



## **NUCLEAR REGULATORY COMMISSION**

### **10 CFR Part 37**

**[NRC-2022-0191]**

**RIN 3150-AK90**

### **Advance Tribal Notification of Category 1 Quantities of Radioactive Material Shipments**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to require NRC and Agreement State licensees to provide advance notification to participating federally recognized Tribal governments regarding shipments of category 1 quantities of radioactive material that pass within or across their reservation boundaries. This proposed rule would resolve a petition for rulemaking (PRM-37-2) requesting changes to the regulations to include advance Tribal notification requirements similar to existing State notification requirements. The NRC will hold a public meeting during the public comment period to promote full understanding of this proposed rule and facilitate public comments.

**DATES:** Submit comments by **[INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received before this date.

**ADDRESSES:** You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- **Federal rulemaking website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2022-0191. Address questions about NRC dockets to Dawn Forder; telephone: 301-415-3407; email: [Dawn.Forder@nrc.gov](mailto:Dawn.Forder@nrc.gov). For technical questions contact the individuals listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **Email comments to:** [Rulemaking.Comments@nrc.gov](mailto:Rulemaking.Comments@nrc.gov). If you do not receive an automatic email reply confirming receipt, then contact us at 301-415-1677.

- **Fax comments to:** Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

- **Hand deliver comments to:** 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. eastern time, Federal workdays; telephone: 301-415-1677.

- **Mail comments to:** Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

You can read a plain language description of this proposed rule at <https://www.regulations.gov/docket/NRC-2022-0191>. For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Caylee Kenny, Office of Nuclear Material Safety and Safeguards, telephone: 301-415-7150, email: [Caylee.Kenny@nrc.gov](mailto:Caylee.Kenny@nrc.gov) and Anita Gray, Office of Nuclear Material Safety and Safeguards, telephone: 301-415-7036,

email: Anita.Gray@nrc.gov. Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

## **SUPPLEMENTARY INFORMATION:**

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### **I. Obtaining Information and Submitting Comments**

#### **A. Obtaining Information**

Please refer to Docket ID NRC-2022-0191 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- **Federal Rulemaking Website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2022-0191.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, at 301-415-4737, or by email to [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov). For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the "Availability of Documents" section.

- **NRC's PDR:** The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov) or call 1-800-397-4209 or 301-415-4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

- B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC-2022-0191 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <https://www.regulations.gov> as well as enter the comment

submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

## **II. Background**

### **A. Petition for Rulemaking (PRM-37-2)**

On December 4, 2020, Richard Arnold and Ron Johnson, on behalf of the Tribal Radioactive Materials Transportation Committee, submitted a petition for rulemaking (PRM), PRM-37-2, that requested that the NRC amend its regulations in part 37 of title 10 of the *Code of Federal Regulations* (10 CFR), “Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material,” to ensure consistency regarding advance Tribal notification of certain radioactive material shipments with similar NRC regulations for State notification. Currently 10 CFR part 37 only requires advance notification of certain radioactive material shipments to be sent to States, unlike the advance notification provisions of § 71.97, “Advance notification of shipment of irradiated reactor fuel and nuclear waste,” and § 73.37, “Requirements for physical protection of irradiated reactor fuel in transit,” which require advance notifications of specified shipments to be sent to States and participating federally recognized Tribes. The petitioner was concerned with “the divergence that exists in 10 CFR part 37 in contrast to the content that is provided in 10 CFR parts 71 and 73.” The petitioner requested that consistent

notification standards be applied to States and Tribal governments as well as constituencies under their respective jurisdictions.

The NRC published a notice of docketing of the petition and request for comment in the *Federal Register* on April 9, 2021 (86 FR 18477). The NRC received 10 public comment submissions during the 75-day public comment period. Nine comment submissions supported the petition, while one comment submission and two individual comments within other comment submissions were outside the scope of the issue raised in the petition. On October 17, 2022, in SRM-SECY-22-0074, Petition for Rulemaking and Rulemaking Plan on Advance Tribal Notification of Certain Radioactive Material Shipments (PRM-37-2; NRC-2021-0051), the Commission determined that the issue raised in the petition would be addressed in rulemaking. On November 8, 2022, the NRC published a document in the *Federal Register* (87 FR 67397) stating that the NRC would consider the issue about advance notification of certain radioactive material shipments in its rulemaking process. Comments received on the petition were considered in development of this proposed rule.

#### B. Advance Notification Rule

The NRC published the final rule, “Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste” (Advance Notification rule), in 2012.<sup>1</sup> The Advance Notification rule established the regulations in 10 CFR part 71, “Packaging and Transportation of Radioactive Material,” and 10 CFR part 73, “Physical Protection of Plants and Materials,” requiring NRC and Agreement State licensees to provide advance notification to federally recognized Tribal governments that choose to participate in the Tribal Advance Notification program before irradiated reactor fuel and certain nuclear waste shipments pass within or across the boundary of their Tribal

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<sup>1</sup> See 77 FR 34194 (June 11, 2012).

reservations. The Advance Notification rule also provided relief from fingerprinting requirements to access safeguards information (SGI) for Tribal officials, designees, and law enforcement personnel.

