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DOCKET NUMBER
PROPOSED RULE 71+93
(64FR 71331)

DOCKETED
USNRC

'00 JUN -5 P12:49

TEA-21 NEGOTIATED RULEMAKING COMMITTEE

OFFICE OF THE
GENERAL
ADJUDICATOR

June 27, 2000

Ms. Annette L. Vietta-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemaking and Adjudications Staff

Re: Tribal Comments on the NRC's Advance Notice of Proposed Rulemaking concerning Advance Notification to Indian tribes of the Transportation of Nuclear Waste, 64 Fed. Reg. 713321 (Dec. 21 1999)

Dear Ms. Vietta-Cook:

The Tribal Caucus of the federally-appointed TEA-21 Negotiated Rulemaking Committee is pleased to provide you with the enclosed tribal comments explaining the importance of providing advance notification to Indian tribal governments when nuclear waste is transported on or near tribal lands. These comments respond to the questions posed in the Nuclear Regulatory Commission's advance notice of proposed rulemaking published in the Federal Register on December 21 1999. We understand that the deadline for responding to the NRC's notice of proposed rulemaking has been extended to July 5, 2000.

On May 25, 2000, at a duly called and convened meeting of the TEA-21 Negotiated Rulemaking Committee, the tribal representatives on the Committee met in caucus to review, revise and adopt the enclosed tribal comments. These comments reflect the considered views of the tribal representatives on the TEA-21 Negotiated Rulemaking Committee regarding this important issue.

As mandated by the Transportation Equity Act for the 21st Century (TEA-21), we were appointed to represent the interests of all federally-recognized Indian tribes in the development of federal regulations to implement the federal Indian Reservation Roads program. We believe the nuclear transportation issues raised in the NRC notice of proposed rulemaking closely relate to

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the transportation issues of concern to this Committee. We are therefore pleased to provide the views of the TEA-21 Negotiated Rulemaking Committee Tribal Caucus to the NRC as it develops further regulations in this area.

Thank you for your careful consideration of these tribal comments.

Sincerely,

<u>Pete Red Tomahawk</u> 6-27-2000 Pete Red Tomahawk, Tribal Co-Chair (Date)	<u>Jim Garrigan</u> 6/27/2000 Jim Garrigan, Tribal Co-Chair (Date)
<u>Vlayn McCovey</u> 6-27-00 Vlayn McCovey, Tribal Co-Chair (Date)	<u>Chuck Tsoodle</u> 6-27-00 Chuck Tsoodle, Tribal Co-Chair (Date)

Enclosures

cc: Hon. Kevin Gover, Assistant Secretary for Indian Affairs

**TRIBAL RESPONSE TO THE NRC ADVANCE NOTICE OF PROPOSED
RULEMAKING -- ADVANCE NOTIFICATION TO INDIAN TRIBES OF THE
TRANSPORTATION OF NUCLEAR WASTE**

**Submitted by the Tribal Caucus of the Federally-appointed
TEA-21 Negotiated Rulemaking Committee**

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 BIA. Is this an appropriate approach? Are there any other sources that the NRC should consider?

The contact list should be drawn from the list of federally recognized tribes maintained by the BIA. State-recognized tribes should be included by the state. State should have the responsibility of informing state-recognized tribes of the NRC advance notification procedures.

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 follow the same approach for tribal contacts that it uses for state contacts. The size of the tribe is irrelevant. The NRC could utilize e-mail or methods other than postal mail to facilitate this effort. A uniform database could be maintained by each NRC region and forwarded to headquarters using a consistent nationwide database design. The BIA could lend assistance in keeping the contact information current.

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?

Presumably the NRC can provide the licensees with the appropriate contact information. The tribes can provide their own points of contact and contact information to the NRC for distribution to the licensees. At the tribe's discretion, the contact information should include primary and secondary points of contact and tribal "first responder" agencies, such as tribal police and fire services. The contact information can also include answering machines or email addresses for notifications occurring outside normal business hours. The size of the tribe is irrelevant.

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

There will not be an "administrative burden." After all, there are a finite number of routes over which these shipments can take place, and a finite number of tribes along these routes.

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

No. Indian tribal governments have jurisdiction over their territory and a responsibility to serve and protect their members. It is essential that Indian tribes remain informed about health and safety issues affecting their lands and members. Tribal governments have a right to receive the same level of advance notification as state governments.

