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Mendiola, Doris

Subject: FW: Comments from the National Tribal Air Association
Attachments: NTAA Comments on NRC Policy Statement 04-29-15.pdf

From: Andy Bessler [mailto:Andy.Bessler@nau.edu]
Sent: Wednesday, April 29, 2015 1:48 PM
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Subject: Comments from the National Tribal Air Association

Cindy Bladey, Chief
Rules, Announcements, and Directives Branch
Office of Administration
Mail Stop: 3WFN-06-44M
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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2015 APR 29 PM 4:18

RULES AND DIRECTIVES
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OFFICE

Hello Ms. Bladey:

Please find the attached comment letter from the National Tribal Air Association.

The same letter has been mailed via the U.S Postal Service as well.

Please let me know if there are any difficulties in downloading the attached letter.

Thank you,

Andy Bessler

Andy Bessler
Project Director



National Tribal Air Association

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April 29, 2015

Cindy Bladey, Chief
Rules, Announcements, and Directives Branch
Office of Administration
Mail Stop: 3WFN-06-44M
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Proposed NRC Tribal Policy Statement

Dear Ms. Bladey:

The National Tribal Air Association (NTAA) is pleased to submit these comments regarding the U.S. Nuclear Regulatory Commissioner's (NRC's) proposed Tribal Policy Statement (Statement).

The NTAA is a Tribal membership organization with 94 principal member Tribes. The organization's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is also important that NRC understands interactions with the organization do not substitute for government-to-government consultation, which can only be achieved through direct communication between the Federal government and Indian Tribes.

The NTAA approves generally of the Statement and its six principles (Principles). Nevertheless, the NTAA would like to provide the NRC with its comments and recommendations regarding proposed changes to the Principles, implementation of Principle No. 3 and Principle No. 4, development of a consultation plan for Principle No. 4, and coordination with other Federal agencies and states for Principle No. 5.

Proposed Changes to the Principles. The NTAA proposes specific changes to the language and intent of the following Principles (note proposed changes are indicated with underlined, bolded text):

1. *The NRC Recognizes the Federal Trust Relationship and Will Uphold Its Trust Relationship With Indian Tribes*

As an independent agency of the Federal government, the NRC shares the unique trust relationship with, and responsibility to Indian Tribes. At the same time, the NRC's actions must be in accordance with its authorizing statutes and regulations. The NRC shall respect Indian Tribal self-government and sovereignty, will honor Tribal **treaty and other** rights, and meet responsibilities that arise from the unique relationship between the Federal government and Indian Tribal governments. **Further, the NRC shall encourage states to recognize the Federal government's trust relationship with Tribes and incorporate this recognition in their own practices.**

2. *The NRC Recognizes and Is Committed to a Government-to-Government Relationship With Indian Tribes*

The NRC recognizes the right of each Indian Tribe to self-governance and supports Tribal sovereignty and self-determination. The NRC recognizes Tribal governments as dependent domestic sovereign nations, independent from State governments, with separate and distinct authorities **with inherent sovereign powers over their members and territory.**

4. *The NRC Will Engage in Timely Consultation*

The NRC will provide timely notice to, and consult with, Tribal governments on NRC's regulatory **and non-regulatory** actions that have substantial direct effects on one or more Indian Tribes. Tribal officials may request that the NRC engage in government-to-government consultation with them on matters that have not been identified by the NRC to have substantial direct effects on one or more Indian Tribes. The NRC will make efforts to honor such requests, taking into consideration the nature of the activity at issue, past consultation efforts, available resources, timing issues, and other relevant factors. The NRC will establish early communications and begin consultation at the earliest permissible stage, as appropriate. The NRC will consult in good faith throughout the agency decision-making process and develop and maintain **regular and meaningful** effective communication, coordination, and cooperation with Indian Tribes. The NRC representative for consultations with Tribal officials or representatives will be of an appropriate rank of NRC representatives and level of interaction commensurate with the circumstances **and who shall have decision-making power.** The appropriate level of interaction will be determined by past and current practices, continuing dialogue between NRC and Tribal governments, and program office consultation procedures.