The rulemaking resulted in advance notification requirements for shipments that pass within or across participating Tribal reservations that are similar to the 1982 requirements to notify States.<sup>2</sup> The rule's preamble also stated that the purpose of the rule was to recognize Tribal sovereignty and the Tribal governments' interest in being informed of activities occurring on Tribal reservations.<sup>3</sup> Currently, seven federally recognized Tribes participate in the voluntary Tribal Advance Notification program.

In March 2013, the NRC published the final rule, "Physical Protection of Byproduct Material," to establish security requirements for the use and transport of category 1 and category 2 quantities of radioactive material.<sup>4</sup> The regulations in § 37.77, "Advance notification of shipment of category 1 quantities of radioactive material," require NRC and Agreement State licensees to provide advance notification to States of shipments of licensed material in a category 1 quantity that pass through or across the boundary of a State. As stated in this final rule, during the public comment period on the proposed rule (75 FR 33902; June 15, 2010), the NRC received a comment stating that the rule should provide for advance notification to Tribes for shipments that cross their reservations. The NRC's response in the final rule stated that the NRC may consider providing advance notification of these materials to Tribes in the future.<sup>5</sup> The final 10 CFR part 37 rule, however, did not include provisions for Tribal notifications. Subsequently, the NRC published a final rule in the *Federal Register* in June 2013 that

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See 78 FR 16922 (March 19, 2013).

<sup>5</sup> See *id.* at 16991.

discussed Agreement State licensees' implementation of the Advance Notification rule.<sup>6</sup> The document only addressed implementation of 10 CFR parts 71 and 73 advance Tribal notification requirements. The notice did not mention advance Tribal notifications under 10 CFR part 37.

### **III. Discussion**

#### **A. What Action is the NRC Taking?**

The NRC is proposing to amend its regulations to require NRC and Agreement State licensees to provide to Tribal officials of participating federally recognized Tribes, or their designees, advance notice of shipments of category 1 quantities of radioactive material under § 37.77 before shipments pass within or across the Tribe's reservation boundary. As part of this amendment, the NRC is proposing to revise the language in part 37 from "through or across the boundary" by adopting the phrase "within or across the boundary" to be consistent with parts 71 and 73. This action would only affect commercial shipments being made by NRC and Agreement State licensees. The NRC also is proposing to make changes to § 37.5, "Definitions," by adding definitions for "Indian Tribe" and "Tribal official," and § 37.29, "Relief from fingerprinting, identification, and criminal history records check and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials," to exempt Tribal officials or the Tribal official's designee and Tribal law enforcement personnel from fingerprinting requirements. Minor conforming changes will also be made to § 37.21, "Personnel access authorization requirements for category 1 or category 2 quantities of radioactive material," and § 37.43, "General security program requirements."

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<sup>6</sup> See "Advance Notification to Native American Tribes of Transportation of Certain Shipments of Nuclear Waste" (78 FR 35746; June 14, 2013).

## B. What Persons Would this Action Affect?

This proposed rule, if adopted, would apply to NRC and Agreement State licensees that ship category 1 quantities of radioactive materials. This proposed rule also would affect any federally recognized Tribe that chooses to participate in the Tribal Advance Notification program to receive the advance notifications of category 1 shipments that pass within or across its Tribal reservation.

## C. Why Do the Requirements Need to Be Revised?

The § 37.77 provisions require advance notification to State governments but not Tribal governments for shipments of category 1 quantities of radioactive material. In comparison, 10 CFR parts 71 and 73 provisions require advance notification to both State and participating federally recognized Tribal governments for shipments of certain types of radioactive material. Therefore, the current requirements in 10 CFR part 37 are inconsistent with requirements in 10 CFR parts 71 and 73. The NRC recognizes Tribal sovereignty and Tribal governments' interest in being informed of category 1 radioactive material shipments that would pass within or across reservations of participating federally recognized Tribes. This action also would support the NRC's Tribal Policy Statement, which established the NRC's principles to promote effective Government-to-Government interactions with federally recognized Tribes and to encourage and facilitate Tribal involvement in the areas over which the Commission has jurisdiction. Revising 10 CFR part 37 would provide consistency with 10 CFR parts 71 and 73 regarding advance Tribal notification of certain radioactive material shipments, implement the principles in the Tribal Policy Statement, and further the NRC's commitment to its Principles of Good Regulation. Additionally, the importance of communication among the States, Tribes, and the public supports the NRC's amendments in this proposed rule.

