



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

October 6, 2010

OFFICE OF THE  
SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-10-0095

TITLE: PROPOSED RULE: ADVANCE NOTIFICATION TO NATIVE  
AMERICAN TRIBES OF TRANSPORT OF CERTAIN TYPES  
OF NUCLEAR WASTE (RIN 3150-AG41)

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of October 6, 2010.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff  
OGC  
EDO  
PDR

VOTING SUMMARY - SECY-10-0095

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X				X	9/7/10
COMR. SVINICKI	X				X	9/27/10
COMR. APOSTOLAKIS	X				X	9/17/10
COMR. MAGWOOD	X				X	9/15/10
COMR. OSTENDORFF	X				X	8/30/10

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on October 6, 2010.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Gregory B. Jaczko

SUBJECT: SECY-10-0095 – PROPOSED RULE: ADVANCE  
NOTIFICATION TO NATIVE AMERICAN TRIBES OF  
TRANSPORT OF CERTAIN TYPES OF NUCLEAR  
WASTE (RIN 3150-AG41)

Approved  Disapproved  Abstain

Not Participating

COMMENTS: Below  Attached  None

  
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SIGNATURE

9/7/10  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No

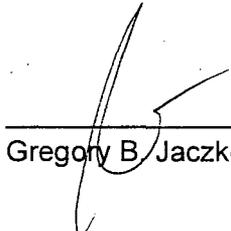
**Chairman Jaczko's Comments on SECY-10-0095,  
"Proposed Rule: Advance Notification to Native American Tribes of  
Transport of Certain Types of Nuclear Waste"**

I approve of the staff's recommendation to publish the proposed amendments to 10 CFR 71 and 73 in the *Federal Register*. These amendments would require licensees to provide advance notice to Federally recognized Tribal governments with respect to shipments of irradiated nuclear fuel and certain nuclear wastes for any shipment that passes through Tribal reservations.

I agree with Commissioner Ostendorff, however, that the staff has not clearly presented the staff's justification for the provision of the proposed rule that would relieve Tribes from fingerprinting and background investigations for access to SGI. Before publication, staff should revise the supplementary information for this rule to provide that justification. If appropriate justification cannot be found, the staff should notify the Commission. I also agree with Commissioner Ostendorff that there does not appear to be a basis for limiting the relief provided to only SGI related to these types of shipments. This should be more clearly discussed in the proposed rule.

Also, the proposed rule currently specifies that licensees should provide "advance notification to the Tribal official of participating Tribes referenced in paragraph (c)(3)(iii) of this section, or the official's designee, of the shipment of licensed material..." and "Tribal official" is defined as an "elected or duly appointed official of Indian tribal governments." The wording mirrors that already used in the rule with respect to States, which says that each licensee shall provide advance notification to "the governor of a State, or the governor's designee, of the shipment..." The wording regarding the Tribal official should specify that the rule is referring to the *head* Tribal official or that official's designee, and not other officials that may be elected to various positions within the Tribal organization.

Lastly, the staff should ensure that in addition to providing a list of Tribal contacts on the website, they should also provide a map delineating the locations of the Tribal reservations so that licensees can properly identify when shipments may be crossing into those areas.

  
\_\_\_\_\_  
Gregory B. Jaczko

9/7/10  
\_\_\_\_\_  
Date

**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** COMMISSIONER SVINICKI  
**SUBJECT:** SECY-10-0095 – PROPOSED RULE: ADVANCE  
NOTIFICATION TO NATIVE AMERICAN TRIBES OF  
TRANSPORT OF CERTAIN TYPES OF NUCLEAR  
WASTE (RIN 3150-AG41)

Approved XX Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached XX None \_\_\_\_\_

  
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09/27/10  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

**Commissioner Svinicki's Comments on SECY-10-0095**  
**Proposed Rule: Advance Notification to Native American Tribes of Transport of Certain**  
**Types of Nuclear Waste (RIN 3150-AG41)**

I approve for publication in the *Federal Register* the proposed amendments to Parts 71 and 73. I agree with the other members of the Commission that the staff has not presented a justification for the provision of the proposed rule that would relieve Tribes from fingerprinting and background investigations for access to safeguards information. Before publication of the proposed amendments in the *Federal Register*, the supplementary information accompanying the proposal should be modified to include this justification.

