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RED LAKE BAND
of CHIPPEWA INDIANS

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DIVISION:

DOCKET NUMBER
PROPOSED RULE PR 71 & 73
(64FR 71331)

March 10, 2000

The Secretary, U.S. Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemakings and Adjudications Staff

Dear Secretary:

As a matter of principle the Red Lake Band supports changing U.S. Nuclear Regulatory Commission (NRC) regulations to require advance notification to Native American Tribes for 10 CFR 71.97(b) and 10 CFR 73.37(a) shipments of certain types of high-level radioactive waste, including spent nuclear fuel, whenever a shipment will cross or is to a Tribal Land boundary. Shipment of such nuclear materials on Tribal Land is an important concern for Native American Tribes. Changing NRC regulations to provide notice to Tribes would be both respectful and an important recognition of Native American sovereignty in accordance with President Clinton's 1994 memorandum "Government-to-Government Relations with Native American Tribal Governments." The U.S. Department of Energy (DOE) implemented its Tribal notification policy in 1994 for nuclear shipments, and we support the NRC proposal to amend its regulations to accomplish the same goal. This NRC effort to recognize the sovereignty of Federally recognized Native American Tribes is commendable.

Mr. Lickus, Chief of State and Government Affairs for the NRC, listed several specific questions for consideration in his January 28, 2000 letter. These questions are each addressed in pages 2 through 6 of this letter. If you have any questions, please contact William Smith, Environmental Specialist, Red Lake DNR, at 1.218.679.3959 x1328.

Sincerely,

Bobby Whitefeather

Bobby Whitefeather, Chairman
Red Lake Band of Chippewa Indians

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A. Developing a List of Native American Tribe Contacts

A.1. In preparing the list of Tribal contacts, the NRC would most likely look to the list of Federally recognized Native American Tribes maintained by the Bureau of Indian Affairs (BIA), U.S. Department of the Interior. Is this an appropriate approach? Are there any other sources that the NRC should consider?

This approach is acceptable.

A.2. How can the NRC ensure that contact information is kept current, particularly for smaller Tribes? In maintaining State contacts, the NRC provides each State with the opportunity to update its information annually. Should NRC follow the same approach for Tribal contacts?

The NRC should provide an annual opportunity to update contact information for the Tribes, and if a problem is found to exist with keeping a current list of contacts, increase the frequency of updates to twice a year.

A.3. How can licensees effectively and efficiently provide notification to Native American Tribes, particularly smaller Tribes, of a schedule change that would require updated notification by telephone at any time of day?

Provide for two Tribal contacts, one being a Tribal peace officer on duty around the clock, or obtain two phone contact numbers for the Tribal designee (office and home). Another option might be to amend the notification rule to allow more than 6 hours but less than 1 business day to make contact with the Tribal designee. Schedule changes should only occur for delayed shipment, and therefore Tribal notification could be delayed until the end of the next business day without a significant loss of Tribal sovereignty.

B. Minimizing the Licensees' Administrative Burden

B.1. In what ways can licensees comply with this advance notification requirement, while keeping their administrative burden at a minimum?

Allowing for more than one Tribal contact or a larger time window for schedule change notifications, as we propose for question A.3 should minimize any burden on licensees. Original notification to Tribes should not be any significant additional burden to licensees.

B.2. If a shipper is unable to make contact with a Tribe prior to or during a shipment, should the shipment proceed.

No, because 10 CFR 71.97(c)1 and 2 provide for mail and messenger notification a minimum of 4 days before a 7 day period during which shipment to commence. No reasonable reason exists for a shipper to fail to contact a Tribal designee with such a large planning window available to the shipper. Notification of schedule changes should be relatively easy with a larger time allowed, as we propose for question A.3.

C. Identifying the Location of Tribes Along Shipment Routes

C.1. How can licensees effectively and comprehensively identify the location of Native American Tribes along a particular vehicle, rail, or vessel shipment route?

The Federal government should provide maps of Indian trust lands to licensees. Such a map overlain with the route map should identify Tribal boundaries that are crossed by shipment routes.

C.2. Should DOE and NRC licensees develop and maintain a central data base regarding the location of Tribal lands? Should NRC look to Geographic Information System (GIS) resources to provide licensees with information regarding the location of Tribal lands?

DOE and NRC licensees should not develop and maintain their own individual data bases regarding the location of Tribal lands. The number of licensees would essentially guarantee that data base errors and incompatibilities would occur. It would be preferable to assess an annual fee on each DOE and NRC licensee to permit the Federal government to develop and maintain a data base of Tribal trust lands which would be available to DOE and NRC licensees. GIS would provide the greatest ease of use and accessibility to the data base of Tribal lands and should be pursued by NRC. This data base should also be made available to Tribal governments and the public for their use.

C.3. What types of Tribal lands should the rule apply to (e.g., Trust Lands, Fee Lands (i.e., lands owned by Native Americans but not held in trust by the Federal government), etc.)?

The rule should apply to Trust Lands.

