proposed rule change encompasses all current and potential Federal spent nuclear fuel and high-level radioactive waste campaigns. The commenter stated that the origin and destination of these materials is relevant because the fiduciary duty to Tribes is borne by all Federal entities responsible for these shipments, including the DOE and DOD. The commenter stated that all similar spent nuclear fuel and high-level radioactive materials shipments and potential impacts need to be addressed by the NRC, and appropriate Federal agencies. Another commenter

requested that the rule include shipments from the DOE and DOD. Another commenter noted that it is unclear whether nuclear waste shipments going to a Federal repository or interim storage facility would be subject to this rule. The commenter believed that once waste leaves a commercial nuclear power plant for Federal disposal, the shipments are considered to be DOE shipments. The Commenter noted that the language must be clarified to ensure that any shipment originating from an NRC- licensed facility (i.e., all commercial power plants) would be covered by the rule provisions, even if the DOE takes possession of the material and it becomes a DOE shipment.

Response: Under the AEA and the Energy Reorganization Act of 1974, as amended, the NRC has authority over shipments of NRC-licensed material. DOE and DOD may transport DOE and DOD titled spent nuclear fuel and high-level radioactive waste shipments outside of NRC's regulatory authority. These DOE and DOD spent nuclear fuel and high-level radioactive waste shipments are not licensed by the NRC for transportation. In some circumstances Congress mandated that the DOE follow the NRC notifications of state and local governments prior to transportation of spent nuclear fuel or high-level radioactive waste for disposal at a repository or for monitored retrievable storage. The mandate does not include Native Tribes; however, the DOE has a policy in place to provide notification to Federally-recognized Tribes in advance of any shipments of spent nuclear fuel or high-level radioactive material. The DOE's policy ensures an effective implementation of government-to-government relationship with Tribal governments.

Comment 20: One commenter noted that certain Tribes have designated their lands as nuclear-free zones. In order to more fully achieve the NRC's stated goal of respecting Tribal

sovereignty, the commenter encouraged the NRC and its licensees to establish alternative transportation routes that do not involve these territories.

Response: Although the NRC does approve the routes proposed by the licensee, the licensee is responsible for designating the routes for nuclear waste shipments for which advance notification will be required under this rule. With respect to these shipments, regulations of the Department of Transportation in 49 CFR Part 397, Subpart D “Routing of Class 7 (Radioactive) Materials” and Subpart E “Preemption Procedures,” govern a carrier’s selection of the highway route. These regulations also contain the procedures which must be followed by a State or Indian tribe to designate a highway route over which these shipments may or may not be transported. See also the Federal hazardous material transportation law at 49 U.S.C. 5112 and 5125(c).

In particular, 49 CFR Part 397, Subpart D sets forth the standards for the States and Indian tribes to follow when designating specific highway routes for transportation of Class 7 (radioactive) materials. In particular, 49 CFR 397.103 “Requirements for State routing designations” requires the routing agency to select routes to minimize radiological risk and consult with affected local jurisdictions and other affected States to ensure consideration of all impacts and continuity of designated routes. A list of State-designated preferred routes is available upon request to Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance (MC-EC), 1200 New Jersey Ave., SE, Washington, DC 20590-0001.

Comment 21: One commenter noted that the Tribes’ resources and experience vary with regard to navigating government-to-government relations of this nature. The commenter indicated that the NRC needs to make a good-faith effort in these inaugural stages as some

Tribes are able to assist the NRC with advanced tools, such as digital mapping of their areas, while others are struggling with funding for even older, more established projects.

Response: The NRC is aware that the Tribes' resources and experience vary which is why all Tribes will be initially contacted by letter. The NRC will offer different methods for conducting training on protection of SGI so that Tribes can select the appropriate method to fulfill their needs.

Comment 22: One commenter noted that there is no provision in the rule concerning feedback or review and that feedback on training, notification processes, and general implementation issues would be very valuable to successful execution of the rule. The commenter noted that feedback would also help facilitate dialogue with the Tribal governments over other issues in nuclear transportation. The commenter noted that the proposed rule may benefit from an institutionalized review procedure, particularly in the initial years.

Response: Although the NRC does not have an institutionalized review procedure, it does request feedback when it conducts training and outreach efforts during public meetings.

Comment 23: One commenter encouraged the NRC to coordinate with other government agencies that regularly work with sovereign Tribal governments, and particularly with the DOE. The commenter encouraged the NRC to make use of the methods and contacts that the DOE currently employs in its regular communication with Tribal governments as such coordination would likely reduce the labor required to maintain an accurate list of Tribal government contacts. The commenter also noted that out of respect for the sovereignty of Tribes and Tribal governments, coordination with other government agencies and consistent communication procedures would also reduce the administrative burden on the Tribes themselves.

Response: The NRC does coordinate with other Federal agencies on a case-by-case basis. For example, the NRC worked with the Bureau of Indian Affairs (BIA) and the National Council of American Indians in developing the list of Federally-recognized Tribes contacted about this rule and for other activities, including the creation of an NRC database encompassing all 565 Federally-recognized Tribes. NRC frequently coordinates with DOE in areas of mutual interest, including DOE's Tribal outreach.

Comment 24: One commenter suggested that the NRC work with the DOE and other agencies to develop a central database of Tribal information that can be easily accessed by licensees. The commenter noted that accurate information about the recognized geographical boundaries of Tribes is of utmost importance to successful implementation of the rule. The commenter stated that the NRC should work with the DOE and BIA to create and regularly update a map of Tribal jurisdictions. The commenter noted that the map could be made available to licensees on the NRC Web site. The commenter indicated that the NRC should also coordinate with other agencies to acquire information on cultural holidays or events that could result in a particular Tribal government being closed and not receiving its necessary notification.

Response: The NRC is currently developing and will maintain a United States map that shows the Tribal reservations, using a State-by-State presentation, and the contacts for those Tribes that choose to receive the notifications. The NRC will coordinate with DOE and BIA as appropriate. Additionally, the NRC has already developed a calendar of Tribal days of significance for internal use and will consider adding the information to the NRC Web site.

Comment 25: One commenter noted that a primary concern about this rule is that the additional dissemination of nuclear waste transportation information could threaten information

security. The commenter believes that the rule adequately safeguards against this concern by making the advance notification voluntary, ensuring security in a manner commensurate with State procedures, and providing clear equipment and training requirements. The commenter stressed that Tribal governments are just as invested in preventing harmful uses of nuclear waste as state governments and that the rule not only recognizes Tribal sovereignty, but also their stake in this decision-making process.

Response: The NRC agrees with the commenter that the rule provides adequate protection of the information contained in the advance notifications.

IV. Discussion of Final Amendments by Section

Section 71.4 Definitions.

The definition for *Indian tribe* is based on the term as defined in E.O. 13175. The definition of *Tribal official* describes the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

Section 71.97 Advance notification of shipment of irradiated reactor fuel and nuclear waste.

Current paragraph (a) is renumbered as paragraph (a)(1) and revised to reflect shipments within or across the State boundary instead of through or across. This change is made for consistency of rule language. Paragraph (a)(2) is added to require licensees to provide advance notification to Tribal officials or their designee of the shipment of licensed material within or across the boundary of the Tribe's reservation.

Paragraph (c) is revised to require notifications to be made to the office of each appropriate Tribal official or his or her designee. Paragraph (c) is also revised to indicate how the list of Tribal officials will be made available.

Paragraph (d) is revised to include arrival at Tribal reservation boundaries.

Paragraph (e) is revised to require that revision notices be provided to Tribal officials or their designee if schedule information previously provided will not be met.

