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March 10, 2000

Mr. Paul H. Lohaus, Director
Office of State Programs
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

DOCKET NUMBER
PROPOSED RULE **PR 71 + 73**
(64FR71331)

RE: Comments on Proposed Rules Regarding Notification to Tribes about Shipments of High Level Radioactive Waste

Dear Mr. Lohaus:

Please accept the attached comments and suggestions to the Commission's proposed rules regarding notification to Tribes about shipments of high level radioactive waste which will or have a likelihood of passing through the boundaries of the Fort Apache Indian Reservation. While specific comments on each proposed revision are set forth in the attached comment sheet, please note that the White Mountain Apache Tribe supports the Commission's intent to observe President Clinton's 1994 call for government-to-government relations with Native American Tribal Governments in concert with Executive Orders 12875 and 12866.

Mr. Lohaus, I applaud the Commission's recognition of the achievements possible when dealing with Indian nations on a government-to-government basis. I believe that such amicable relationships will enable the Commission and all Indian nations to ensure the safety of all Americans. Our commitment to this goal is already evident in this very area, as illustrated through the attached Resolution establishing the Fort Apache Indian Reservation as a nuclear free zone banning all nuclear activities. Please accept the attached comments for your careful consideration, and do not hesitate to contact my office should you wish to further discuss this invaluable opportunity to build a safer future for our children.

Sincerely,
MARGARET BAHAWALKER
Acting Chairman
For
Dallas Massey, Sr.
Chairman

Comments on Proposed Rules Regarding Notification to Tribes about Shipments of High Level Radioactive Waste

DS10

Submitted by the White Mountain Apache Tribe

The following comments are set forth according to the corresponding questions raised in Volume 64, No. 244 of the Federal Register, December 21, 1999. As a central theme to all of these comments, please acknowledge that the White Mountain Apache Tribal Council has declared the Fort Apache Indian Reservation a nuclear free zone, according to duly enacted Resolutions, Nos. 09-93-246 and 08-93-223. Further, please note the trust obligation of all federal agencies in relation to Indian nations, including that of the Nuclear Regulatory Commission as well as President Clinton's Executive Order requiring a Government-to-Government relationship between the Federal Government and Indian nations.

Supporting reasons for comments listed herein:

Indian nations have the absolute right to establish laws, regulations and ordinances pertaining to their lands and their internal operation. Notification to these Nations of the shipment of irradiated nuclear waste or other toxic health hazards is essential to observe these rights. As applied to the White Mountain Apache Tribe, notification is essential because the Tribal Council, in its inherent power granted through its Constitution, can protect the natural resources on its land and act in all matters that concern the welfare of the Tribe. The Council of the White Mountain Apache Tribe has exercised its inherent powers in this regard to establish the Reservation as a nuclear free zone, free from the construction of power plants, any uranium milling or mining, any nuclear weapon production, deployment and testing, and any transport and disposal of radioactive materials and waste, as noted in Resolution No. 09-93-246.

The White Mountain Apache Tribal Council's power to establish this nuclear free zone is integral to inherent tribal sovereignty, powers of self-government, and to the power necessary to govern purely intramural matters. The White Mountain Apache Tribe has a vibrant interest in maintaining its right to implement laws, ordinances and regulations and to be governed by them.

Therefore, because the White Mountain Apache Tribal Council has determined that the Fort Apache Indian Reservation shall remain a nuclear free zone, transport of any nuclear waste or spent fuel within the exterior boundaries of the Fort Apache Indian Reservation should comply with Tribal law, of which Resolution No. 09-93-246 is a part. Nonetheless, in order to fully disclose the Tribe's opinion on such matters, the Tribe submits the following responses, set forth according to the corresponding sections of the Federal Register notice.

A. List of Contacts

- A.1 A list of Tribal contacts for the NRC based upon the list of Federally recognized Indian community published in the Federal Register is appropriate. However, the NRC should also consult dependent Indian communities located outside the boundaries of any affiliated federally recognized community.

- A.2 For current contact information, the NRC must provide each Indian community contact with a yearly request for Information, which is simply a statement of the current information the NRC has on the community and a space provided for any updates, changes or new information.
- A.3 Notification by telephone should be provided to the established main contact (which should be determined either at this time or very soon thereafter) which must be a twenty-four hour operated entity (likely the local fire department), which the Chairman or President designates to receive such information. For small communities, the Chairman of the Indian nation or his authorized designee should receive the notification. A telephone and facsimile contact number, if available should be provided to the NRC.