## D. Would all Tribes Receive Advance Notifications?

No. Only federally recognized Tribes that participate in the voluntary Tribal Advance Notification program would receive notification of category 1 quantities of radioactive material under 10 CFR part 37 and receive notification of irradiated reactor fuel and other nuclear waste shipments that pass within or across their reservation under 10 CFR parts 71 and 73. The advance notification program recognizes Tribal sovereignty and Tribal governments' interest in being cognizant of activities taking place on their reservations.

#### E. How and When Would Tribes be Given the Option to Receive Advance Notifications?

If this proposed rule is finalized, the NRC staff would inform each federally recognized Tribe of the rule amendment. As part of the information, the non-participating federally recognized Tribes would be asked if they would like to participate in the Tribal Advance Notification program to receive advance notifications of category 1 quantities of radioactive material shipments, irradiated reactor fuel, and other nuclear waste shipments that pass within or across the boundary of the Tribal reservation. The Tribes can then notify the NRC whether they would like to participate in the Tribal Advance Notification program and certify that any information received regarding shipments of category 1 quantities of radioactive material would be protected against unauthorized disclosure according to § 37.43(d). The Tribes also would be able to change their decision to participate in the Tribal Advance Notification program by informing the NRC at any time. In addition, the NRC would contact all federally recognized Tribes to give them an opportunity to opt into the Tribal Advance Notification program: 1) every 5 years; 2) after a Tribe achieves Federal recognition; and 3) when a transportation route is approved that is within a reservation or crosses a reservation boundary of a federally recognized Tribe. Before participating in the advance notification program, a Tribe would submit the following information: 1) a certification that the Tribal official or their designee(s) has (or have) taken training on the handling of Safeguards Information; 2) a

certification that the Tribe has the necessary protection measures in place and will protect the SGI; 3) the contact information for the Tribal official or the Tribal official's designee(s) (when a Tribal official is designating another person to receive the advance notifications); 4) an affirmation of the boundaries of the Tribe's reservation or the necessary corrections to a map provided by the NRC; and 5) the name and contact information for the Indian Tribe's emergency response contact(s).

#### F. What Notifications Would Tribes Receive?

By choosing to participate in the Tribal Advance Notification program, federally recognized Tribes would receive notification under 10 CFR part 37 for shipments of category 1 quantities for radioactive material, and 10 CFR parts 71 and 73 for shipments of irradiated reactor fuel and nuclear waste that pass within or across the boundaries of their Tribal reservation.

#### G. Do Tribes Who Currently Receive Notifications under Parts 71 and 73 Need to Take Additional Action?

No. Tribes that have already elected to participate in the Tribal Advance Notification program would automatically receive notification of shipments of category 1 quantities of radioactive material that may pass within or across their reservation. If this rule goes final, the NRC staff intends to contact non-participating federally recognized Tribes after the effective date of the rule to see if they would like to join the advance Tribal notification program.

#### H. Does a Tribe's Decision to Receive Advance Notification Affect Whether Shipments Pass Within or Across That Tribe's Reservation?

No. This proposed rule would only give the Tribes a voluntary opportunity to receive advance notification of shipments that pass within or across their reservation. A Tribe's decision to receive or not receive advance notifications does not affect shipment routes.

I. How Would Licensees Determine Who the Tribal Contacts Are?

The NRC maintains a list of Tribal contacts as it does for State governmental contacts. The NRC works with the Tribes to maintain the list. The Tribal official designates who is intended to represent the Tribe. The NRC annually publishes a list of Tribal contacts in the *Federal Register* and posts it on a website maintained by the NRC's Office of Nuclear Material Safety and Safeguards at <https://scp.nrc.gov>.

J. How Would Advance Notifications be Made to Tribal Officials?

The methods permitted for communication of advance notifications are detailed in § 37.77(a), "Procedures for submitting advance notification."

K. Would Tribes be Required to Protect the Advance Notifications?

Tribes would be required to protect the schedule and itinerary information contained in the advance notification against unauthorized disclosure as specified in § 37.43(d).

L. Would Tribal Officials Need to Be Fingerprinted and Undergo a Background Investigation for Unescorted Access to Shipments?

Under the proposed rule, if the Tribe decides to participate in the Tribal Advance Notification program, the Tribal official, Tribal official designee, or Tribal law enforcement personnel may have unescorted access to certain radioactive materials without undergoing fingerprinting or a criminal history check. The Tribal official, Tribal official designee, or Tribal law enforcement personnel who needs to know shipment information to perform their job function may also have access to shipment schedule and itinerary information regarding advance notification of shipments passing within or across their Tribal reservation.

Section 149 of the Atomic Energy Act of 1954, as amended (AEA), requires fingerprinting and submission of fingerprints to the Attorney General of the United States for identification and criminal history records check for any individual permitted

unescorted access to radioactive material or other property subject to regulation by the Commission that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks, unless the Commission, by rule, has relieved that individual from the fingerprinting, identification, and criminal history records check requirements. The Commission may relieve individuals from these regulatory requirements “if the Commission finds that such action is consistent with its obligations to promote the common defense and security and protect the health and safety of the public.” As allowed by Section 149 of the AEA, the NRC enacted § 37.29 to relieve specific categories of individuals from fingerprinting and criminal history record checks prior to receiving unescorted access to certain radioactive materials.