Paragraph (f) is revised to require that cancellation notices be provided to each Tribal official or his or her designee that had previously been notified of an advance shipment.

Section 73.2 Definitions.

The definition for *Indian tribe* is based on the terms as defined in E.O. 13175. The definition for *Tribal official* is added to describe the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

Section 73.21 Protection of Safeguards Information: Performance Requirements.

Paragraph (a)(2) is revised to include Tribal law enforcement agencies in the list of agencies whose information protection procedures are presumed to meet the general performance requirements for the protection of SGI.

Section 73.37 Requirements for physical protection of irradiated reactor fuel in transit.

Paragraph (f) is revised to require that advance notification of irradiated fuel shipments be provided to participating Tribes if a shipment crosses Tribal reservation boundaries.

Section 73.59 Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals.

New paragraph (l) is added to include Tribal official, Tribal official's designee, and Tribal law enforcement personnel to the categories of individuals that are relieved from the requirement for fingerprinting, identification and criminal records checks, and other elements of background checks.

V. Criminal Penalties

For the purpose of Section 223 of the AEA, the Commission is amending 10 CFR Parts 71 and 73 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule would be subject to criminal enforcement.

VI. Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the *Federal Register* (62 FR 46517; Sept. 3, 1997), this final rule is a matter of compatibility between the NRC and the Agreement States, thereby providing consistency among the Agreement States and the NRC requirements. The NRC staff analyzed the final rule in accordance with the procedure established within Part III, "Categorization Process for NRC Program Elements," of Handbook 5.9 to Management Directive 5.9, "Adequacy and Compatibility of Agreement State Programs" (a copy of which may be viewed at <http://www.nrc.gov/reading-rm/doc-collections/management-directives/>).

The NRC program elements (including regulations) are placed into four compatibility categories (see the Compatibility Table in this section). In addition, the NRC program elements can also be identified as having particular health and safety significance or as being reserved solely to the NRC. Compatibility Category A are those program elements that are basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt Category A program elements in an essentially identical manner to provide uniformity in the regulation of agreement material on a nationwide basis. Compatibility Category B are those program elements that apply to activities that have direct and significant effects in multiple jurisdictions. An Agreement State should adopt Category B program elements in an essentially identical manner. Compatibility Category C are those program elements that do not meet the criteria of Category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. An Agreement State should adopt the essential objectives of the Category C program elements. Compatibility Category D are those program elements that do not meet any of the criteria of Category A, B, or C, above, and, thus, do not need to be adopted by Agreement States for purposes of compatibility.

Health and Safety (H&S) are program elements that are not required for compatibility but are identified as having a particular health and safety role (i.e., adequacy) in the regulation of agreement material within the State. Although not required for compatibility, the State should adopt program elements in the H&S category based on those of the NRC that embody the essential objectives of the NRC program elements because of particular health and safety considerations.

Compatibility Category NRC are those program elements that address areas of regulation that cannot be relinquished to Agreement States under the AEA, or provisions of 10 CFR. These program elements are not adopted by Agreement States. The following table lists the parts and sections that are being revised and their corresponding compatibility categorization under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs."

Compatibility Table for Final Rule

Section	Change	Subject	Compatibility	
			Existing	New
10 CFR Part 71				
71.4	New	Definition Indian tribe	-	B
71.4	New	Definition Tribal official	-	B
71.97	Amend	Advance notification of shipment of irradiated reactor fuel and nuclear waste	B	B
10 CFR Part 73				
73.2	New	Definition Indian tribe	-	NRC
73.2	New	Definition Tribal official	-	NRC
73.21	Amend	Protection of Safeguards Information: Performance Requirements	NRC	NRC
73.37	Amend	Requirements for physical protection of irradiated reactor fuel in transit	NRC	NRC
73.59	Amend	Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals	NRC	NRC

VII. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104-113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies, unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this final rule, the NRC is requiring that advance notification be provided to participating Tribal governments for shipments of irradiated reactor fuel and other nuclear wastes listed in § 71.97 that pass within or across Tribal reservations. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

VIII. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(3). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

IX. Paperwork Reduction Act Statement

This final rule contains new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget, approval numbers 3150-0008 and 3150-0002.

The burden to the public for these information collections is estimated to average 0.422 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. Send comments on any aspect of these information collections, including suggestions for reducing the burden, to the Information Services Branch (T-5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail to INFOCOLLECTS.RESOURCE@NRC.GOV; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0151), Office of Management and Budget (OMB), Washington, DC 20503. You may also e-mail comments to [Christine J. Kymn@omb.eop.gov](mailto:Christine.J.Kymn@omb.eop.gov) or comment by telephone at (202) 395-4638.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

X. Regulatory Analysis

The Commission has prepared a regulatory analysis on this regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The analysis is available for inspection in the NRC Public Document Room, One White Flint North,

11555 Rockville Pike, Room O-1F21, Rockville, MD 20852 and can be found at <http://www.regulations.gov> by searching on Docket ID NRC-1999-0005.

XI. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. The amendments will apply to reactor licensees and a few licensees who possess large sources of byproduct materials. The majority, if not all, of these licensees are not “small entities” under either the Regulatory Flexibility Act or the NRC’s size standards (10 CFR 2.810).

XII. Backfit Analysis

The NRC has determined that the backfit rule, which is found in the regulations at 10 CFR 50.109, 70.76, 72.62, 76.76, and in 10 CFR Part 52, does not apply to this final rule because this amendment would not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required.

XIII. Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects

10 CFR Part 71

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

10 CFR Part 73

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

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR Parts 71 and 73.

PART 71--PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

1. The authority citation for Part 71 continues to read as follows:

AUTHORITY: Secs. 53, 57, 62, 63, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201,2232, 2233, 2297f); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). Section 71.97 also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789-790.

2. In § 71.4, new definitions for *Indian tribe* and *Tribal official* are added in alphabetical order to read as follows:

§ 71.4 Definitions.

* * * * *

Indian tribe means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

* * * * *

Tribal official means the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

* * * * *

3. In § 71.97, paragraphs (a), (c)(1), (c)(3), (d)(4), (e), and (f)(1) are revised to read as follows:

§ 71.97 Advance notification of shipment of irradiated reactor fuel and nuclear waste.

(a)(1) As specified in paragraphs (b), (c), and (d) of this section, each licensee shall provide advance notification to the governor of a State, or the governor's designee, of the shipment of licensed material, within or across the boundary of the State, before the transport, or delivery to a carrier, for transport, of licensed material outside the confines of the licensee's plant or other place of use or storage.

(2) As specified in paragraphs (b), (c), and (d) of this section, after **[INSERT DATE ONE YEAR AFTER PUBLICATION IN THE FEDERAL REGISTER]**, each licensee shall provide advance notification to the Tribal official of participating Tribes referenced in paragraph (c)(3)(iii) of this section, or the official's designee, of the shipment of licensed material, within or across the boundary of the Tribe's reservation, before the transport, or delivery to a carrier, for transport, of licensed material outside the confines of the licensee's plant or other place of use or storage.

* * * * *

(c) *Procedures for submitting advance notification.* (1) The notification must be made in writing to:

- (i) The office of each appropriate governor or governor's designee;
- (ii) The office of each appropriate Tribal official or Tribal official's designee; and
- (iii) The Director, Division of Security Policy, Office of Nuclear Security and Incident

Response.

* * * * *

(3) A notification delivered by any other means than mail must reach the office of the governor or of the governor's designee or the Tribal official or Tribal official's designee at least 4 days before the beginning of the 7-day period during which departure of the shipment is estimated to occur.

