



NEW MEXICO ENERGY, MINERALS & NATURAL RESOURCES DEPARTMENT

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September 15, 1997

SEP 16 REC'D

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U.S. Department of Energy
c/o Lois Smith
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Washington, D.C. 20024

Attn: SECTION 180(c) COMMENTS of the STATE OF NEW MEXICO

Following are the comments and recommendations of the State of New Mexico regarding the U.S. Department of Energy's (DOE) Notice of Revised Proposed Policy and Procedures (Notice) for providing financial/technical assistance to States and Indian Tribes under Section 180(c) of the Nuclear Waste Policy Act, as amended. This Notice was published in the Federal Register of July 17, 1997, Vol. 62, No. 137, pps. 38273-38285. Our comments are divided into the seven subject areas identified in the Notice: Policy Statement; Objectives; Proposed Funding Mechanism; Basis for Cost Estimate/Funding Allocation; Definitions of Key Terms; Eligibility and Timing of the Grants; and Allowable Activities.

INTRODUCTION

The State of New Mexico has for many years played an active role in helping formulate a Section 180(c) program. Through its Radioactive Waste Consultation Task Force (74-4A-6 New Mexico Statutes Annotated, 1978), New Mexico submitted comments dated May 1, 1992 on DOE's Draft Strategy to Provide Section 180(c) Training Assistance to State, Tribal and Local Governments (57 Federal Register 81190; May 17, 1995, on DOE's Section 180(c) Notice of Inquiry (60 Fed. Reg. 99 and 13715); September 25, 1995, on DOE's Section 180(c) Notice of Inquiry, Supplemental Information (60 Fed. Reg. 36793); and September 30, 1996, on DOE's Notice of Proposed Policy and Procedures (61 Fed. Reg. 24772).

In addition, New Mexico is a member of the Western Interstate Energy Board's (WIEB) High-Level Radioactive Waste Committee and, as such, has contributed to development of the Committee's Section 180(c) comments over the years, including those of January 30, 1991; December 6, 1993; May 4, 1995; September 30, 1995; and September 12, 1996. Consistent with this history, we endorse WIEB's comments on this Notice.

Finally, the State has participated on DOE's Transportation External Coordination Working Group (TEC/WG) since its inception. Significantly, implementation of Section 180(c) is one of the key issues being addressed by the TEC/WG. Given our long history of involvement in this area, the State of New Mexico respectfully requests that DOE consider all previous comments referenced above, and especially those which follow, in finalizing an effective Section 180(c) assistance program for affected state, tribal and local governments.

POLICY STATEMENT

The State of New Mexico strongly supports DOE's policy that each responsible jurisdiction will have the training necessary to help ensure the safe routine transportation of spent nuclear fuel or high-level waste and for responding to NWPA shipment accidents. Similarly, we fully endorse DOE's proposal to implement Section 180(c) through a grants program, with funding to states and tribes based in part on their respective determination of needs. This is the only type of approach which makes sense, given the number and diversity of anticipated program participants.

Notwithstanding the preceding improvements, several areas of the Section 180(c) proposal remain seriously flawed. First and foremost, we vehemently disagree with the statement in the Notice that the Section 180(c) program is only to assist states and tribes in obtaining access "...to the increment of training necessary to prepare for NWPA shipment." The State of New Mexico believes the Section 180(c) program, through appropriations from the Nuclear Waste Fund, should pay the full costs of all preparations associated with the NWPA shipping campaign. It is evident from reviewing the legislative history of the NWPA that this is what Congress intended from the outset.

Second, the current Section 180(c) proposal does not provide funding to states or tribes for preparing the grant application package. Specifically, no technical or financial assistance is offered to help develop and pay the costs of the "three-year plan" called for in DOE's program application guidance. In order to develop this plan--especially one that is realistic and effective, it will be necessary for affected jurisdictions to assess their current capabilities and then determine unmet needs. For many western states this will be a significant and costly undertaking attributable to the expected substantial number of emergency response organizations along lengthy transportation routes within our borders. Simply put, New Mexico is steadfast in its opposition to bearing the costs of any new federal unfunded mandates.