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

Detailed maps are available from the BIA, the DOE, the Bureau of Land Management and other federal and state agencies which can assist the NRC in identifying the location of Indian tribes and tribal lands. Indian tribes can also assist the NRC by sending in their own digitally-created or geographically referenced maps. These maps should be posted on an NRC web site and made available to licensees.

C.2. Should DOE and NRC licensees develop and maintain a central database 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?

Yes. The maps should include roads, railway lines and the boundaries of the Indian tribes' traditional territory, as determined by the Indian tribes. Indian tribes should receive advance notification of nuclear transportation shipments proceeding over highways or railroad lines located in close proximity to these tribal lands, as well as over the tribal lands themselves.

C.3. What types of tribal lands should the rule apply to (e.g., trust lands, fee lands)?

The rule should apply to all federally and state recognized tribes regardless of their land status.

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

Yes, for the reasons stated above. The shipments should occur only with the approval of the affected Indian tribal government. The NRC must recognize that Indian tribes have legal jurisdiction over their lands and tribal membership. The NRC should develop an ongoing government-to-government relationship with Indian tribes and enter into appropriate agreements with them prior to allowing the transport of potentially dangerous material across or near tribal lands.

D.2. The NRC's "need-to-know" requirement of 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. Native American tribal governments have a "need to know" about nuclear transportation which may pose a risk to their land or membership.

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?

It is not appropriate for the NRC to assume that a tribal contact would create a greater risk than a state contact. As noted in the NRC's own background information in this advance notification of proposed rulemaking, the DOE already requires advance notification to Indian tribes when DOE transportation shipments occur across tribal lands. The NRC should follow the DOE model for notifying tribes and safeguarding information. The procedure for safeguarding the information should be similar to that for state and local police.

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

The tribes should be given the same consideration regarding Safeguards Information as the states. Indian tribal governments must already safeguard a great deal of confidential information, such as tribal court records, medical records, mental health counseling records, and child protection records to name only a few examples. Many Indian tribes require their elected officials and employees to take confidentiality oaths and abide by strict confidentiality procedures. Tribal confidentiality laws and procedures should be deemed to satisfy the Safeguards Information protection requirements in 10 CFR 73.21

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?

Obviously, Indian tribes have more limited financial resources than state governments. Therefore, tribes should not be subjected to onerous requirements regarding the handling of this information. We believe that most tribes will simply want to know the day, the time, and the type of material that will be shipped near or through their tribal lands. We do not believe that significant financial resources will be required to safeguard this basic information. For tribes who want to receive this information, simple rules can be developed for safeguarding it. It should be the tribe's decision to determine if it can or wants to handle Safeguards Information. Some tribes may elect the option of delegating this responsibility to another responsible party, such as the BIA.

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

No. The tribes should be treated in the same manner as states regarding Safeguards Information. Because it does not examine state Safeguards procedures, the NRC also should not examine or control tribal Safeguards procedures.

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?

No. As noted above, Indian tribes are sovereign governments, and they already maintain confidential information in many areas. The NRC should not assume that Indian tribes are less capable of safeguarding this information than state or local governments. Tribal confidentiality laws and procedures should be deemed to satisfy the Safeguards Information protection requirements in 10 CFR 73.21. The NRC should only take appropriate action if a verified lapse in the tribal safeguarding of this information occurs.

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 an exemption?

No. If an Indian tribe is unable to protect the Safeguards Information, an alternate shipment route should be used. As far as we are aware, there are no exemptions to the advance notification requirements for state and local governments. Similarly, there should be no exemptions for Indian tribes.

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 Safeguards Information to responsible tribal government officials?

No. Licensees *must* be required to release the Safeguards Information to tribal governments. The NRC has a federal trust responsibility to Native American governments. A failure to notify a tribe regarding shipments across their land would constitute a failure to fulfill this basic federal trust responsibility. Furthermore, the NRC must comply with the CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS, Executive Order 13084 (May 14, 1998) and the GOVERNMENT TO GOVERNMENT RELATIONS WITH NATIVE AMERICAN TRIBAL GOVERNMENTS, Executive Memorandum (April 29, 1994). The NRC's legal responsibilities to Native American governments supercede any perceived inconvenience on the part of the licensee to notify tribal governments.