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**Subject: SECTION 180(c) COMMENTS**

Following are the comments of the State of New Mexico's Radioactive Waste Consultation Task Force<sup>1</sup> on DOE/OCRWM's supplemental Notice of Inquiry regarding the structure and implementation of Section 180(c) of the federal Nuclear Waste Policy Act, as amended. The solicitation of comments was published in the *Federal Register* of July 18, 1995, Vol. 60, No. 137, p. 36793-36804.

**Guiding Principles for Section 180(c) Policy & Procedures**

To begin, the State of New Mexico concurs in OCRWM'S interpretation of the legislative history of Section 180(c) regarding the mechanism for distributing the funding and technical assistance, namely that "Congress intended for the [DOE] to provide direct funding to States and they, rather than the Department, would determine how best to allocate the funds." Indeed, New Mexico State government is prepared to accept and discharge this important responsibility in close consultation with our affected units of local government in New Mexico. Notwithstanding this, we should clarify that the State supports DOE interacting directly with each potentially impacted Indian tribe and pueblo on a government-to-government basis.

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<sup>1</sup>The Task Force, created by statute in 1979, is composed of the Cabinet Secretaries of six State agencies: Energy, Minerals and Natural Resources Department; Environment Department; Department of Public Safety; Department of Health; Taxation and Revenue Department; and State Highway and Transportation Department. The federal Civilian Radioactive Waste Management Program falls within the purview of the Task Force.

We appreciate DOE's acknowledgment of how State, tribal and local jurisdictions vary in organizational and staffing structures, philosophies on roles and responsibilities of public safety officials, and the levels of preparedness and training. Sufficient flexibility must be built into the Section 180(c) program so as to accommodate the wide variety of State, tribal, and local government assistance needs. DOE is commended for recognizing the importance of such program flexibility and for its commitment to achieving the objective.

New Mexico strongly agrees with DOE's stated intent to minimize the Section 180(c) program's administrative burden on the Department as well as recipient jurisdictions. For a program of this nature that will span several decades and involve many diverse entities, ease of administration is critical to success. Even though it will be necessary to ensure accountability regarding the distribution and use of Section 180(c) funds, we believe this can be accomplished in a manner which does not impose undue, time-consuming requirements on either DOE or a program participant. Administration of the Section 180(c) program must be made as simple and efficient as possible, thereby allowing more resources to be allocated to programmatic tasks aimed at protecting public health and the environment.

#### Discussion of Policy Options

In its deliberations regarding the scope of the Section 180(c) program, DOE is encouraged to: 1) identify the similarities and differences between the NWPA and WIPP shipping campaigns, including a comparison of corresponding attendant risks; 2) review the full range of WIPP transportation safety activities being conducted at all levels of government; and 3) use the preceding results to assist in determining what WIPP activities may be appropriate for inclusion in the Section 180(c) program. DOE and various States have invested considerable time and resources in reaching agreement on the scope of a comprehensive WIPP transportation safety program. Therefore, to avoid "reinventing the wheel" for the NWPA transportation system, components and activities of the WIPP safety program should be looked at closely and considered for adoption (with or without modifications) when planning the implementation of Section 180(c).

\* **Definition of *Safe Routine Transportation*.** The State endorses the definition of "safe routine transportation" developed by the Transportation External Coordination Working Group (TEC/WG). Because the Working Group is composed of over 25 national and regional organizations representing numerous individuals and jurisdictions potentially impacted by DOE shipments of hazardous materials--including spent nuclear fuel and high-level radioactive waste, the TEC/WG definition of "safe routine transportation" reflects a broad-based consensus on the meaning of that term. However, after review and consideration of widespread public input, we recommend

that DOE be as explicit as possible in delineating in the final Section 180(c) Policy and Procedures the program elements and activities which characterize "safe routine transportation." Guidance in this area should be clear and specific to minimize the potential for inappropriate or unauthorized expenditure of Section 180(c) funds. Please refer to the State of New Mexico's Section 180(c) comments of May 17, 1995, for a listing of transportation safety program components and activities that may be appropriate for application to the NWPA shipping campaign.

\* **Definition of *Technical Assistance*.** The State generally endorses the TEC/WG's definition of "technical assistance" over an abbreviated version developed by the Midwestern High-Level Radioactive Waste Committee. Our preference for the TEC/WG definition relates to its greater specificity and clarity. We do, however, recommend two revisions to the definition: 1) The first sentence should read "...to ensure that State and tribal governments are trained for safe routine transportation practices as well as capable of responding safely and effectively to spent nuclear fuel and high-level waste transportation emergencies within their jurisdictions." 2) The second sentence should read "...and for public information, outreach, and participation efforts." In addition, we believe the term "technical assistance" should include certain equipment and supplies (e.g., TRANSCOM software) that DOE or its contractors may provide directly to recipient jurisdictions.

\* **Eligibility Criteria.** The discussion of eligibility in this supplemental Notice of Inquiry is limited to how the NWPA shipment schedule may impact the timing of funds and technical assistance to eligible jurisdictions. It is therefore not very useful in helping to establish eligibility criteria for the Section 180(c) program. We believe DOE must largely defer to the existing language of Section 180(c) itself in defining eligibility. Our reading of that language is as follows: any State, tribal, or local government through whose jurisdiction NWPA shipments will be transported is eligible to participate--either directly or indirectly--in the program. Simply stated, any entity affected by the NWPA shipping campaign should be allowed to participate in the Section 180(c) assistance program.