(i) A list of the names and mailing addresses of the governors' designees receiving advance notification of transportation of nuclear waste was published in the *Federal Register* on June 30, 1995 (60 FR 34306).

(ii) The list of governor's designees and Tribal official's designees of participating Tribes will be published annually in the *Federal Register* on or about June 30th to reflect any changes in information.

(iii) A list of the names and mailing addresses of the governors' designees and Tribal officials' designees of participating Tribes is available on request from the Director, Division of

Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

* * * * *

(d) * * *

(4) The 7-day period during which arrival of the shipment at State boundaries or Tribal reservation boundaries is estimated to occur;

* * * * *

(e) *Revision notice.* A licensee who finds that schedule information previously furnished to a governor or governor's designee or a Tribal official or Tribal official's designee, in accordance with this section, will not be met, shall telephone a responsible individual in the office of the governor of the State or of the governor's designee or the Tribal official or the Tribal official's designee and inform that individual of the extent of the delay beyond the schedule originally reported. The licensee shall maintain a record of the name of the individual contacted for 3 years.

(f) *Cancellation notice.* (1) Each licensee who cancels an irradiated reactor fuel or nuclear waste shipment for which advance notification has been sent shall send a cancellation notice to the governor of each State or to the governor's designee previously notified, each

Tribal official or to the Tribal official's designee previously notified, and to the Director, Division of Security Policy, Office of Nuclear Security and Incident Response.

* * * * *

PART 73 -- PHYSICAL PROTECTION OF PLANTS AND MATERIALS

4. The authority citation for Part 73 continues to read as follows:

AUTHORITY: Secs. 53, 161, 149, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2169, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat.

2232, 2241 (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99-399, 100 Stat. 876 (42 U.S.C. 2169).

5. In § 73.2, new definitions for *Indian tribe* and *Tribal official* are added in alphabetical order to read as follows:

§ 73.2 Definitions.

* * * * *

Indian tribe means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

* * * * *

Tribal official means the highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

* * * * *

6. In § 73.21, paragraph (a)(2) is revised to read as follows:

§ 73.21 Protection of Safeguards Information: Performance Requirements.

(a) * * *

(2) Information protection procedures employed by Federal, State, Tribal, and local law enforcement agencies are presumed to meet the general performance requirement in paragraph (a)(1) of this section.

* * * * *

7. In § 73.37, paragraphs (f) and (g) are revised to read as follows:

§ 73.37 Requirements for physical protection of irradiated reactor fuel in transit.

* * * * *

(f) A licensee subject to this section shall notify the governor or the governor's designee prior to the transport of spent fuel within or across a State. After **[INSERT DATE ONE YEAR AFTER PUBLICATION IN THE FEDERAL REGISTER]** a licensee subject to this section shall notify the Tribal official or Tribal official's designee of each participating Tribe referenced in § 71.97(c)(3) of this chapter prior to the transport of spent fuel within or across the Tribal reservation. The licensee shall comply with the following criteria in regard to a notification:

(1) The notification must be in writing and sent to the office of each appropriate governor or the governor's designee and each appropriate Tribal official or the Tribal official's designee. A notification delivered by mail must be postmarked at least 7 days before transport of a shipment within or across the State or Tribal reservation. A notification delivered by messenger must reach the office of the governor or the governor's designee and any Tribal official or Tribal official's designee at least 4 days before transport of a shipment within or across the State or Tribal reservation. A list of the mailing addresses of governors and governors' designees and Tribal officials and Tribal officials' designees is available upon request from the Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials

and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

(2) The notification must include the following information:

(i) The name, address, and telephone number of the shipper, carrier and receiver.

(ii) A description of the shipment as specified by the Department of Transportation in 49 CFR 172.202 and 172.203(d).

(iii) A listing of the routes to be used within the State or Tribal reservation.

(iv) A statement that the information described in paragraph (f)(3) of this section is required by the NRC regulations to be protected in accordance with the requirements of §§ 73.21 and 73.22.

(3) The licensee shall provide the following information on a separate enclosure to the written notification:

(i) The estimated date and time of departure from the point of origin of the shipment.

(ii) The estimated date and time of entry into the governor's State or Tribal reservation.

(iii) For the case of 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 §§ 73.21 and 73.22 until at least 10 days after the shipment has entered or originated within the State or Tribal reservation.

(iv) For the case of 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 §§ 73.21 and 73.22 until 10 days after the last shipment in the series has entered or originated within the State or Tribal reservation and an estimate of the date on which the last shipment in the series will enter or originate within the State or Tribal reservation.

(4) A licensee shall notify by telephone or other means a responsible individual in the office of the governor or in the office of the governor's designee and the office of the Tribal official or in the office of the Tribal official's designee of any schedule change that differs by more than 6 hours from the schedule information previously furnished in accordance with paragraph (f)(3) of this section, and shall inform that individual of the number of hours of advance or delay relative to the written schedule information previously furnished.

(g) State officials, State employees, Tribal officials, Tribal employees, and other individuals, whether or not licensees of the Commission, who receive schedule information of the kind specified in paragraph (f)(3) of this section shall protect that information against unauthorized disclosure as specified in §§ 73.21 and 73.22.

8. In § 73.59, new paragraph (l) is added to read as follows:

§ 73.59 Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals.

* * * * *

(l) Tribal official or the Tribal official's designated representative, and Tribal law enforcement personnel.

Dated at Rockville, Maryland, this _____ day of _____ 2011.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,
Secretary of the Commission.

Regulatory Analysis

Rulemaking: Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste (10 CFR Parts 71 and 73)

U.S. Nuclear Regulatory Commission

Office of Federal and State Materials and Environmental Management Programs

September 2011



Executive Summary

The U.S. Nuclear Regulatory Commission (NRC) regulations currently require NRC licensees who ship irradiated reactor fuel and certain nuclear wastes listed in § 71.97, “Advance notification of shipment of irradiated reactor fuel and nuclear waste,” to provide advance notification of such shipments to Governors of States or their designees. This rulemaking will amend these regulations to extend the provision for advance notification to Tribal governments and to extend to Tribal officials, his or her designee, and Tribal law enforcement personnel relief from fingerprinting requirements required for access to Safeguards Information (SGI). This action will further Federal efforts to consult and coordinate with Tribal governments with regard to Federal affairs that are of concern to them. The rule recognizes the right of Native American Tribes to self-government, and thereby support Tribal sovereignty and self-determination.

This regulatory analysis evaluates the consequences associated with the “Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste” final rule. This document presents background material, rulemaking objectives, alternatives, input assumptions, and analysis of the consequences of the rule language and alternative approaches to accomplish the regulatory objectives. The analysis makes the following key findings:

- **Total Cost.** The final rule results in a net quantitative impact estimated of \$1,525,000 over a 10-year period at a 3 percent discount rate and \$1,400,000 over a 10-year period at a 7 percent discount rate.
- **The costs breakdown (10-year period at a 3 percent discount rate) is as follows:** industry (\$212,000), Agreement States (\$790,000), NRC (\$276,000), and Tribes (\$245,000). Each of the 565 Tribes may incur a one-time cost of \$259 to read the regulations and decide if they want to receive notification. If a Tribe does decide to receive notification they will incur an additional one-time cost of \$1,103. For those Tribes who chose to receive notification they will incur on average annual cost of \$43.
- **Decision Rationale.** The NRC believes that the rule is cost-justified because the NRC’s current regulations require a licensee to inform a State Governor, or the Governor’s designee, of certain shipments of irradiated reactor fuel and certain nuclear wastes listed in 10 CFR 71.97 passing through the boundary of the State. Current regulations, however, do not require that licensees provide such advance notifications to Federally-recognized Native American Tribes. The rule revises sections of 10 CFR Parts 71, “Packaging and Transportation of Radioactive Material,” and 73, “Physical Protection of Plants and Materials,” to: 1) require advance notification of participating Tribal governments of shipments of irradiated reactor fuel and certain nuclear wastes listed in 10 CFR 71.97 passing through Tribal reservations; and 2) extend to Tribal officials, his or her designee, and Tribal law enforcement personnel relief from fingerprinting requirements required for access to SGI. The rule also might pose a risk to public perceptions regarding safeguards and safety considerations due to wider dissemination of SGI on shipments. However, the rule results in several benefits. Tribes will be given the option to be informed of commercial nuclear waste shipments passing through their reservations. The rule recognizes Tribal governments’ interest in being informed of activities occurring on Tribal reservations.