The NTAA does not find any of these changes to the Principles to be controversial and such changes promote the intent of the Tribal Protocol Manual.¹

¹ See "Tribal Protocol Manual" at <http://pbadupws.nrc.gov/docs/ML1427/ML14274A014.pdf>.

Principle No. 3: Outreach with Tribes. The NTAA supports Principle No. 3 which provides:

The NRC Will Conduct Outreach to Indian Tribes

The NRC will consult and coordinate with Indian Tribes, as appropriate, related to its regulatory actions with Tribal implications and will seek additional opportunities for general outreach. The NRC will participate in national and regional Tribal conferences and summits hosted by Federal agencies and Tribal organizations, and will seek Tribal representation in NRC meetings and advisory committees concerning NRC regulatory actions that have substantial direct effects on one or more Indian Tribes.

While the NTAA supports Principle No. 3, it does not find that current NRC outreach to Indian Tribes is being done or happening in a timely manner. For example, apart from some local efforts, the NTAA is unaware of any venue where Tribes are being brought together to discuss radiation issues and air quality impacts from the nuclear program. The NTAA finds that NRC must be more diligent in conducting outreach on all issues as they are brought to the attention of the NRC by Tribes, the NTAA, or other Tribal organizations.

Principle No. 4: An Example of Lack of Implementation. In 2012, the NRC proposed an Advanced Notification Rule, by which Indian Tribes would receive advance notification of shipments of irradiated reactor fuel and other nuclear wastes transported across their reservations.² Yet, the NRC claims that “there are no tribes that have the prerequisite required to receive advance notifications.”³

Nuclear waste is being transported through a number of reservations weekly by unmarked trucks (e.g., missing placards) and Indian Tribes of these reservations have not been made privy to the transportation schedules for the waste. Knowing the schedule would enable Tribes to protect their reservation environments by having emergency response teams in place in case of any accidental waste releases. Regardless of whether Tribes meet the aforementioned prerequisite, the NRC should still be actively consulting with Tribes on shipments across their reservations and other NRC actions having potentially substantial air quality and other direct effects on one or more Tribes.

The NTAA has also seen several inconsistencies in the reporting of the number of regulated facilities in Indian Country. The NTAA finds that, an update of NRC’s maps or inventories of regulated facilities, would help the NRC to more effectively contact and identify Tribes about NRC regulatory and non-regulatory actions having substantial air quality and other direct effects on one or more Tribes.

² “Tribal Advance Notification” at <http://www.nrc.gov/about-nrc/state-tribal/tribal-advance-notification.html#def> (last visited on April 12, 2015).

³ *Id.*

Principle No. 4: Development of a Consultation Plan. The NTAA recommends that Principle No 4 require the NRC to also develop a comprehensive Tribal consultation plan for NRC regulatory and non-regulatory actions having potentially substantial direct effects on one or more Indian Tribes. Although Tribes consider consultation to be very important, Tribes have limited resources and time to expend on it. The NRC must be sensitive to this fact and make every effort to provide Tribes with any additional resources and assistance that they might require to engage in effective consultation. Some recommendations to help the NRC to conduct effective consultation with Tribes include:

1. Develop guidance on how the NRC intends to assure that consultation meetings result in meaningful dialogue rather than simply pro forma consultation;
2. Assign a Tribal liaison to the specific NRC action who has extensively worked with Tribes on similar issues; and
3. Provide adequate time to Tribes to review and provide comments concerning proposed NRC actions well beyond the 30- to 60-day periods provided to the public to make its comments.

Further, the NRC must engage in government-to-government consultation with individual Tribes and not groups of Tribes which might occur as part of an outreach session at a conference or other similar gathering. Such a consultation approach is necessary for a number of reasons. First, it provides for more candid conversations between the individual Tribe and NRC than would occur otherwise during a group meeting. Second, each Tribe's circumstances are unique and must be treated as such by the NRC. A group meeting of Tribes would only give short shrift to these circumstances. Third, most cultural resources information is protected from release under statutory exemptions to the Freedom of Information Act. Discussion of such information by an individual Tribe as part a group meeting of Tribes risks its release to the general public and potentially endangers Tribal cultural sites and practices. Finally, the subject matter may be so unique that government-to-government consultation between the individual Tribe and NRC provides the best opportunity for a resolution to the situation versus a group meeting of Tribes where any number of Tribal issues could be discussed in a finite period of time.