The United States has a unique legal relationship with Indian Tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Indian Tribes exercise inherent sovereign powers over their members and territory. The United States recognizes the right of Indian Tribes to self-government and supports Tribal sovereignty and self-determination. As a result, the NRC has determined that exempting Tribal officials, Tribal official designees, or Tribal law enforcement personnel is analogous to exempting the State governor, State governor designees, or State law enforcement personnel from the fingerprinting and background check requirements. Furthermore, some Tribes have emergency response responsibilities similar to States. Revising the regulation would permit the Commission and licensees to more efficiently approve unescorted access to certain radioactive materials relating to advance notification of shipments to Tribes. This proposed rule would enable the Tribes to be more effective in their day-to-day efforts to ensure the protection of certain radioactive materials and respond to emergencies within their territories. Therefore, the Commission has determined that these proposed revisions

would help the Commission fulfill its obligations to promote the common defense and security and to protect the health and safety of the public.

This proposed rule would add Tribal official, their designee, and Tribal law enforcement personnel to the list of categories of individuals that are granted relief from the fingerprinting, identification and criminal history records checks, and other elements of background checks. Those individuals granted access to advance notifications are required to abide by the requirements in § 37.43(d) for proper management and protection of information.

#### **IV. Section-by-Section Analysis**

The following paragraphs describe the specific changes proposed by this rulemaking.

##### **Section 37.5 Definitions.**

This proposed rule adds definitions for “Indian Tribe” and “Tribal official.”

##### **Section 37.21 Personnel access authorization requirements for category 1 or category 2 quantities of radioactive material.**

This proposed rule would revise § 37.21(c)(2) to make a conforming change to update the reference from § 37.29(a)(13) to read § 37.29(a)(14).

##### **Section 37.29 Relief from fingerprinting, identification, and criminal history records checks and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials.**

This proposed rule would revise § 37.29 by removing the word “and” after paragraph (a)(12) and adding it after paragraph (a)(13), and adding a new paragraph (a)(14) to exempt Tribal officials from the fingerprinting requirement.

**Section 37.43 General security program requirements.**

This proposed rule would revise § 37.43(d)(4)(i) to make a conforming change to update the reference from “§ 37.29(a)(1) through (13)” to read “§ 37.29(a)(1) through (14)”.

**Section 37.77 Advance notification of shipment of category 1 quantities of radioactive material.**

This proposed rule would revise the introductory paragraph in § 37.77 to specify that NRC and Agreement State licensees shall provide advance notification to the Tribal official of participating federally recognized Tribes, or the official’s designee, of the shipment of licensed material in category 1 quantities that passes within or across the Tribe’s reservation. In addition, this section would be revised to make conforming changes.

**V. Regulatory Flexibility Certification**

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. This proposed rule would affect a number of “small entities” as defined by the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810). However, as indicated in the draft regulatory analysis available under the “Availability of Documents” section, the proposed

amendments, if promulgated, would not have a significant economic impact on the affected small entities.

Any small entity subject to this regulation that determines, because of its size, it is likely to bear a disproportionate adverse economic impact should notify the Commission of this opinion in a comment that indicates—

(a) The licensee's size and how the proposed regulation would impose a significant economic burden on the licensee as compared to the economic burden on a larger licensee;

(b) How the proposed regulations could be modified to take into account the licensee's differing needs or capabilities;

(c) The benefits that would accrue or the detriments that would be avoided if the proposed regulations were modified as suggested by the licensee;

(d) How the proposed regulation, as modified, would more closely equalize the impact of NRC regulations or create more equal access to the benefits of Federal programs as opposed to providing special advantages to any individual or group; and

(e) How the proposed regulation, as modified, would still adequately protect public health and safety.

Comments should be submitted as indicated under the ADDRESSES caption.

## **VI. Regulatory Analysis**

The NRC has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the NRC. The conclusion from the analysis is that this proposed rule would result in net costs to the industry, the NRC, Agreement States, and Tribal governments of \$2.9 million using a 7-percent discount rate and \$3.4 million using a 3-percent discount rate. Although the

proposed rule would not be quantitatively cost effective, the costs for Tribes would be marginal and the costs for the NRC, industry, and Agreement States would be small and incremental because of the existing regulatory regime that created the Advance Tribal Notification program. The proposed rule would provide qualitative benefits by increasing regulatory efficiency and effectiveness for both the NRC and industry, would provide Tribal governments with greater regulatory predictability, would enhance the transparency of the Tribal Advance Notification program, and would resolve an inconsistency among the NRC's advance notification regulations in 10 CFR part 37 and 10 CFR parts 71 and 73. The proposed rule is also consistent with the NRC's Principles of Good Regulation and specifically Principle 2 in the NRC's Tribal Policy Statement, which states that the NRC recognizes the right of each Indian Tribe to self-governance and Tribal sovereignty and the right to self-governance. The NRC requests public comment on the draft regulatory analysis. The regulatory analysis is available as indicated in the "Availability of Documents" section of this document. Comments on the draft analysis may be submitted to the NRC as indicated under the ADDRESSES caption of this document.