Abbreviations and Acronyms

AEA	Atomic Energy Act of 1954
ANPR	Advance Notice of Proposed Rulemaking
BIA	Bureau of Indian Affairs
CFR	<i>Code of Federal Regulations</i>
DOD	Department of Defense
DOE	Department of Energy
DOT	Department of Transportation
E.O.	Executive Order
FRN	<i>Federal Register</i> notice
HLW	High Level Waste
ISFSI	Independent Spent Fuel Storage Installation
NRC	U.S. Nuclear Regulatory Commission
RTR	Research and Test Reactor
SGI	Safeguards Information

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1. Introduction

The U.S. Nuclear Regulatory Commission (NRC) regulations currently require NRC licensees who ship irradiated reactor fuel and certain nuclear wastes listed in § 71.97, “Advance notification of shipment of irradiated reactor fuel and nuclear waste,” to provide advance notification of such shipments to Governors of States or their designees. This rulemaking will amend these regulations to extend the provision for advance notification to Tribal governments and extends to Tribal officials, his or her designee, and Tribal law enforcement personnel relief from fingerprinting requirements required for access to Safeguards Information (SGI). This action will further Federal efforts to consult and coordinate with Tribal governments with regard to Federal affairs that are of concern to them. The rule recognizes the right of Native American Tribes to self-government, and thereby supports Tribal sovereignty and self-determination.

This regulatory analysis evaluates the consequences associated with the “Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste” final rule. This document presents background material, rulemaking objectives, alternatives, input assumptions, and analysis of the consequences of the rule language and alternative approaches to accomplish the regulatory objectives.

The remainder of this introduction is divided into two sections. Section 1.1 states the problem and the objective of the rulemaking. Section 1.2 provides background information.

1.1 Statement of the Problem and Objective of the Rulemaking

The NRC has determined that there is a need to modify existing regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 71, “Packaging and Transportation of Radioactive Material,” and Part 73, “Physical Protection of Plants and Materials,” which currently require a licensee to inform a State Governor, or the Governor’s designee, of certain shipments of irradiated reactor fuel and certain nuclear wastes listed in § 71.97 passing within or across the boundary of the State. The NRC promulgated these regulations in 1982 to comply with the NRC Authorization Act for Fiscal Year 1980.

The objective of the current rulemaking is to amend NRC regulations to extend the advance notification to include Federally-recognized Tribal governments regarding shipments of irradiated reactor fuel and certain nuclear waste listed in § 71.97 passing within or across their reservations.

The primary purpose of the rule is to inform Native American Tribes of shipments passing within or across the boundary of Tribal reservations as recognition of Tribal sovereignty as well as the need for Tribes to be aware of activities that occur on Tribal reservations. Although emergency preparedness is not the main reason for developing such a rule, Tribes that do have emergency preparedness capabilities will benefit from advance notification.

1.2 Background

Irradiated reactor fuel comes from commercial nuclear power plants and domestic research and test reactors. After the fresh fuel has been used in a reactor, highly radioactive irradiated reactor fuel assemblies remain. The assemblies must be removed from the reactor for storage

to make room for new assemblies and to allow the fuel to cool. Currently, most irradiated fuel assemblies are stored in pools of water, above ground vaults, or concrete casks. Irradiated reactor fuel may be shipped to temporary storage sites when space at reactor sites is limited. Irradiated reactor fuel is also shipped for various research studies. The NRC regulates irradiated reactor fuel shipments in terms of both public health and safety and common defense and security.

Current NRC regulations in 10 CFR require licensees to inform State Governors, or the Governor's designee, of certain shipments of irradiated reactor fuel and certain nuclear wastes listed in § 71.97 passing within or across the boundary of States. Section 73.37, "Requirements for physical protection of irradiated reactor fuel in transit," requires advance notifications for shipments of irradiated reactor fuel in excess of 100 grams in net weight, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding. Section 71.97 requires advance notice for shipments of irradiated reactor fuel in quantities less than that subject to § 73.37 and certain licensed material that is required to be transported in Type B packaging and is being transported to a disposal facility or a collection point for transport to a disposal facility. The advance notification provisions also apply if the quantity of licensed material in a single package exceeds the least of the following: (1) 3000 times the A_1 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for special form radioactive material; (2) 3000 times the A_2 value of the radionuclides as specified in Appendix A, Table A-1 of 10 CFR Part 71, for normal form radioactive material; or (3) 1000 Terabequerel (TBq) (27,000 curies). Schedule information provided for shipments in excess of 100 grams of irradiated reactor fuel is considered to be SGI under NRC regulations and must be protected under the requirements in §§ 73.21, "Protection of Safeguards Information: Performance requirements," and 73.22, "Protection of Safeguards Information: Specific requirements."

The NRC developed these advance notification regulations in 1982 to comply with the NRC Authorization Act for Fiscal Year 1980. The NRC Authorization Act for Fiscal Year 1980 was enacted to deal with concerns expressed by States about their abilities to fulfill their responsibilities to protect public health and safety while waste shipments pass through their jurisdictions. Neither the Atomic Energy Act of 1954, as amended (AEA) nor the notification regulations required licensees to notify Native American Tribes of this type of shipment passing within or across their Tribal reservations.

In 1994, President Clinton issued a memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951; May 4, 1994). Although this memorandum did not impose any new obligations on NRC as an independent regulatory agency, it did 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. This direction from the President was also reiterated in Executive Order (E.O.) 13084 (63 FR 27655; May 19, 1998), "Consultation and Coordination with Indian Tribal Governments," issued on May 14, 1998.

On December 21, 1999, the NRC published an Advance Notice of Proposed Rulemaking (ANPR) to solicit stakeholder input on a possible rulemaking that would consider requiring advance notification to Native American Tribes of transportation of certain types of nuclear

waste (64 FR 71331; December 21, 1999). Information was sought on minimizing the burden to licensees, identifying the location of Tribal reservations in relationship to shipment routes, and the sharing and protecting of SGI. Forty-four comment letters were received from a variety of stakeholders including Tribal governments, Tribal associations, private citizens, a State, a Federal agency, a licensee, and an industry association. Virtually all the comments favored providing advance notification to Tribal governments with some disagreement on the details on the implementation. Most comments 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 notifications, 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. The comments received in response to the ANPR were taken into account during the development of this rule.

On November 6, 2000, President Clinton issued E.O. 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 emphasized the importance of respecting the sovereignty of Tribal governments and working with them on a government-to-government basis. On November 5, 2009, President Obama expressed his commitment to E.O. 13175 at the White House Tribal Nations Conference and Interactive Discussion with Tribal Leaders. During the conference, the President signed an Executive Memorandum on Tribal consultation for the heads of Executive Departments and Agencies directing Cabinet agencies to take steps to develop regular and meaningful consultation with Tribal governments regarding the implementation of E.O. 13175. While the Executive Memorandum does not directly apply to independent agencies the NRC has adopted agency practices that are consistent with both President Clinton's April 29, 1994, guidance and E.O. 13175. The NRC practice is to conduct its activities in a manner that respects the rights of sovereign Tribal governments, and involves consultation and cooperation with Federally-recognized Tribes on a government-to-government basis.