D. Safeguards Information

D.1. Should advance notification of spent fuel shipments be provided to any federally recognized Native American Tribe when spent fuel shipments are transported to or across tribal boundaries?

Yes, advance notification of spent fuel shipments should be provided to any Federally recognized Native American Tribe when those shipments are to or across a boundary of that Tribe's Tribal Trust Lands.

D.2. The NRC's "need-to-know" requirement for advance notification of spent fuel shipment information is found in 10 CFR 73.21. Should this requirement be broadened to include other entities, such as Federally recognized Native American Tribes?

Yes, the "need-to-know" requirement should be broadened to include the Tribal designee or designees.

D.3. Does wider dissemination of shipment information increase the risk to safeguarding spent fuel shipments (i.e., protecting public health and safety)? How should the NRC address any increase in risk compared with the benefits to be gained from Tribal notification?

The benefits gained from Tribal notification are concrete and include recognition of Tribal sovereignty, demonstrated increased respect for Native Americans, and a better informed Tribal government which has a responsibility to be aware of activities that could adversely affect Tribal lands and members.

The risks associated with safeguarding spent fuel shipments because of wider dissemination of shipment information may be slightly greater, but not significantly so. No good rationale for excluding Tribal governments exists unless one takes the position that somehow designated Tribal "need-to-know" recipients of shipment information are less reliable than non-Tribal recipients of the same information.

We do not believe that there is any appreciable greater security risk incurred by including Native American Tribes in the NRC mandated shipment notifications.

D.4. How should the rule address the point of contact for Safeguards Information in the context of Tribal notification?

Tribal designee.

D.5. A recipient of Safeguards information must expend resources to ensure the information is handled properly. Are there Tribes who may not wish to be recipients of Safeguards Information?

There may be Tribes that do not wish to be notified of Safeguards Information, either because they do not see any need, because they do not wish to incur the expense

associated with Safeguards information, or because the Tribal lands being crossed are deemed to be of a lower level of concern to the Tribe (i.e. small parcels of uninhabited Trust Land remote from the main inhabited body of the reservation). If a GIS system is set up indicating all Tribal Trust Lands, a survey could be sent out to the Native American Tribes asking them if they wish to receive Safeguards Information for all, none, or part of their Trust Lands. If only part of the Tribal Trust Lands are of concern to the Tribal government, they could indicate which in the GIS system which land that is.

If a Tribal government does not feel it possesses the resources to ensure the Safeguards information is handled properly, the NRC and/or licensees should assist the Tribal government in development of that capability, as is outlined in our question D.8 response.

D.6. If a Tribal government receives Safeguards Information, should the NRC review the Tribe's actions to control and protect Safeguards Information?

The NRC should review State government recipients and Tribal government recipients of Safeguards Information in the same manner and at the same frequency.

D.7. 10 CFR 73.21(a) states that "information protection procedures employed by State and local police forces are deemed to meet the information protection requirements of Sec. 73.21(b) through (i)." Should the NRC determine the ability of Tribal governments to protect Safeguards Information and, if so, how?

The NRC should use the same procedures to assess a Tribal government's ability to protect Safeguards Information as it would to assess a State government's ability. If a state government is assumed to be capable of managing Safeguards Information in an adequate manner without the need for an NRC determination of fitness, so should a Tribal government be.

D.8. Should the contemplated rule include an exemption to the notification requirement if there is reason to believe that a Tribe will not be able to protect the Safeguards Information from disclosure? What basis would the NRC need for granting such and exemption?

The NRC should not grant such exemptions. If the NRC feels that Safeguards Information is not be adequately protected from disclosure by a Tribe, the NRC and licensee should work with and assist the tribe to develop the requisite capability to protect the Safeguards Information. Such assistance could take many different forms, including training, financial assistance, physical improvements to facilities, etc. In addition, a grant of exemption should require hearings, an appeal process, review, and reassessment procedures to reestablish notification to the Tribal government.

Rather than excluding a Tribe from notification, if no other assistance is given to a Tribal government to handle Safeguards Information, licensees should be required to find alternate shipment routes to avoid crossing Tribal boundaries.

D.9. Should 10 CFR 73.37(f) be changed to a permissive form? That is, should the licensee be permitted rather than required to release Safeguard Information to responsible Tribal government officials?

No, 10 CFR 73.37(f) should not be changed to a permissive form. Firstly, if notification of Tribal governments is at the licensees' discretion, it is possible that often notification of Tribal governments will not occur. Secondly, discretionary notification is contrary to the NRC stated purpose of recognizing Tribal sovereignty in accordance with President Clinton's 1994 memorandum entitled "Government-to-Government Relations with Native American Tribal Governments." In addition, again, due process should require hearings, an appeal process, review, and reassessment procedures to reestablish notification to the Tribal government.

As stated in our response to D.8., if no assistance is given to a Tribal government by the NRC and/or licensee to develop an adequate capability to handle Safeguards Information, then the licensee should be compelled to find an alternate route for shipment of the nuclear materials.

Prepared by William Smith, Environmental Specialist