## **VII. Backfitting and Issue Finality**

The NRC has determined that the backfit rule, which is found in the regulations at 10 CFR 50.109, 70.76, 72.62, 76.76, and in 10 CFR part 52, does not apply to this rulemaking because this amendment would not involve any provisions that would impose backfits as defined in 10 CFR chapter I. Therefore, a backfit analysis is not required.

## **VIII. Cumulative Effects of Regulation**

The staff's preliminary assessment of the cumulative effects of regulation concludes that no known activities or affected entities would be impacted significantly by implementing the proposed changes. To ensure adequate identification of potential effects not currently foreseen, the staff plans to solicit Agreement State input on this issue during the proposed and final rule phases of this rulemaking.

## **IX. Plain Writing**

The Plain Writing Act of 2010 (Pub. L. 111-274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, "Plain Language in Government Writing," published June 10, 1998. The NRC requests comment on this document with respect to the clarity and effectiveness of the language used.

## **X. National Environmental Policy Act**

The NRC has determined that this proposed rule is the type of action described in the categorical exclusion at 10 CFR 51.22(c)(3)(v). Therefore, neither an environmental impact statement nor environmental assessment has been prepared for this proposed rule.

## **XI. Paperwork Reduction Act**

This proposed rule contains amended collections of information contained in 10 CFR part 37 and "Tribal Participation in the Advance Notification Program" subject to the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This proposed rule has been submitted to the Office of Management and Budget (OMB) for review and approval of the information collections.

*Type of submission, new or revision:* Revision

*The title of the information collection:* Advance Tribal Notification of Category 1 Quantities of Radioactive Material Shipments

*The form number if applicable:* Not Applicable

*How often the collection is required or requested:* On occasion for licensees making notifications of shipments of category 1 quantities of radioactive material that will pass within or across the reservations of federally recognized Tribes participating in the NRC's Tribal Advance Notification program. For participating Tribes, information would be requested: 1) every 5 years; 2) after an Indian Tribe achieves Federal recognition; 3) when a transportation route is approved that is within a reservation or crosses a reservation boundary; 4) when there is a change in Tribal leadership or the Tribal official's designation; and 5) once, after the final rule is approved by the Commission.

*Who will be required or asked to respond:* NRC licensees and Agreement State licensees who ship category 1 quantities of radioactive material and federally recognized Tribal governments choosing to opt-in to the Tribal Advance Notification program for certain radioactive material shipments.

*An estimate of the number of annual responses:* 20 (14 for part 37 licensees and 6 for participating Tribes).

*The estimated number of annual respondents:* 10 (6 part 37 licensees and 4 participating Tribes.)

*An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 25 hours for part 37 licensees (25 third-

party disclosure hours). 17 hours for participating Tribes (11 hours reporting + 6 recordkeeping hours).

*Abstract:* The NRC recognizes Tribal sovereignty and Tribal governments' interest in being informed of category 1 radioactive material shipments that would pass within or across reservations of participating federally recognized Tribes. The information collections related to the proposed rule would include licensee third-party disclosures for advance written notification to the Tribes of category 1 shipments, notification of revisions of shipments to the Tribes, cancellation notifications to Tribes, and recordkeeping including maintaining copies of the advance notifications, revisions, and cancellation notices.

This proposed rule would enable federally recognized Tribes to opt into the NRC Tribal Advance Notification program under 10 CFR part 37 to receive notifications of shipments of category 1 quantities of radioactive material that pass within or across their reservation under 10 CFR part 37, along with notifications of certain shipments of nuclear waste and shipments of irradiated reactor fuel under 10 CFR parts 71 and 73. Federally recognized Indian Tribes would affirmatively opt-in to receive the notifications by providing certain information to the NRC. The NRC would use the collected information to implement the advance notification program, which includes the following purposes: first, information would be collected and made available to licensees to enable licensees to comply with NRC and Agreement State regulations. Second, information would be collected to facilitate correspondence to the Tribal official, Tribal official's designated representative, or the Tribe's emergency response contact on matters related to transportation of shipments of certain types of radioactive material or the implementation of the advance notification program.