2. Identification and Preliminary Analysis of Alternative Approaches

The following discussion describes the two regulatory options being considered, with additional analysis presented in Section 3 of this analysis.

2.1 Option 1: No Action

Under Option 1, the No-action alternative, NRC would not amend the current regulations regarding advance notification of shipments of irradiated reactor fuel and certain nuclear wastes. The baseline of the analysis is Option 1, the No-action alternative, for which there are no costs or benefits.

2.2 Option 2: Amend Regulations to Provide for Advance Notification of Tribal Governments

Under this option, the NRC conducts a rulemaking to amend several sections of 10 CFR Parts 71 and 73 to enable advance notification of participating Tribal governments of shipments of irradiated reactor fuel and certain nuclear wastes in §71.97 passing through Tribal reservations. These changes are to: (1) amend §§ 71.4, "Definitions," and 73.2, "Definitions,"

to add definitions of “Indian tribe” and “Tribal official”; (2) amend §§ 71.97, and 73.37, to extend the advance notification that now applies to States so that it also applies to participating Federally-recognized Tribal governments; (3) amend § 73.21 to state that information protection procedures employed by Tribal law enforcement agencies are presumed to meet the general performance requirements for protection of SGI; and (4) amend § 73.59, “Relief from fingerprinting, identification and criminal history records checks and other elements of background checks for designated categories of individuals,” to extend to Tribal officials, his or her designee, and Tribal law enforcement personnel relief from fingerprinting requirements that are required for access SGI.

The NRC has estimated the benefits and costs of this option, as described in Sections 3 and 4 of this regulatory analysis, and has pursued Option 2 for the reasons discussed in Section 5.

3. Estimation and Evaluation of Values and Impacts

This section describes the analysis conducted to identify and evaluate the benefits (values) and costs (impacts) of the two regulatory options. Section 3.1 identifies the attributes expected to be affected by the rulemaking. Section 3.2 describes how the values and impacts have been analyzed. Finally, Section 3.3 presents the detailed results of the projected values and impacts.

3.1 Identification of Affected Attributes

This section identifies the factors within the public and private sectors, that the rule is expected to affect, using the list of potential attributes provided in Chapter 5 of NUREG/BR-0184, "Regulatory Analysis Technical Evaluation Handbook," dated January 1997, and in Chapter 4 of NUREG/BR-0058, Rev. 5, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission," dated September 2004. The evaluation considered each attribute listed in Chapter 5 of NUREG/BR-0184. The basis for selecting those attributes is presented below.

Affected attributes include the following:

- *Industry Implementation* -- The implementation of this rule requires licensees to read the amended regulations.
- *Industry Operation* -- Licensees will be required to identify affected Federally recognized Tribal reservations prior to shipment. Licensees will also be required to produce additional notifications of shipments to participating Federally recognized Tribal governments and will incur any costs associated with these notifications.
- *Improvements in Knowledge* -- The participating Tribes would now have knowledge of when radioactive material is moved through their tribal reservations.
- *NRC Implementation* -- The NRC will be required to revise existing regulatory guidance as well as develop a contact list of Federally-recognized Tribal governments that choose to receive the advance notifications. Training for SGI could be provided to Tribes who choose to receive notifications.

- *NRC Operation* -- NRC will need to update the participating Federally-recognized Tribal government contact list on an annual basis as well as publicize the updated contact list.
- *Other Government* -- The rule affects Federally-recognized Tribal governments choosing to receive advance notification of irradiated reactor fuel and other certain nuclear waste shipments crossing their reservations. Tribes will need to protect SGI contained in the advance notifications and provide NRC with contact information. The rule recognizes Tribal governments' interest in being informed of activities occurring on Tribal reservations. Agreement State governments will incur a one-time cost for adopting this final rule into their State regulations governing the use of radioactive material. The Bureau of Indian Affairs (BIA), U.S. Department of Energy (DOE), U.S. Department of Transportation (DOT) and the United States Geologic Survey may serve as resources depending upon how the rule is implemented. However, these effects will be marginal incremental efforts for services already currently provided and are not deemed significant.
- *Safeguards and Security Considerations* -- The rule modifies the types of entities afforded access to SGI by granting relief to Tribal officials or those designated, and tribal law enforcement personnel from the fingerprinting, identification and criminal history records checks, and other elements of background checks. The rule could increase the potential for perception by the public of unauthorized disclosure of SGI due to wider dissemination of information.

Attributes that are *not* expected to be affected by the rulemaking options include the following:

- Occupational Health (Routine)
- Occupational Health (Accident)
- Public Health (Routine)
- Public Health (Accident)
- Off-site Property
- On-site Property
- Environmental Considerations
- General Public
- Anti-trust Considerations
- Regulatory Efficiency

3.2 Analytical Methodology

This section describes the methodology used to analyze the consequences associated with the rule. The values (benefits) include any desirable changes in the affected attributes. The impacts (costs) include any undesirable changes in affected attributes.

The NRC collected input assumptions using data and information from the following sources: NRC workgroups and staff experience, NRC databases, and reports and documents.

As described in Section 3.1, the attributes expected to be affected include the following:

- Industry Implementation
- Industry Operation
- Improvements in Knowledge
- NRC Implementation
- NRC Operation
- Other Government
- Safeguards and Security Considerations

This analysis relies on a qualitative evaluation for several of the affected attributes (i.e., Other Government, Improvements in Knowledge, and Safeguards and Security Considerations) due to the difficulty in quantifying the impact of the current rulemaking. One attribute (i.e., Other Government) is analyzed both qualitatively and quantitatively.

The remaining attributes (Industry Implementation, Industry Operation, NRC Implementation, and NRC Operation) are evaluated quantitatively. Quantitative analysis requires a baseline characterization of the universe, including factors such as the number and location of Federally-recognized Tribes affected by the number of shipments of irradiated reactor fuel and other nuclear wastes listed in § 71.97, and the travel routes of each shipment. The analysis proceeds quantitatively for these attributes and makes numerous assumptions as discussed in Sections 3.2.1 and 3.2.2.

In accordance with Office of Management and Budget guidance and NUREG/BR-0058, Rev. 4, the results of the analysis are presented using both 3 percent and 7 percent real discount rates.

3.2.1 Model Design

This section describes the cost model and the data sources used to calculate the values and impacts for the affected attributes of the rule. The analysis is driven, in part, by the number of shipments requiring notifications and the number of Federally-recognized Tribes to be notified. Shipment data was taken from NUREG/CR-0725, Rev. 15, "Public Information Circular For Shipments of Irradiated Reactor Fuel," May 2010. In January of 2010, the DOE established a Blue Ribbon Commission on America's Nuclear Future to review policies for managing the back end of the nuclear fuel cycle. This coincided with the DOE's notification to the NRC of its intent to withdraw its Yucca Mountain High Level Waste (HLW) Repository license application. This regulatory analysis cost model assumes shipping routes and actual shipments for a 10-year period. The shipments made during this timeframe will largely be for research purposes. The potential for and impact of policy changes to the back end of the nuclear cycle makes it prudent to keep this cost model at the 10-year period.