With respect to the timing of funding and technical assistance, the State of New Mexico supports DOE's commitment that "...implementation of the Section 180(c) program will begin three to five years prior to shipments." Our experience with the WIPP Project provides compelling evidence that this time frame (3-5 years) is appropriate and necessary to adequately prepare for this type of special shipping campaign. Hence, DOE should stick to its commitment and be prepared to provide Section 180(c) assistance to affected jurisdictions at least three years--and preferably five years--before NWPA shipments begin. States and other prospective recipients should, however, have the opportunity to request and receive assistance earlier or later than this 3- to 5-year period based on the submittal of requisite documentation/justification and approval by DOE. Again, it is important for the

program to be structured flexibly so it can accommodate extraordinary or unforeseen circumstances as they arise.

\* **Funding Allocation Formulas.** The State of New Mexico has already gone on record as endorsing the general framework and approach embodied in the Section 180(c) draft regulations developed by the Western Interstate Energy Board's High-Level Radioactive Waste Committee. These draft regulations were transmitted along with Western Governors' Association Resolution #94-005 to DOE Secretary Hazel O'Leary by WGA Chairman Michael O. Leavitt, Governor of Utah, and WGA Vice-Chairman E. Benjamin Nelson, Governor of Nebraska, in a letter dated August 16, 1994. The WIEB "strawman" regulations provide for: 1) the development and funding of state and tribal plans which identify the minimum elements necessary to ensure safe routine transportation and procedures for dealing with emergency response situations; 2) annual implementation grants to states and tribes, with 75% of the grant funds allocated according to the number of projected shipment-miles in the jurisdiction and 25% of the funds allocated by DOE to ensure minimum funding levels and program capabilities among impacted states and tribes; and 3) the establishment of Regional Training Advisory Teams of states and tribes to review and coordinate plans along shipment corridors as well as a National Training Advisory Committee to report to DOE on progress and needed additional actions.

We believe the proposed WIEB Committee approach to the allocation of funding under Section 180(c) has significant merit and should be carefully reviewed and seriously considered. The use of shipment-miles (*i.e.*, the number of shipments multiplied by the distance of such shipments) is straightforward and provides as equitable a basis for allocating funds as may be achievable. As a member of WIEB, New Mexico is disappointed that DOE did not summarize or specifically reference the draft regulations in either of the two Notices of Inquiry issued since they were submitted to DOE. We believe others would benefit from having an opportunity to review, compare, and contrast the approach proposed by WIEB with others under consideration.

\* **Restrictions on Use of Funds.** The DOE should exercise extreme caution in this area. Care must be taken so as not to be too prescriptive in establishing restrictions of the use of Section 180(c) funds. Restrictions on the types of equipment to be purchased and on the training to be offered may be appropriate **ONLY** if such restrictions are developed in close consultation with those entities that may ultimately be impacted.

In regard to specifying a percentage of funds that would have to be distributed to units of local government, we believe it would be very difficult--if not impossible--to come up with a percentage that is perceived as equitable and appropriate in all applications. Due to the diversity of prospective recipient jurisdictions in terms of

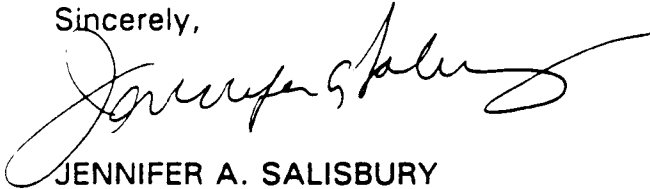
levels of training, resources and other considerations, there is probably no single percentage that would apply satisfactorily in each and every case. To modify an old adage, "one size does not fit all" in this instance. As an alternative to what may prove to be an exercise in frustration and futility, the State of New Mexico recommends DOE incorporate in the final Section 180(c) Policy and Procedures a requirement that states notify potentially affected local jurisdictions of the NWSA assistance program and encourage their participation.

#### Discussion of Procedural Options

The State of New Mexico continues to be convinced that establishment of a DOE/OCRWM grant program is the best overall option for implementing NWSA Section 180(c), particularly from a long-term perspective. It would be the most direct means of funding since OCRWM already has in place a system for tracking and managing appropriations from the Nuclear Waste Fund. This option would also greatly minimize the bureaucracy associated with program administration, thereby benefiting both DOE and recipients. We believe, however, that the Section 180(c) program can be enhanced to a significant degree if existing Cooperative Agreements with representative regional organizations such as WIEB continue. These organizations fulfill an important coordination function among participating states, providing a unique forum for interested and affected parties to identify, discuss, and resolve issues. Consequently, New Mexico supports an OCRWM grant program that is implemented in conjunction with the continuation of established cooperative agreements with regional organizations.

Thank you for the opportunity to comment on the continuing development of a Section 180(c) program.

Sincerely,



JENNIFER A. SALISBURY

Chair

N.M. Radioactive Waste Consultation Task Force

c: Governor Gary E. Johnson  
Task Force Member Agencies