

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

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*email **ML112220078/WITS 200800219/EDATS: SECY-2011-0521**

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