3.2.2 Data and Assumptions

3.2.2.1 Data/Affected Entities

Licensees

- Operating commercial power reactors: 104 commercial power reactors (65 sites) are currently generating irradiated reactor fuel. The analysis assumes that no new reactors will ship irradiated fuel within the 10 year time period.
- There are 15 decommissioned, non-operating commercial power reactors.
- Operating Research and Test Reactors (RTRs): There are 32 RTRs which will be included in the analysis. The 10 Decommissioning RTRs are not included in this analysis.
- On-Site Independent Spent Fuel Storage Installations (ISFSIs): Shipments from reactors to dedicated ISFSIs maintained by reactor licensees themselves (e.g., Calvert Cliffs maintains an on-site ISFSI) are assumed not to traverse Tribal reservations and are not included in the analysis.
- Off-Site Independent Spent Fuel Storage Installations: The General Electric ISFSI in Morris, IL, is included in the analysis. Shipments to and from yet-to-be-licensed commercial ISFSIs will not be considered in the analysis.
- Costs associated with shipping irradiated reactor fuel and other wastes shipped under Section 71.97 are incurred by licensees. If shippers (e.g., trucking companies) conduct any of the activities required by the rule, the analysis assumes that the costs of these activities will be passed onto the licensee. Thus, shippers are not affected by the rule.

Agreement States

- The 37 Agreement State governments will incur a one-time cost for adopting this rule into their State regulations governing the use of radioactive material.

Federally-Recognized Tribal Governments

- The analysis assumes that of the 565 Federally-recognized Native American Tribes, only 50 will be affected by the rule, calculated as follows:
- 227 Tribes located in Alaska will not be affected by the rule because shipments will not pass through Alaska.
- Of the remaining 338 Tribes the NRC estimates that 50 will elect to receive advanced notifications of shipments of irradiated reactor fuel and other nuclear wastes listed in § 71.97.

- Only those participating Tribes whose reservations are crossed will be notified of shipments. Tribes notified will depend on the particular route of individual shipments. The NRC estimates each shipment will impact 15 tribes. The NRC estimates 300 notifications will be issued to a total of 50 Tribes on an annual basis. Note that an individual Tribe will likely receive more than one notification (see Table 3 for list of Federally-recognized Tribal Governments by State).

3.2.2.2 Assumptions/Shipping Routes

- For the analysis, the NRC assumed that an average of 20 shipments annually over the next 10 years would be affected by the regulation under both the No-Action Alternative and the Rulemaking Alternative. Table 1 shows the history of shipments from 1979 to 2007; the last 10 years showed an average of 17 shipments per year. The NRC assumes 20 shipments per year for the next 10 years.
- The 20 shipments would break down to 16 shipments via highway and 4 via railways. The NRC does not anticipate any shipments via waterways.
- The NRC estimates that the shipments would pass through or cross an average of 5 states per shipment.
- The NRC estimates that three Tribes per State (15 per shipment) would be notified.
- The NRC anticipates five shipments annually would incur some issue(s) which would require revisions to the schedule.
- In addition, the NRC anticipates that one shipment would be canceled over a 3-year period.
- The analysis does not include shipments of irradiated fuel other than commercial irradiated reactor fuel. It includes only shipments of academic, industrial, and utility irradiated reactor fuel and other wastes shipped under § 71.97 that are subject to NRC regulation. The NRC does not regulate DOE or Department of Defense (DOD) shipments; therefore, this analysis does not include those shipments.

3.2.2.3 Shipment Routes

- To simplify the analysis, the NRC assumed that all shipments will comply with NRC approved shipping routes (see Table 2 for list of NRC approved routes used from 1998 to 2007).
- The analysis estimates the number of Tribes to be notified in a given State to average three Federally-recognized Tribes that are participating in the notification program.

3.2.2.4 Other

- Assumed labor rate for NRC staff is \$119 per hour.

- Assumed labor rate for licensee personnel and Agreement State personnel is \$100 per hour.
- The NRC estimates the salary for Tribal personnel compiling the information to be \$33.83 per hour. This estimate is based on the Bureau of Labor Statistics' Employer Costs for Employee Compensation—September 2008, for the category of Management, Professional, and Related Staff. Including a multiplier of 1.4 for benefits results in a total salary of \$47.36 per hour.
- The analysis assumes that the rule will become effective in April 2013.

3.3 Detailed Results

This section presents a detailed estimate of the values and impacts for the rulemaking (Option 2). Some values and impacts are addressed qualitatively for reasons discussed in Section 3.2. These results are summarized in Exhibits 3–1 and 3–2.

Option 1: No-action

NRC would not amend the current regulations regarding advance notification of shipments of irradiated reactor fuel and certain nuclear wastes. The baseline of the analysis is Option 1, the No-action alternative, for which there are no costs or benefits.

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

Under this option, NRC would conduct a rulemaking to amend several sections of 10 CFR Parts 71 and 73 to enable advance notification of participating Tribal governments of shipments of irradiated reactor fuel and certain nuclear wastes in §71.97 passing through Tribal reservations. These changes are to: (1) amend 10 CFR 71.4, "Definitions," and 73.2, "Definitions," to add definitions of "Indian tribe" and "Tribal official"; (2) amend §§ 71.97, and 73.37, to extend the advance notification that now applies to States to also apply to participating Federally-recognized Tribal governments; (3) amend § 73.21 to state that information protection procedures employed by Tribal law enforcement agencies are presumed to meet the general performance requirements for protection of SGI; and (4) amend § 73.59 to extend to Tribal officials, his or her designee, and Tribal law enforcement personnel relief from fingerprinting requirements that are required for access SGI.

Agreement States Implementation

Impact: Agreement State governments will incur a one-time cost for adopting this final rule and integrating its provisions into their State regulations governing the use of radioactive material.

- On average each State will expend 208 hours (0.1 Full-time equivalent (FTE) to amend their State regulations.

Industry Implementation

Impact: Read the amended regulations.

- One time incremental effort of 1.5 hours per licensee.

Industry Operation

Impact: Identify Tribal government reservations crossed by shipments (truck and rail), and obtain Tribal government contact information.

- Effort of 2.5 hours per licensee for each shipment.

Impact: Send notification to Tribal government(s) by mail, messenger/courier.

- (\$10.00 delivery charge + 0.5 hour of labor) x the total number of shipments per year per licensee x total number of Tribes requiring notification.

Impact: Notify Tribal government(s) by telephone if shipment schedule changes.

- (Phone call + 5 minutes of labor) x 25 percent of all shipments per licensee per year.

Impact: Notify Tribal government(s) by telephone if shipment is cancelled.

- (Phone call + 5 minutes of labor) x one shipment in a 3 year period.

Impact: Recordkeeping:

- 1 hour per shipment of administrative labor (e.g., marking records as SGI, and filing). No incremental capital cost will be incurred to store the records (i.e., licensees already own secure filing cabinets).

NRC Implementation

Impact: Develop rule guidance:

- One time incremental effort of 80 hours to develop new guidance or revise existing guidance.

Impact: Develop initial Federally-recognized Tribal government contact information listing for those Tribes that choose to participate:

- One time incremental effort of 240 hours of labor.

Impact: Publicize initial contact information for Federally-recognized Tribal governments (e.g., web page, *Federal Register* notice [FRN]):

- One time incremental effort of 80 hours.

Impact: Develop and distribute SGI training package for the participating Federally-recognized Tribal governments.

- One time incremental effort of 80 hours.

Impact: Distribute information package for the Federally-recognized Tribal governments.

- One time incremental effort of 80 hours.

NRC Operation

Impact: Update Federally-recognized Tribal government contact list information of participating Tribes

- Annual incremental effort of 120 hours per year to collect, review, and update contact information for the Federally-recognized Tribes electing to receive advance notifications.