Third, DOE continues to propose inappropriate limits on the types of activities that can be funded under the Section 180(c) program. For example, it appears from the Notice that "safe routine transportation" encompasses only inspection/enforcement activities and shipment monitoring conducted by the states and tribes. No mention is made of allowing funds to be used for carrier record-keeping audits, development and application of bad weather protocols, identification of safe parking areas, etc. Significantly, DOE has been much more flexible with respect to its Waste Isolation Pilot Plant (WIPP) transportation safety program, wisely choosing not to impose such arbitrary restrictions. Common sense dictates that safety precautions for NWPA shipments should at least be on par with those being applied to the WIPP campaign.

OBJECTIVES

The State of New Mexico generally concurs in DOE's objective "...to provide a base grant to every eligible state and tribe to aid in planning and coordination activities for training in a timely

manner.” We also support the proposal to provide variable amounts of funding and technical assistance to ensure each jurisdiction is adequately prepared for NWPA shipments. DOE is commended for recognizing existing capabilities vary significantly among state, tribal and local governments, thereby requiring different levels of assistance.

However, we take strong exception to the proposed amount of the base grant and how it was established. Based on the experience of those states represented on the Western Governors' Association (WGA) Technical Advisory Group for WIPP Transport, it has been determined that \$150,000 per state or tribe is the minimum level of funding necessary to identify critical transportation safety needs. Indeed, this funding level (\$150,000) is embodied in WIPP Cooperative Agreement #DE-FC04-90AL65416 between DOE and WGA. Only after a jurisdiction's needs have been delineated it is appropriate for DOE to establish a base grant amount for that entity.

FUNDING MECHANISM

The Section 180(c) proposal in the Notice states that funding would be provided every year beginning approximately three years prior to the first shipment through state or tribal reservation boundaries. New Mexico believes that a minimum of three years of full program funding is probably sufficient for most affected jurisdictions to prepare for the commencement of NWPA shipments, provided those states and tribes have already conducted their needs assessments and are poised for program implementation. We continue to stress the importance of establishing an administratively simple and efficient grant application process, and reiterate our call for DOE to develop a user-friendly “format and content guide” to assist applicants.

The Notice again states that DOE does not presently plan to codify the Section 180(c) policy and procedures as substantive regulations. The State continues to believe that implementation of Section 180 within a formal regulatory framework would provide this important program much needed stability through inevitable changes of administration in the Executive Branch. We are convinced that codifying the Section 180(c) program in Department regulations can be accomplished in an expedited rulemaking and will not significantly limit DOE's flexibility with respect to its implementation.

BASIS FOR COST ESTIMATE/FUNDING ALLOCATION

DOE proposes that each eligible jurisdiction would receive a predetermined base grant of \$74,152. This amount was derived by taking the average salary of a state health physicist (\$35,000), doubling that figure, and then adjusting it for inflation during 1995 and 1996. The physicist's average annual salary was doubled “...to allow states and tribes to pay the salary of one person each to carry out safe routine transportation and emergency response planning. The State of New Mexico objects to using the preceding methodology for determining the base grant. One

major problem with this approach is that it does not factor in any benefits, indirect costs, or operational expenses associated with either full-time position. Funding must take into consideration and include legitimate program costs such as those associated with travel, office space, telecommunications, rent of equipment, copying, supplies, etc. Consequently, we support DOE providing each pre-screened applicant with a \$150,000 planning grant to be used for conducting a "needs" assessment and preparing its grant application, including the three-year plan. A base grant amount could then be established by DOE, in consultation with the state or tribe, utilizing the information provided by the applicant.