Principle No. 5: Coordinating with Other Federal Agencies and States. The NTAA supports Principle No. 5 which provides:

The NRC Will Coordinate With Other Federal Agencies

When the Commission's action involves other Federal agencies, the NRC will perform its Tribal consultation jointly with other Federal agencies, as appropriate.

The NTAA finds that working with other Federal agencies, particularly when it involves consultation with Indian Tribes, is essential. NTAA is deeply concerned that the EPA, with whom our member Tribes regularly work, does not have the capacity regionally to support regulatory

review of radioactive sites or the corresponding air quality/monitoring issues related to such sites. Further, some of EPA's regional offices have been slow to respond to Tribes concerning nearby nuclear waste sites. NRC coordination with other government agencies on consultation with Tribes, concerning issues involving radiation and related matters, should help EPA and other Federal agencies to better understand potential concerns to Tribes.

However, the Principle should go further by requiring the NRC, as appropriate, to also coordinate consultation efforts with other states, particularly when such states have been given granted regulatory authority by the NRC.⁴ According to the NRC:

37 States have signed formal agreements with the NRC, under which those States have assumed regulatory responsibility over certain byproduct and source material, as well as small quantities of special nuclear material. The NRC assists States intending to become Agreement States, and reviews and approves new Agreements. NRC technical assistance to Agreement States continues after the agreement is signed. The NRC also reviews Agreement State programs for continued adequacy to protect public health and safety, and ensure compatibility with the agency's regulatory program. The NRC and Agreement States jointly develop new regulations, regulatory guidance, and other regulatory initiatives.⁵

While such agreements might appear complete, the negative impacts from omissions or incomplete authorities in the agreements can have great significance to Tribes.

For example, the Washington State Department of Health oversees a uranium mill adjacent to the Spokane Indian Reservation which has been allowed by the state to expand and grant permit extensions continuously, although the site should have been closed and cleaned up years ago.⁶ The State of Washington has no enforcement authority over the uranium mill, so if the owner of the mill doesn't meet its cleanup schedule, the state will be unable to do anything about it except wait. As such, waste at the uranium mill site will continue to grow in size, which, in turn, will cause more radon emissions, impacting the Spokane Tribe and other Tribes in the area.

The State of Washington is not required to follow any of the Federal government's consultation policies regarding Indian Tribes much like the NRC or EPA must follow.⁷ As such, there haven't been any community meetings about the uranium mill that have involved the Spokane Indian Tribe. Further, the Tribal leadership for the Spokane Indian Tribe has been turned away from a uranium mill site tour by the mill's operator absent any protests from the State of Washington.

⁴ The NTAA would have the same expectation of Tribes if such regulatory authority is or was available to them.

⁵ "Agreement State Program" at <http://www.nrc.gov/about-nrc/state-tribal.html> (last visited on April 12, 2015).

⁶ The air permit for the uranium mill began in 2005.

⁷ The Federal government engages in ongoing consultation with the Spokane Indian Tribe regarding the Midnite Mine which is an inactive uranium mine on the Spokane Indian Reservation and also listed as a Superfund site.

The NTAA encourages the NRC to coordinate with states on consultation with Tribes. This effort will advance the NRC's Tribal trust responsibility and will help to promote a more positive dialogue between Tribes, the NRC, Federal agencies, and states. In addition, this effort would lead to greater uniformity in states' approaches to the Tribal consultation process. Currently the state-Tribal consultation process varies greatly between states and most often does not behoove Tribes.

As such, the NTAA recommends a revised Principle No. 5 that reads as follows (with changes bolded and underlined):

*The NRC Will Coordinate With Other Federal Agencies **and States***

When the Commission's action involves other Federal agencies **and States**, the NRC will perform its Tribal consultation jointly with other Federal agencies **and States**, as appropriate.

Conclusion

In summary, the NTAA is pleased to provide to the NRC the aforementioned comments and recommendations concerning the Statement and its six Principles.

On Behalf of the NTAA Executive Committee,

A handwritten signature in black ink, appearing to read "Bill Thompson", is positioned above the printed name.

Bill Thompson, Chairman, NTAA