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Mandan Hidatsa

May 17, 1995

U.S. Department of Energy
c/o Ms. Lois Smith
TRW Environmental Safety Systems
2650 Park Tower Drive
Suite 800
Vienna, VA 22180

RE: Comments to Implementation of Section 180(c) of
the Nuclear Waste Policy Act of 1982, As Amended

The National Congress of American Indians, founded in 1944, is the oldest and largest national Indian tribal government advocacy organization established to promote and protect the sovereignty and treaty rights of American Indian and Alaska Native nations. The NCAI currently has a membership of 182 tribal governments. The NCAI presents the accompanying comments to the Federal Register Notice of Inquiry of January 3, 1995, regarding the U.S. Department of Energy (DOE) Office of Civilian Radioactive Waste Management implementation of Section 180(c) of the Nuclear Waste Policy Act of 1982, as Amended (NWPAA).

The inherent federal trust responsibility afforded to all federally-recognized tribal governments through the U.S. Constitution, provides rights to tribes which come into play in the NWPAA 180(c) implementation process. The DOE must continue to keep the tribes informed on a timely and direct government-to-government basis, elicit participation and input, and incorporate the tribal comments and concerns into DOE program policy.

The obligations of the DOE to tribal governments and peoples impacted by transportation of spent nuclear fuel and high-level radioactive waste through their lands is not yet defined, nor is it clear to the neighboring state jurisdictions. But it is apparent from the NCAI's standpoint that tribal governments are several years behind the states in radiological emergency preparedness training and readiness.

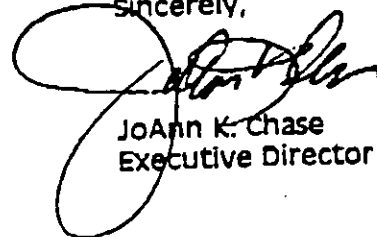
Through its longstanding cooperative agreement with DOE-OCRWM, the NCAI has begun informing tribes of their potential rights and responsibilities in expectation of DOE-OCRWM spent nuclear fuel and high-level radioactive

waste shipments. The NCAI Nuclear Waste Program advisory group, the National Indian Nuclear Waste Policy Committee, continues to meet and discuss DOE-OCRWM issues and the impact upon Indian country.

NCAI Tribal Radiological Emergency Preparedness (TREP) workshops provide basic awareness of potential hazards resulting from nuclear waste transportation accidents, and encourages as well as assists tribes to respond to these hazards by developing tribal regulatory transportation and emergency preparedness codes. The workshops also address tribal responsibilities to implement emergency preparedness plans in what is hoped to be a mutually beneficial and cooperative effort with surrounding jurisdictions.

The NCAI looks forward to further communication with the Department of Energy Office of Civilian Radioactive Waste Management Program on this important topic. Thank you for the opportunity to submit these comments on behalf of the NCAI. If you require further clarification or information regarding these comments, please contact NCAI Nuclear Waste Program Director, Mr. Robert Holden.

Sincerely,



JoAnn K. Chase
Executive Director

Attachment



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Comments of the National Congress of American Indians on the U.S. Department of Energy Office of Civilian Radioactive Waste Management Implementation of Section 180(c) of the Nuclear Waste Policy Act of 1982, as Amended

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Naimi K. Chase, J.D.
Mandan Hidatsa

Introduction

There are several issues that may be of concern to the tribes in evaluating the Department of Energy (DOE) Office of Civilian Radioactive Waste Management's (OCRWM) options for providing technical assistance and funding to state and tribal government programs for safe routine transportation of spent nuclear fuel and high-level radioactive waste through their respective jurisdictions, under Section 180(c) of the Nuclear Waste Policy Act of 1982, as amended (NWPAA). Some of these issues are general in nature, while others may be of special interest to tribes. These comments reflect the National Congress of American Indians (NCAI) review of not only the "Notice of Inquiry" (Federal Register, Vol. 60, No.3, page 99, January 3, 1995), but also the "Strategy for OCRWM to Provide Training Assistance to State, Tribal, and Local Governments," and the "Options for Providing Technical Assistance and Funding Under 180(c) of the Nuclear Waste Policy Act, as Amended" (NWPAA). The comments are intended to be used as a basis for discussion among DOE officials, potentially affected or interested tribal and state officials, and other stakeholders in the decision-making process.

Comments

- After reviewing the options presented in the Options Papers and the Notice of Inquiry, it is apparent that the tribes are not eligible for funding under many of the other federal programs presented. Some of the Federal Emergency Management Agency programs may have some mechanisms available to the tribes, but it appears these programs are limited in terms of how they could be adjusted to meet the true needs of the tribes under 180(c) parameters. Therefore, the options that draw on existing federal mechanisms may not be feasible at this time.