DEFINITION OF KEY TERMS

The State of New Mexico generally concurs in DOE's proposed definition of "technical assistance." It could be improved, however, by eliminating the qualifying that such assistance must be "unique to the Department." DOE may have under contract at some time in the future individuals that could provide the type of assistance sought by states or tribes. Similarly, DOE may be able to execute an agreement (low-cost or no-cost) with another federal agency to provide the requested assistance.

In contrast to our preceding concurrence, we continue to believe that the definition of "safe routine transportation" is still too restrictive. The term should be defined more broadly to include at least the following additional activities: alternate route analyses; route and risk assessments; carrier compliance audits; development and implementation of bad weather procedures; identification of safe parking areas; equipment maintenance and calibration; infrastructure improvements; and public information and outreach.

ELIGIBILITY AND TIMING OF THE GRANTS PROGRAM

The State supports DOE's proposal to allow funding to ultimately flow to the jurisdictions responding to a NWPA transportation emergency--even if no shipments occur within the boundaries of those jurisdictions. This is a logical approach that recognizes the existence of mutual aid agreements and cross-deputization among state, tribal and local government authorities.

We also support DOE's previously stated commitment to provide Section 180(c) program funding directly to Indian tribes. Adherence to this commitment will maintain a true government-to-government relationship between DOE and the tribes, and will better ensure DOE fulfills its important trust responsibility to affected Indian Nations.

New Mexico remains concerned about the lack of information on the mechanics of the grants program. For example, will a three-year budget be negotiated and then funded in one-year increments? What is DOE's proposal with respect to re-application after the first three years?

What criteria will be used in determining the variable amounts of funding to be provided to states and tribes? Many more details are needed regarding these procedural issues.

The State also has serious reservations regarding the so-called "contingency plan" for schedule and route changes. In essence, the plan is skeletal and cursory in nature at best. At worst, it may not be adequate to protect public health and the environment from those risks posed by NWPA shipments. We believe that, absent adequate notice, funding, and preparations by affected jurisdictions, DOE should delay those planned NWPA shipments. New Mexico will be more than willing to work with DOE in resolving to our mutual satisfaction any "emergency" situations requiring such schedule or route changes.

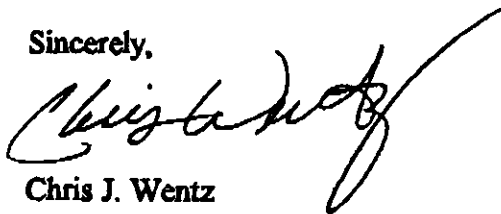
ALLOWABLE ACTIVITIES FOR FUNDING

Although the DOE has increased the percentage of a grantee's budget that is allowed to be spent on equipment from ten percent (10%) to twenty-five percent (25%), the State of New Mexico opposes limiting the higher percentage to only the first two years of the program. It is our belief that the 25% maximum should apply to each grantee's annual budget. Indeed, few entities will have the foresight to accurately determine their full equipment needs up front for the several decades over which the program will operate. Moreover, DOE will essentially be negotiating a three-year budget with each applicant and can use that process to discuss any questionable equipment proposals. Hence, there are already enough "checks and balances" inherent in the system to justify applying the 25% cap on an annual basis.

In conclusion, New Mexico appreciates DOE striving to develop an equitable, flexible Section 180(c) program. Please keep foremost in mind that transportation safety will be a primary factor in determining the ultimate success of the Civilian Waste Management Program under the NWPA.

Please don't hesitate to contact me or Heidi Snow at 505/827-5950 regarding these comments. Thank you.

Sincerely,



Chris J. Wentz
Coordinator
N.M. Radioactive Waste Task Force

c: Jennifer A. Salisbury, Cabinet Secretary and Task Force Chair
Senator Dede Feldman, Chair
Radioactive and Hazardous Materials Committee

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Facsimile Transmission Cover Sheet

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MESSAGE:

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(Section 180(c) comments)

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