B. Administrative Burden

- B.1 Licensees can comply with this notification requirement and keep their administrative burden low, by pre-planning their route of travel and simply providing concurrent notice to both the states and Indian nations in their path of travel. If these administrative burdens are excessive, the licensee could possibly submit a statement of the excess to the NRC and receive reduced administrative fees from NRC.
- B.2 If licensees/shippers can not make contact with a Tribe prior to or during a shipment, the shipment must not proceed. Although this could pose problems for the shipper/licensee, most of them can be resolved through a well established and easily administered contact list and annual update information system. Further, for immediate schedule changes, the inability to contact an Indian nation's notification source should not vitiate that community's right to object to, or receive notification of, the likely presence of hazardous materials in its territory.

C. Location of Indian communities

- C.1 Licensees can identify the location of Native American Tribes along a particular shipment route with, as stated above, a pre-planning process, which could involve the Department of Interior, Bureau of Indian Affairs providing a detailed map or other source indicating the exact location of Indian communities across America, in relation to transportation routes. The Department of Transportation would also be a likely source for information and assistance in this regard. Perhaps the best resource for establishing the boundaries of each Indian community, however, is the community itself, which should be consulted when developing these resources.
- C.2 If the DOI/BIA can not provide a mapping source for NRC's use, then it would be useful for the DOE and NRC to establish and maintain a central data base regarding the location of Tribal lands in relation to various transportation routes. The GIS resources could also prove invaluable to help establish these routes. However, the Indian communities are the best source for information regarding the extent of their boundaries and location.

Coordination between the NRC, licensee, Indian community and all of the above noted federal agencies is essential to develop a comprehensive mapping source.

- C.3 The lands upon which the proposed NRC notification rules should apply are those generally within Indian Country, as defined in federal judicial opinions, which shall include all lands, whether they be Trust lands, Fee lands, Dependent Indian Communities, lands received under any claims settlements, (such as those prevalent in Alaska), lands claimed or recognized under aboriginal title, and lands upon which Indian communities hold treaty or other reserved rights.

D. Safeguards Information

- D.1 Advance notice of spent fuel shipments must be adequately provided to all Indian nations when such shipments are transported to or across tribal boundaries. Such notice will enable the appropriate tribal departments to plan for situations which may arise in the transport process.
- D.2 The NRC's "need-to-know" information protection requirements would be appropriate for Federally Recognized Indian Tribes, only if the NRC provides funding necessary to establish and operate such a system for Indian nations along with funding necessary for the indirect costs associated with such a system.
- D.3 To curb any increased risk caused by the dissemination of information on spent fuel shipments to Indian nations, the NRC should appropriate funds adequate to enhance internal security measures and adequate to develop tribal notification and confidentiality procedures. Further, NRC must provide funding adequate to cover the training, administrative, and indirect costs necessary to establish this program in Indian country.
- D.4 Point of contact information should be determined in consultation with all Indian nations, to determine the most appropriate agency and individual who can receive this important information. The same procedure and standards applicable to state could be applied to Indian nations as long as funding is made available to enable the assumption of these requirements.
- D.5 The NRC must observe its trust responsibility to Indian nations and must therefore ensure that it provides adequate protection for their resources and self-government. This adequate protection requires funding, either through NRC or an appropriation to and through the BIA for each Indian nation. Thus, the funds required to be expended for compliance with NRC safeguards must be appropriated to each Indian nation. Those Indian nations which do not consent to the transport of hazardous and nuclear waste materials should not have to expend resources for safeguards information, much like the White Mountain Apache Tribe.
- D.6 The NRC should review a Indian nation's actions to control and protect Safeguard's

Information, but only if the NRC has helped establish the Tribe's procedures and provides funding necessary to comply with such procedures and their administration. If the NRC chooses not to provide funding for compliance with its procedures, then an Indian nation should not be regulated in its actions to control and protect Safeguards Information, as this would amount to an unfunded mandate.

- D.7 If the NRC assists with the development, funding and implementation of information protection procedures in Indian Country, then it is assumed that the procedures would meet with NRC's approval.
- D.8 If the NRC believes that an Indian nation is not capable of protecting Safeguards Information from disclosure, it should never exempt that Indian nation from the advance notification requirement. Rather, the NRC should prevent this possibility by taking a pro-active role in assisting Indian nations in the development of their procedures and standards for protecting Safeguards Information. Therefore, under no circumstance should NRC grant a licensee an exemption from early notification to an Indian nation.
- D.9 The requirements set forth in 10 C.F.R. 73.37(f) should not be changed to a permissive form, but should rather be extended to permit longer time periods of notification to the Tribal official designated to receive such notice. The White Mountain Apache Tribe tentatively proposes a post mark at least 12 days before shipment, with the notice reaching the designated Tribal official at least 8 days before transport of a shipment through or within Indian Country.