I also support Chairman Jaczko's proposal that the wording regarding advance notification to the Tribal official should clarify that the rule is referring to the head Tribal official or that official's designee, and not other officials that may be elected to various positions within the Tribal organization. Finally, I agree that the NRC will need to maintain, perhaps through its website, the precise locations of Tribal reservation boundaries so that licensees will have an authoritative reference for determining whether the routing of their shipments will require Tribal notifications, if these proposed amendments are instituted.



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Kristine L. Svinicki

0927/10

**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** Commissioner Apostolakis  
**SUBJECT:** SECY-10-0095 – PROPOSED RULE: ADVANCE NOTIFICATION TO NATIVE AMERICAN TRIBES OF TRANSPORT OF CERTAIN TYPES OF NUCLEAR WASTE (RIN 3150-AG41)

Approved  X  Disapproved       Abstain      

Not Participating      

**COMMENTS:** Below  X  Attached       None      

I approve the staff's recommendations to publish to proposed amendment to 10 CFR Parts 71 and 73 in the *Federal Register*.

I agree with Chairman Jaczko and Commissioners Ostendorff and Magwood that the *Federal Register* notice would benefit from additional text that provides the rationale to relieve Tribes from fingerprinting and background investigation for access to the advance notifications of transport that are treated as Safeguards Information prior to and during the shipments.

  
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9/17/10   
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DATE

Entered on "STARS" Yes  X  No

**NOTATION VOTE**

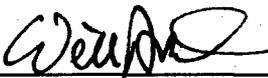
**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MAGWOOD  
SUBJECT: SECY-10-0095 – PROPOSED RULE: ADVANCE  
NOTIFICATION TO NATIVE AMERICAN TRIBES OF  
TRANSPORT OF CERTAIN TYPES OF NUCLEAR  
WASTE (RIN 3150-AG41)

Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached  None \_\_\_\_\_

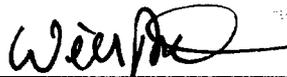
  
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15 SEPT 2010  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

**Commissioner Magwood's Comment on SECY 10-0095, "proposed Rule: Advance Notification to native American Tribes of Transport of Certain Types of Nuclear Waste"**

I approve the staff's proposal to publish a proposed rule that would require licensees to provide to Federally recognized Tribal governments advanced notification regarding shipments of irradiated reactor fuel and certain nuclear wastes listed in 10 CFR 71.97. The proposed rule would also relieve Tribal officials of the obligation to undergo a background check prior to being granted access to this Safeguard Information (SGI). I agree with staff that it is important that we inform Federally recognized Tribal governments of shipments of irradiated fuel and other nuclear wastes passing through their reservations and that we recognize Tribal governments' interest in being informed of activities occurring on Tribal reservations. However, before publication, staff should clearly outline in the proposed rule its justification for the provision that would relieve Indian Tribes from fingerprinting and background checks for access to SGI. One example of such justification might include that requiring fingerprinting and criminal history check of the Tribal government could strain existing cooperative relationships with the Tribes and the NRC's effort to voluntarily comply with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments". Also it is important to note that the information being provided is limited in scope and that if the Tribes choose to be notified, they will adhere to the requirements of 10 CFR Part 73.21 and 73.22 as well as demonstrate that they have a "need to know". I support the staff's efforts to communicate with Tribes when the proposed rule is published. In that respect, staff should continue to ensure the final rule reflects comments and concerns of the Tribal governments. Staff should also communicate with the Tribal governments regarding the legal obligation associated with protecting SGI and the consequences associated with not protecting the information appropriately. To this end, staff should seek comments in the proposed rule as to the best methods to impress upon the Tribal governments regarding the obligations associated with possessing SGI.