Impact: Publicize updated contact information of participating Federally-recognized Tribal governments (e.g., web page, FRN):

- Annual incremental effort of 80 hours.

Other Government

Value: Tribes will be given the option to be informed of nuclear waste shipments passing through their reservations. The rule recognizes Tribal governments' interest in being informed of activities occurring on Tribal reservations.

Impact: The BIA, DOE, and DOT may be marginally affected by the rule because they may be asked to assist in the identification of the location(s) of Federally-recognized Tribal reservations.

- The incremental burden on these entities is estimated to be negligible or zero.

Tribal Government Implementation

Impact: Read regulations and familiarize with the requirements:

- One-time burden of 1.5 hours per Tribe x all Federally-recognized Native American Tribes in the United States.

Impact: Determine if Tribe wants to receive notification and Identify individuals to receive notifications:

- One-time burden of 4 hours per Tribe x the number of Tribes electing to receive notifications.

Impact: SGI Training for the 50 Tribes who determine they want to receive notification.

- One-time burden of 4 hours per participating Tribe (2 hour training for 2 individuals to receive training).

Impact: Notify NRC of contact person for notification:

- One-time burden of 0.5 hours per participating Tribe.

Impact: Purchase shredder to destroy SGI:

- 50 Tribal governments are estimated to purchase a shredder at a one-time cost of \$250.

Impact: Purchase security storage container for SGI:

- 50 Tribal governments are estimated to purchase a secure filing cabinet at a one-time cost of \$500.

Impact: Develop information safeguards procedures for shipment schedule information in accordance with § 73.21:

- One-time burden of 3 hours per Tribe x 50 Tribes.

Tribal Government Operations

Value: Tribes will be given the option to be informed of commercial nuclear waste shipments passing through their reservations. The rule recognizes Tribal governments' interest in being informed of activities occurring on Tribal reservations.

Impact: Provide contact information to NRC:

- Annual burden of 0.5 hour per participating Tribe to fill-out updated contact information paperwork and send to NRC.

Impact: Process written notifications:

- The burden is 15 minutes per Tribe processing the shipment information.

Impact: Process revision notifications:

- The burden 5 minutes per phone call, 5 shipments annually will require notification of the Tribes of the new shipment information.

Impact: Process cancel notifications:

- The burden is 5 minutes per cancel notification; one shipment in a 3-year period will be canceled.

Safeguards and Security Considerations

Impact: Increased potential for public perceptions of unauthorized disclosure of SGI due to wider dissemination of information.

Exhibit 3-1 Quantitative Results in Dollars (Total Present Value through 2022) Value or (Impact)

	One-time Implementation Costs	Annual Operating Costs	Total Annual Costs 2012–2021 at 3% discount	Total Annual Costs 2012–2021 at 7% discount
Industry	(17,100)	(22,880)	(212,271)	(177,800)
Agreement States	(790,400)	0	(790,400)	(790,400)
Tribal Governments	(202,431)	(5,052)	(245,523)	(237,912)
Sub-total	(1,009,931)	(27,932)	(1,248,194)	(1,206,112)
NRC	(73,290)	(23,800)	(276,309)	(240,451)
Total	(1,083,221)	(51,732)	(1,524,503)	(1,446,563)

Total Annual Costs 2012–2021 at 3% discount	(441,282)
Total Annual Costs 2012–2021 at 7% discount	(363,342)
Total Combined Implementation and Annual Costs 2012–2021 at 3% discount rate	(1,524,503)
Total Combined Implementation and Annual Costs 2012–2021 at 7% discount rate	(1,446,563)

4. Presentation of Results

4.1 Values and Impacts

This section summarizes the values (benefits) and impacts (costs) estimated for the regulatory options. (A more detailed analysis is presented in Section 3.3.) To the extent that the affected attributes could be analyzed quantitatively, the net effect of each option has been calculated and is presented below. However, some values and impacts could be evaluated only on a qualitative basis.

The results of the value-impact analysis are summarized in Exhibit 4–1. Relative to the No-action alternative (Option 1), rulemaking (Option 2) would result in a net quantitative impact estimated of \$1,524,503 over a 10-year period at a 3 percent discount rate and \$1,446,563 over a 10-year period at a 7 percent discount rate.

The costs breakdown (10-year period at a 3 percent discount rate) associated with Option 2 is industry (\$212,000), Agreement States (\$790,000), NRC (\$276,000) and Tribes (\$245,000). Each of the 565 Tribes may incur a one time cost of \$259 to read the regulations and decide if they want to receive notification. If a Tribe does decide to receive notification they will incur an additional one time cost of \$1,103. For those Tribes who chose to receive notification they will incur on average annual cost of \$43. The analysis estimates that Option 2 would result in qualitative benefits in the following attributes: other government.

Exhibit 4-1
Summary of Values and Impacts

Regulatory Option	Net Value (+) or Impact (-) (Total Present Value)	Qualitative Values/Impacts
Option 1: No Action	\$0	N/A
Option 2:	<u>Agreement States</u> -\$790,000 <u>Industry:</u> -\$212,000 <u>Tribal Governments:</u> -\$245,000 <u>NRC:</u> - \$276,000	<p><u>Values:</u></p> <p><i>Other Government</i> - Tribes will be given the option to be informed of commercial nuclear waste shipments passing through their reservations. The rule recognizes Tribal governments' interest in being informed of activities occurring on Tribal reservations.</p> <p><i>Improvements in Knowledge</i> - The Tribes would now have knowledge of when radioactive material is moved through their tribal reservations.</p> <p><u>Impacts:</u></p> <p><i>Safeguards and Security Considerations</i> - Increased potential for public perception of unauthorized disclosure of SGI, due to wider dissemination of information.</p>

4.2 Backfit Analysis

The NRC has determined that the backfit rule does not apply to this rule because this amendment does not add or modify any regulations to impose backfits as defined in 10 CFR 50.109 or 10 CFR 72.62. Therefore, a backfit analysis is not required.

5. Decision Rationale

The NRC's current regulations require a licensee to inform a State Governor, or the Governor's designee, of certain shipments of irradiated reactor fuel and certain nuclear wastes listed in § 71.97 passing through the boundary of the State. Current regulations, however, do not require that licensees provide such advance notifications to Federally-recognized Native American Tribes.

The final rule revises sections of 10 CFR Parts 71 and 73 to (1) require advance notification of participating Tribal governments of shipments of irradiated reactor fuel and certain nuclear wastes listed in § 71.97 passing through Tribal reservations and (2) extend to Tribal officials, his

or her designee, and Tribal law enforcement personnel relief from fingerprinting requirements required for access to the SGI.

The rule results in an estimated net quantitative estimated cost of \$1,525,000. The rule also might pose a risk to public perceptions regarding safeguards and safety considerations due to wider dissemination of SGI on shipments. However, the rule results in several benefits. Tribes will be given the option to be informed of commercial nuclear waste shipments passing through their reservations. The rule recognizes Tribal governments' interest in being informed of activities occurring on Tribal reservations.

For the reasons discussed above, the recommended option is superior to the No-action alternative.

6. Implementation

The NRC staff is recommending that the final rule be effective 1 year after publication in the *Federal Register*. This provides time for NRC staff to develop and publish the Federally-recognized Tribal contact list and to provide training on the protection of SGI to participating tribes. It will also allow the NRC time to review and update guidance documents. It also provides time for licensees to put the necessary programs in place, develop procedures, and conduct training on the new requirements.

In order to receive the advance notifications, Tribes will need to declare that they want to receive the information and certify that the Tribe will appropriately protect any SGI. The NRC staff believes that in view of the information protection requirements, a Tribe should be given the option to receive advance notifications.