The NRC is seeking public comment on the potential impact of the information collection(s) contained in this proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility? Please explain your answer.
2. Is the estimate of the burden of the proposed information collection accurate? Please explain your answer.
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the proposed information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

There are two OMB supporting statements associated with this proposed rule; one related to 10 CFR part 37 and one relating to Tribal participation in the Advance Notification program. A copy of the OMB clearance packages and proposed rule are available in ADAMS under Accession No. ML23285A083 and Accession No. ML23285A084 and may be obtained free of charge by contacting the NRC's Public Document Room reference staff at 1-800-397-4209, at 301-415-4737, or by email to *PDR.Resource@nrc.gov*. You may obtain information and comment submissions related to the OMB clearance package by searching on <https://www.regulations.gov> under Docket ID NRC-2022-0191.

You may submit comments on any aspect of these proposed information collection(s), including suggestions for reducing the burden and on the above issues, by the following methods:

- **Federal rulemaking website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2022-0191.

- **Mail comments to:** FOIA, Library, and Information Collections Branch, Office of the Chief Information Officer, Mail Stop: T-6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001 or to the OMB reviewer at OMB Office of Information and Regulatory Affairs (3150-0214 and 3150-0250), Attention: Desk Officer for the Nuclear Regulatory Commission, 725 17<sup>th</sup> Street NW, Washington, DC 20503.

Submit comments by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Comments received after this date will be considered if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

#### Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the document requesting or requiring the collection displays a currently valid OMB control number.

### **XII. Coordination with NRC Agreement States**

A Government-to-Government meeting was held on October 4, 2023, to share early drafts of and discuss this proposed rule with Agreement States. Comments from Agreement States will be taken into consideration during the development of the final rule.

### **XIII. Compatibility of Agreement State Regulations**

Under the “Agreement State Program Policy Statement,” approved by the Commission on October 2, 2017, and published in the *Federal Register* (82 FR 48535; October 18, 2017), NRC program elements (including regulations) required for adequacy

and having a particular health and safety component are those that are designated as categories A, B, C, D, NRC, and H&S: and those required for compatibility include those regulations and other legally binding requirements designated as compatibility categories A, B, C, and D. Compatibility category A are those program elements that include basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt category A program elements in an essentially identical manner in order to provide uniformity in the regulation of agreement material on a nationwide basis. Compatibility category B are those program elements that apply to activities that have direct and significant effects in multiple jurisdictions. Compatibility category B pertains to a limited number of program elements that cross jurisdictional boundaries and should be addressed to ensure uniformity of regulation on a nationwide basis. The Agreement State program element should be essentially identical to that of NRC. Compatibility category C are those program elements that do not meet the criteria of category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a national basis. An Agreement State should adopt the essential objectives of the category C program elements. Compatibility category D are those program elements that do not meet any of the criteria of category A, B, or C, above, and, thus, do not need to be adopted by Agreement States for purposes of compatibility. Compatibility category NRC are those program elements that address areas of regulation that cannot be relinquished to the Agreement States under the Atomic Energy Act of 1954, as amended, or provisions of 10 CFR. These program elements should not be adopted by the Agreement States. Category H&S program elements are not required for purposes of compatibility; however, they do have particular

health and safety significance. The Agreement State should adopt the essential objectives of such program elements to maintain an adequate program.

This proposed rule is a matter of compatibility between the NRC and the Agreement States, thereby providing consistency among Agreement State and NRC requirements. The Agreement States adopted portions of the Advance Tribal Notification Rule that required Agreement State licensees to provide advance notification to participating federally recognized Tribes for shipments of irradiated reactor fuel and specific types of nuclear waste. The regulations defining “Indian Tribe,” “Tribal Official” and 10 CFR 71.97, “Advance notification of the shipment of irradiated reactor fuel and nuclear waste” were designated as compatibility category “B” in the rulemaking. (See 77 FR 34194, 34203, June 11, 2012.) In comparison, the advance notification provisions in 10 CFR part 73 are compatibility category “NRC” and only apply to NRC licensees. The Agreement States cannot adopt these regulatory requirements. The NRC anticipates that the associated requirements in this proposed rulemaking will remain as compatibility category B, requiring the Agreement States to adopt essentially identical provisions. Agreement States would need to adopt compatible program elements for the revised subparts that would be affected by this proposed rulemaking.

Advance notification for category 1 material shipments to the participating federally recognized Tribes would be provided by NRC and Agreement State licensees, similar to the advance notification already being provided to States for these shipments. Although they would need to adopt compatible program elements, Agreement States would not be providing advance notification to the participating Tribes. The NRC would be applying the principles of the Tribal Policy Statement and the NRC’s Principles of Good Regulations to the NRC’s regulatory activities, which include having consistency between the advance notification provisions between States and Tribes for 10 CFR

part 37 category 1 quantities of radioactive materials. The compatibility categories are designated in the following table:

Compatibility Table

Section	Change	Subject	Compatibility	
			Existing	New
37.5	New	Definitions "Indian Tribe"	-	B
37.5	New	Definitions "Tribal Leader"	-	B
37.21(c)	Amend	Personnel access authorization requirements for category 1 or category 2 quantities of radioactive material.	B	B
37.29(a)	Amend	Relief from fingerprinting, identification, and criminal history records checks and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials.	B	B
37.43(d)	Amend	General security program requirements.	C	C
37.77(a) - (d)	Amend	Advance notification of shipment of category 1 quantities of radioactive material.	B	B
37.77(f)	Amend	Advance notification of shipment of category 1 quantities of radioactive material.	C	C

#### XIV. Availability of Guidance

The NRC expects to update NUREG-2155, "Implementation Guidance for 10 CFR Part 37, 'Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material,'" to conform with this rulemaking effort. To support the development schedule for this proposed rule, the updates will be made in a future revision of the guidance rather than concurrently with this rulemaking. Interim guidance, in the form of frequently

asked questions (FAQs), will be added to the NRC’s public website. The draft FAQs are available in ADAMS under Accession No. ML23277A107 and in the docket for the proposed rule (NRC-2022-0191). You may submit comments on the draft FAQs by the methods outlined in the ADDRESSES section of this document.

### **XV. Public Meeting**

The NRC will conduct a public meeting on the proposed rule during the public comment period for the purpose of describing the proposed rule to the public. The NRC will publish a notice of the location, time, and agenda of the meeting on Regulations.gov and on the NRC’s public meeting website at least 10 calendar days before the meeting. Stakeholders should monitor the NRC’s public meeting website for information about the public meeting at: <https://www.nrc.gov/public-involve/public-meetings/index.cfm>.

### **XVI. Availability of Documents**

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

<b>DOCUMENT</b>	<b>ADAMS ACCESSION NO. / WEB LINK / FEDERAL REGISTER CITATION</b>
SRM-SECY-22-0074, Petition for Rulemaking and Rulemaking Plan on Advance Tribal Notification of Certain Radioactive Material Shipments (PRM-37-2; NRC-2021-0051), October 17, 2022	ML22290A240 (Package)
SECY-22-0074: Petition for Rulemaking and Rulemaking Plan on Advance Tribal Notification of Certain Radioactive Material Shipments (PRM-37-2; NRC-2021-0051), August 10, 2022	ML22056A316 (Package)

Regulatory Analysis for the Proposed Rule: Advance Notification of Category 1 Quantities of Radioactive Material Shipments, February 2024	ML23277A108
NUREG-2155, "Implementation Guidance for 10 CFR Part 37, 'Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material,'" March 2022	ML22083A141
Advance Tribal Notification of Category 1 Quantities of Radioactive Material Shipments Rule – Frequently Asked Questions, February 2024	ML23277A107
PRM-37-2, Consideration in the Rulemaking Process, Advance Tribal Notification of Certain Radioactive Material Shipments, November 8, 2022	87 FR 67397
PRM-37-2, Notice of Docketing and Request for Comment, Advance Tribal Notification of Certain Radioactive Material Shipments, April 9, 2021	86 FR 18477
PRM-37-2, R. Arnold & R. Johnson on Behalf of the Tribal Radioactive Materials Transportation on Advance Tribal Notification of Certain Radioactive Material Shipments, December 4, 2020	ML21042B011
Advance Notification to Native American Tribes of Transportation of Certain Shipments of Nuclear Waste, June 14, 2013	78 FR 35746
Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," November 6, 2000	65 FR 67249
Tribal Policy Statement, January 9, 2017	82 FR 2402
Final Rule - Physical Protection of Byproduct Material, March 19, 2013	78 FR 16922
Proposed Rule - Physical Protection of Byproduct Material, June 15, 2010	75 FR 33902
Final Rule - Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste, June 11, 2012	77 FR 34194
Principles of Good Regulation	<a href="https://www.nrc.gov/about-nrc/values.html#principles">https://www.nrc.gov/about-nrc/values.html#principles</a>
The Plain Writing Act of 2010 (Pub. L. 111-274)	<a href="https://www.govinfo.gov/app/details/P_LAW-111publ274">https://www.govinfo.gov/app/details/P_LAW-111publ274</a>
"Plain Language in Government Writing," June 10, 1998	63 FR 31885
OMB Supporting Statement – 10 CFR Part 37 – Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material (OMB Clearance No. 3150-0214)	ML23285A083

OMB Supporting Statement for Tribal Participation in the Advance Notification Program (OMB Clearance No. 3150-0250)	ML23285A084
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The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at <https://www.regulations.gov> under Docket ID NRC-2022-0191. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: 1) navigate to the docket folder (NRC-2022-0191); 2) click the “Subscribe” link; and 3) enter an email address and click on the “Subscribe” link.

### **List of Subjects in 10 CFR Part 37**

Byproduct material, Criminal penalties, Exports, Hazardous materials transportation, Imports, Licensed material, Nuclear materials, Penalties, Radioactive materials, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is proposing to amend 10 CFR part 37.

