

Responses to Open Questions from January 11, 2012, License Renewal Commission Meeting

1. Does the NRC consult with State-recognized tribes in its license renewal environmental reviews?

For license renewal (LR) reviews, the NRC has consulted with State-recognized tribes on a case-by-case basis. On several LR reviews, the NRC has contacted non-Federally recognized tribes at the request of Federally-recognized tribes and the State Historic Preservation Officer. When non-Federally recognized tribes contact the NRC about a specific LR review, the staff has invited them to participate in the National Environmental Policy Act (NEPA) process.

Although an agency may choose to reach out to and consult with non-Federally recognized tribes, the NRC is not required to treat non-Federally recognized tribes any differently than members of the public. The NRC does not have a policy regarding outreach and consultation with non-Federally recognized tribes. Please see the Background section below for more details.

2. A population displaced through evacuation may have environmental impacts. Does the NRC consider the environmental impacts of evacuation in its license renewal environmental reviews? If not, is this addressed elsewhere?

Because the action of license renewal does not change anything related to emergency preparedness (EP), environmental impacts of evacuation are not addressed in the Generic Environmental Impact Statement or site-specific LR environmental reviews.

The Commission considered the need for a review of EP issues in the context of license renewal during its rulemaking proceedings on Title 10 of the *Code of Federal Regulations* (CFR) Part 54, which included public notice and comment. As discussed in the Statement of Considerations for rulemaking (56 FR 64966), the programs for EP at nuclear power facilities apply to all nuclear power facility licensees and require the specified levels of protection from each licensee regardless of plant design, construction, or license date. Requirements related to EP are in the regulations at 10 CFR 50.47 and Appendix E to 10 CFR Part 50. These requirements apply to all operating licenses and will continue to apply to facilities with renewed licenses. Through its standards and required exercises, the Commission reviews existing EP plans throughout the life of any facility, keeping up with changing demographics and other site-related factors.

The staff is not currently aware of any NRC NEPA analysis that considers the environmental impacts of evacuation. Staff has contacted the Federal Emergency Management Agency and inquired whether it performs an environmental analysis under its authority for offsite planning and response.

Background

According to the Advisory Council on Historic Preservation (ACHP), the Federal government's unique relationship with each and every Indian tribe is embodied in the U.S. Constitution, treaties, court decisions, Federal statutes, and Executive Orders. Legally, there is a distinction between Indian tribes who are Federally-recognized and those who are not. Federal recognition signifies that the U.S. government acknowledges Federally-recognized tribes as sovereign

nations, thus their interaction is conducted on a “government-to-government” basis. In the absence of a specific duty placed on the government with respect to Indians, an independent regulatory agency, such as the NRC, discharges its obligations under the trust responsibility by complying with regulations and statutes designed to protect the public at large, in this case, the Atomic Energy Act and the NEPA.

A number of Federal statutes require Federal agencies to consult or coordinate with Indian tribes. NEPA requires the preparation of an environmental impact statement (EIS) for any proposed major Federal action that may significantly affect the quality of the human environment. While the statutory language of NEPA does not mention Indian tribes, the Council on Environmental Quality regulations and guidance do require agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an environmental assessment or EIS.

A State-recognized tribe has no special status under the National Historic Preservation Act (NHPA) or any of the Executive Orders concerning relations with tribal governments. NHPA Section 101(d)(6)(B) and its implementing regulation at 36 CFR 800.2(c)(2)(ii) only requires Federal agencies to consult with the Federally-recognized tribes that attach religious and cultural significance to properties that may be determined to be eligible for inclusion in the *National Register of Historic Places*. In other words, only Federally-recognized Indian tribes have a statutory right to be consulting parties in the Section 106 process.

Under 36 CFR 800.2(c)(5) a State-recognized tribe can be included as a consulting party if they have a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties. Federal government-wide ACHP guidance includes the following:

The question of inviting non-Federally recognized tribes to participate in consultation can be both complicated and sensitive and thus deserves careful consideration. The agency should consider whether the non-Federally recognized tribe can meet the threshold of a “demonstrated interest”...The inclusion of non-Federally recognized groups in consultation may raise objections from some Federally-recognized tribes. Yet, there are other tribes who routinely support the invitation of non-recognized tribes into consultation, recognizing their interests as well. The ultimate decision on whether to consult with non-Federally recognized tribes, however, rests with the Federal agency.