15 SEPT 2010

William D. Magwood, IV      Date

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER OSTENDORFF  
SUBJECT: SECY-10-0095 – PROPOSED RULE: ADVANCE  
NOTIFICATION TO NATIVE AMERICAN TRIBES OF  
TRANSPORT OF CERTAIN TYPES OF NUCLEAR  
WASTE (RIN 3150-AG41)

Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached  None \_\_\_\_\_

  
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SIGNATURE

8/30/10  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

**Commissioner Ostendorff's comments on SECY 10-0095, "Proposed Rule: Advance Notification to Native American Tribes of Transport of Certain Types of Nuclear Waste"**

I approve of the staff's proposal to publish in the Federal Register the amendments to 10 CFR 71 and 73 that would: (1) require licensees to provide to federally recognized Tribal governments advance notification regarding shipments of irradiated reactor fuel and certain nuclear waste listed in 10 CFR 71.97; and (2) relieve tribal officials of obligations to undergo a background check prior to being granted access to Safeguards Information (SGI). My approval is subject to a revision to the rule language which provides a basis for the relief from fingerprinting and background checks for access to SGI.

I understand that this proposed rule has been anticipated for some time but has not been completed due to the need to prioritize the NRC's work following the events of September 11, 2001. While I believe the reasons for deferring work on the rulemaking were justified, I think it is important that the Commission move forward expeditiously since the tribes initially requested that the NRC act on this issue in the 1990s.

The proposed rule would rightly recognize tribal interests by offering federally recognized tribes access to the same information that is provided to States in advance of spent nuclear fuel and other waste shipments. The rule would demonstrate that the NRC's practices are consistent with the principles of consultation and cooperation with Indian Tribal governments referenced in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments". The proposed rule follows another recent positive accomplishment on the part of the NRC staff in the area of tribal relations- completion of the NRC's Tribal Protocol Manual. I believe both efforts are worthwhile investments into the NRC's relationships with tribal governments, and I commend the staff for its positive efforts with regard to tribal relations.

I agree with the need to communicate with the tribes through advance notification of the shipments referenced which may cross tribal reservations. However, the supplemental information to the draft proposed rule does not clearly outline the staff's justification for the provision in the proposed rule that would provide blanket relief for all federally recognized Indian Tribes from fingerprinting and background checks for access to this SGI. The Atomic Energy Act provides that the Commission may relieve certain individuals from the fingerprinting, identification, and criminal history records check requirements for access to SGI if the Commission finds that such action is consistent with its obligations to promote the common defense and security and to protect the health and safety of the public. As such, while the relief may be justified, the draft proposed rule does not supply a basis for providing relief. Past rules, including the recent 2006 relief rule published on June 13, 2006, have included statements that provide a basis for the Commission's conclusions that categories of persons listed in the rule are deemed to be trustworthy and reliable without having to undergo the fingerprinting or background checks required for access to SGI. Potential justifications, which are similar to those provided in the 2006 rule, are the need to balance the security risks associated with the planning information with the need to coordinate planning functions and the need to foster

relationships with the tribes. Before publishing the proposed rule, the staff should update the supplemental information to include a basis for relieving this category of persons from the statute consistent with the analysis that has been provided by the Commission in past rulemakings. As an alternative, depending on whether a blanket justification for all tribes can be provided, the staff should also consider whether such relief should be provided on a case-by-case basis similar to the provision in 10 CFR 73.59(f) or (j) for representatives of foreign governments or IAEA representatives, where either the Commission approves such entities for access or the entity is "certified" by the NRC.

I note also that the relief provision would only relieve tribal officials from fingerprinting and background checks to the extent that those officials would have access to SGI associated with "advance notification of shipments under provisions of § 73.37(f)." While this might be appropriate since some of the existing relief provisions in this section have also been narrowly applied, before publishing the proposed rule, the staff should revise the supplemental information to the proposed rule to provide a rationale for limiting the relief provided to only SGI related to these shipments.

I noticed that the staff plans to proactively communicate with the tribes to notify them when the proposed rule is published for comment. Adjustments such as this to our communication vehicles or styles given our stakeholder needs enhance the NRC's openness. This action demonstrates NRC's efforts to voluntarily comply with Executive Order 13175, which states that agencies must have "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications". The staff should expand on the planned adjustments to communication vehicles during development of the rule as necessary to ensure the rule addresses tribal interests to the maximum extent possible.