7. References

Nuclear Regulatory Commission, "Regulatory Analysis Technical Evaluation Handbook, Final Report," NUREG/BR-0184, January 1997.

NUREG/CR-0725, Rev. 15, "Public Information Circular For Shipments of Irradiated Reactor Fuel, May 2010.

NUREG/BR-0058, Rev. 5, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission," September 2004.

Department of Interior, Bureau of Indian Affairs, Office of Indian Services. "Tribal Leadership Directory," winter 2009.

Table 1—Domestic Shipments from 1970–2007

Year	Highway	Railway
1979	2	11
1980	73	5
1981	30	2
1982	80	0
1983	92	0
1984	209	3
1985	114	18
1986	88	15
1987	85	15
1988	10	7
1989	11	6
1990	0	8
1991	4	10
1992	20	6
1993	14	12
1994	6	9
1995	7	9
1996	3	8
1997	7	4
1998	11	11
1999	8	9
2000	10	4
2001	9	6
2002	6	16
2003	15	14
2004	7	14
2005	6	7
2006	5	7
2007	6	7

Table 2—NRC Approved Routes Used from 1998–2007

Origin State	Shipment	NRC Route Number	States on route	Status of Route	Transport Mode	Shipment Years
Alabama	Browns Ferry Nuclear Station to GE Vallecitos Nuclear Center	209	AL, MS, LA, TX, NM, AZ, CA		Highway	2003
California	GE Vallecitos Nuclear Center to Argonne National Lab	190	CA, NV, UT, WY, NE, IA, IL	Expired Route	Highway	2000, 2001
	General Atomic to Bechtel BWXT, INEEL	207	CA, NV, AZ, UT, ID	Expired Route	Highway	2003
Florida	University of Florida to Savannah River Site	222	FL, GA, SC		Highway	2006, 2007
Illinois	La Salle County Station to Newport News	208	IL, IN, KY, WV, VA	Expired Route	Highway	2003
	University of Illinois to INEEL	214	IL, IA, NE, WY, UT, ID	Expired Route	Highway	2004
	University of Illinois to University of Texas, Austin	213	IL, MO, AR, TX	Expired Route	Highway	2004
Indiana	Purdue University Training Reactor to Savannah River Site	225	IN, KY, TN, NC, SC		Highway	2007
Iowa	Duane Arnold Energy Center to GE Vallecitos Nuclear Center	163	IA, NE, WY, UT, NV, CA	Expired Route	Highway	1998, 2008
Maryland	Dundalk Marine Terminal to GE Vallecitos Nuclear Center	180	GA, AL, MS, LA, TX, NM, AZ, CA	Expired Route	Highway	2000
	National Institute of Standards and Technology to Savannah River Site	187	MD, WV, VA, NC, SC	Expired Route	Highway	1999, 2003

Origin State	Shipment	NRC Route Number	States on route	Status of Route	Transport Mode	Shipment Years
Massachusetts	Massachusetts Institute of Technology to Savannah River Site	166	MA, CT, NY, PA, MD, WV, VA, NC, SC	Expired Route	Highway	1998 thru 2002
	University of Massachusetts, Lowell to Savannah River Site	215	MA, CT, NY, PA, MD, WV, VA, NC, SC	Expired Route	Highway	2004
	Massachusetts Institute of Technology to Savannah River Site	217	MA, CT, NY, PA, MD, WV, VA, NC, SC		Highway	2005 thru 2007
Michigan	University of Michigan to Savannah River Site	196	MI, OH, KY, TN, GA, SC	Expired Route	Highway	1999, 2000, 2003
Missouri	University of Missouri, Columbia to Savannah River Site	182	MO, IL, KY, TN, GA, SC	Expired Route	Highway	1998 thru 2004
	University of Missouri, Columbia to Savannah River Site	182B	MO, IL, KY, TN, GA, SC		Highway	2005 thru 2007
Nebraska	Veteran Administration to US Geological Survey, Denver Federal Center	206	NE, WY, CO	Expired Route	Highway	2002
New York	Cornell University to Bechtel BWXT, INEEL	212	NY, PA, OH, IN, IL, IA, NE, WY, UT, ID	Expired Route	Highway	2003
	McMaster University to Savannah River Site	198	NY, PA, WV, VA, NC, SC	Expired Route	Highway	2000
	University of Toronto to Savannah River Site	198	NY, PA, WV, VA, NC, SC	Expired Route	Highway	2000

Origin State	Shipment	NRC Route Number	States on route	Status of Route	Transport Mode	Shipment Years
New York (Continued)	University of NY, Buffalo, NY to Idaho National Laboratory, Scoville, ID	216	NY, PA, OH, IN, IL, IA, NE, WY, UT, ID	Expired Route	Highway	2005
North Carolina	Brunswick Nuclear Plant to Harris Nuclear Plant	130	NC		Railway	1998,1999, 2001 thru 2007
Ohio	Battelle, West Jefferson Site to Savannah River Site	211	OH, WV, VA, NC, SC	Expired Route	Highway	2003
Pennsylvania	Limerick Generating Station to GE Vallecitos Nuclear Center	197	PA, MD, WV, OH, IN, IL, IA, NE, WY, UT, NV, CA	Expired Route	Highway	19,992,003
South Carolina	H.B. Robinson Steam Electric Plant to Harris Nuclear Plant	135	SC, NC		Railway	2000,2002 thru 2004
	H.B. Robinson Steam Electric Plant to GE Vallecitos Nuclear Center	200	SC, GA, AL, MS, LA, TX, NM, AZ, CA	Expired Route	Highway	2001
	Charleston to Savannah River Site	185	SC	Expired Route	Railway	1999,2001, 2002,2004 thru 2007
	Charleston to Savannah River Site	192	SC		Highway	2000 2001 2004 2007
	Charleston to Savannah River Site	201A	SC, GA	Expired Route	Railway	1998 thru 2003
	Charleston to Savannah River Site	210	SC	Expired Route	Highway	2003, 2005
	Charleston to INEEL	192 & 195	SC, GA, TN, KY, IL, IA, NE, WY, UT, ID		Highway	1999

Origin State	Shipment	NRC Route Number	States on route	Status of Route	Transport Mode	Shipment Years
South Carolina (Continued)	Savannah River to INEEL	195	SC, GA, TN, KY, IL, IA, NE, WY, UT, ID		Highway	2000,2001 2003
	Savannah River to INEEL	202	SC, GA, TN, KY, IL, MO, IA, NE, WY, UT, ID		Highway	2004, 2006
	Oconee Nuclear Site to AECL Chalk River	203	SC, NC, VA, WV, PA, NY	Expired Route	Highway	2001, 2002
Texas	Texas A&M University to INEEL	221	TX, OK, KS, CO, WY, UT, ID		Highway	2006, 2007
Virginia	North Anna Power Station to Studsvik Nuclear	204A	VA	Expired Route	Highway	2002

Table 3 - Number of Federally-recognized Tribal Governments by State

* Tabulated from the "Tribal Leadership Directory", Department of Interior, Bureau of Indian Affairs, Office of Indian Services, Winter 2009.

Number of Tribes by State
AK - 227
AL - 1
AZ - 20
CA- 104
CO - 2
CT - 2
FL - 2
IA - 1
ID - 4
KS - 4
LA - 4
MA - 2
ME - 4
MI - 12
MN - 6
MO - 1
MS - 1
MT - 7
NC - 1
ND - 4
NE - 4
NM - 21
NV - 17
NY - 7
OK - 37
OR - 9
RI - 1
SC - 1
SD - 8
TX - 3
UT - 5
WA - 29
WI - 11
WY - 2