- Because of the limited nature of existing federal programs, NCAI recommends that DOE consider reevaluating the current process to determine how best to implement a 180(c) technical assistance program. While both the Options Paper and the Notice of Inquiry question

which funding mechanism is best suited for the implementation of 180(c) technical assistance and funding, two basic questions need to be addressed. These questions are, "What are the needs of the potentially affected (affected is not used in this document as defined in the NWPAA parties?," and "How will these needs be determined?." DOE must research these issues before funding is addressed and before asking Congress to appropriate funding for 180(c) assistance. DOE may have difficulty requesting a budgetary line item unless it undertakes a process of needs assessment. This is particularly true for tribal governments who are in the early phases of emergency response program development.

A needs assessment process should provide DOE with:

- an approximation by each potentially affected state or tribe of their complete emergency response and safe transport training needs that affect their ability to respond to incidents involving spent nuclear fuel or high-level radioactive waste;
- an evaluation of the appropriate training currently available to each tribe or state;
- a formal recommendation from each state and tribe as to how best DOE could address their training needs for NWPAA shipments;
- a list of appropriate activities that could be implemented under 180(c)

• DOE will only be able to address the question of need through a direct outreach approach which involves those tribes and states who, at this time, are *likely to be impacted* by NWPAA shipments. While NCAI understands that because DOE has made no decisions with regard to routing of NWPAA shipments, those tribes and states at points of origin will most likely be impacted by OCRWM shipments. Because tribal and state representation within current DOE working groups, such as the OCRWM Transportation External Coordination Working Group, is limited and the issues presented by the current participants may not necessarily reflect the totality of concerns throughout Indian country, DOE should seek the direct input from those potentially affected tribes and states in determining the most appropriate funding and assistance mechanisms. While NCAI through its Cooperative Agreement can and will assist DOE in identification and other efforts, the NCAI is not in the position to act as a decision-maker for the tribes on this matter.

• When DOE is ready to consider other funding mechanisms, DOE must look more comprehensively at other tribal and state programs (both grant and other programs) which currently provide tribes, states, and local governments with funding and technical assistance and determine how best to build on these existing mechanisms. For example, some tribes use the Department of Housing and Urban Development Community Development and Block Grant Program (CDBG) and other tribal programs as a source of funding for emergency response equipment and training. If DOE considers the programs and mechanisms that are currently available at the federal level (including DOE program options), and not other tribal or state programs as a source for channeling funding and assistance, DOE may inadvertently create an administrative burden for communities. Due to the limited availability and congressional appropriation of current funds for grant programs, DOE needs to consider cutting program costs by building on existing programs at all levels of government. However, it must be noted that tribal governments are very much concerned over the current congressional initiatives that would turn over more programs to a block grant system. The tribes concern is the severing of the direct government-to-government relationship if funding is administered via a pass-through to state governments. Additionally, tribal governments have not fared well in similar processes because states continue to challenge the sovereign status of Indian nations by challenging tribal jurisdiction. Tribes have not been given equal access to state funding. A block grant system approach may be feasible but only if it is a two-tiered structure, one for tribes and one for states.

- In providing assistance to the tribes, DOE will need to consider its trust responsibility to protect the health and safety of those tribes which may be affected. This responsibility must be coupled with DOE's responsibilities to the tribes and states under 180(c) and other program requirements, such as cultural resource management. Because the trust responsibility is far reaching, DOE should consider a more comprehensive approach to address the various needs of the tribes. The needs assessment process mentioned above would serve as a useful tool in other areas as well.

- The NCAI is aware that many tribal government leaders, through whose jurisdiction DOE-OCRWM shipments may travel will be unable to comment on these important issues primarily because they do not have the in-house high-level radioactive waste transportation programs and/or personnel to adequately respond. Also, some tribes do not have current technical information on this subject matter in order to appropriately respond. The tribes' inability, or perhaps reluctance, to respond should not preclude their valued and necessary inclusion. Tribal recommendations should be accepted and incorporated into the decision-making process until all issues are resolved.

The DOE also must be cognizant of the various tribal government decision-making processes. A decision or response to a Notice of Inquiry or a letter requiring a response may not be considered timely by the DOE but, may very likely be a deliberate, suitable answer from the tribe's perspective. The overall context of tribal government dynamics should be taken into consideration and the door left open to all tribal responses and dialogue.