## **PART 37 – PHYSICAL PROTECTION OF CATEGORY 1 AND CATEGORY 2 QUANTITIES OF RADIOACTIVE MATERIAL**

1. The authority citation for part 37 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 11, 53, 81, 103, 104, 147, 148, 149, 161, 182, 183, 223, 234, 274 (42 U.S.C. 2014, 2073, 2111, 2133, 2134, 2167, 2168, 2169, 2201, 2232, 2233, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

2. In § 37.5, add, in alphabetical order, definitions for “Indian Tribe” and “Tribal official” to read as follows:

**§ 37.5 Definitions.**

\* \* \* \* \*

*Indian Tribe* means an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5130.

\* \* \* \* \*

*Tribal official* means the highest-ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

\* \* \* \* \*

**§ 37.21 [Amended]**

3. In § 37.21(c)(2), remove the reference “(13)” and add, in its place, the reference “(14)”.

4. In § 37.29, remove the word “and” after paragraph (a)(12), revise paragraph (a)(13), and add (a)(14) to read as follows:

**§ 37.29 Relief from fingerprinting, identification, and criminal history records checks and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials**

(a) \* \* \*

(13) Any individual employed by a service provider licensee for whom the service provider licensee has conducted the background investigation for the individual and approved the individual for unescorted access to category 1 or category 2 quantities of radioactive material. Written verification from the service provider must be provided to the licensee. The licensee shall retain the documentation for a period of 3 years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material; and

(14) The Tribal official or Tribal official's designee, and Tribal law enforcement personnel.

\* \* \* \* \*

### **§ 37.43 [Amended]**

5. In § 37.43(d)(4)(i), remove the reference "(13)" and add, in its place, the reference "(14)".

6. In § 37.77, revise the introductory paragraph and paragraphs (a)(1) and (3); in paragraph (b)(5), remove the word "State" and add in its place the phrase, "State or Tribal reservation boundary"; and revise paragraphs (c), (d), and (f) to read as follows:

### **§ 37.77 Advance notification of shipment of category 1 quantities of radioactive material.**

As specified in paragraphs (a) and (b) of this section, each licensee shall provide advance notification to the NRC, the governor of a State, or the governor's designee, and the Tribal official or the Tribal official's designee of participating Tribes referenced in paragraph (a)(1) of this section, of the shipment of licensed material in a category 1

quantity, within or across the boundary of the State, or within or across the boundary of the Tribal reservation, before the transport, or delivery to a carrier for transport of the licensed material outside the confines of the licensee's facility or other place of use or storage.

(a) \* \* \*

(1) The notification must be made to the NRC, to the office of each appropriate governor or governor's designee, and to the office of each participating Tribal official or Tribal official's designee. The contact information, including telephone and mailing addresses, of governors and governors' designees, and participating Tribes' officials and Tribal official's designees, is available on the NRC's website at <https://scp.nrc.gov/special/designee.pdf>. A list of the contact information also is available upon request from the Director, Division of Materials Safety, Security, State, and Tribal Programs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Notifications to the NRC must be to the NRC's Director, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The notification to the NRC may be made by email to [RAMQC\\_SHIPMENTS@nrc.gov](mailto:RAMQC_SHIPMENTS@nrc.gov) or by fax to 301-816-5151.

\* \* \* \* \*

(3) A notification delivered by any means other than mail must reach NRC at least 4 days before the transport of the shipment commences and must reach the office of the governor or the governor's designee or the Tribal official or Tribal official's designee at least 4 days before transport of a shipment within or across the State or Tribal reservation boundary.

\* \* \* \* \*

(c) *Revision notice.* (1) The licensee shall provide any information not previously available at the time of the initial notification, as soon as the information becomes

available but not later than commencement of the shipment, to the governor of the State or the governor's designee, the Tribal official or Tribal official's designee, and to the NRC's Director, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

(2) A licensee shall promptly notify the governor of the State or the governor's designee and the Tribal official or Tribal official's designee of any changes to the information provided in accordance with paragraphs (b) and (c)(1) of this section. The licensee shall also immediately notify the NRC's Director, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001 of any such changes.

(d) *Cancellation notice.* Each licensee who cancels a shipment for which advance notification has been sent shall send a cancellation notice to the governor of each State or to the governor's designee and Tribal official or Tribal official's designee previously notified and to the NRC's Director, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The licensee shall send the cancellation notice before the shipment would have commenced or as soon thereafter as possible. The licensee shall state in the notice that it is a cancellation and identify the advance notification that is being cancelled.

\* \* \* \* \*

(f) *Protection of information.* State officials, State employees, Tribal officials, Tribal employees, and other individuals, whether or not licensees of the Commission or an Agreement State, who receive schedule information of the kind specified in § 37.77(b) shall protect that information against unauthorized disclosure as specified in § 37.43(d) of this part.

Dated: February 20, 2024.

For the Nuclear Regulatory Commission.

**Raymond Furstenau,**

*Executive Director for Operations.*

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