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RE: Comments on Section 180(c) Policy and Procedures

The Office of Civilian Radioactive Waste Management (OCRWM) of the U.S. Department of Energy (DOE) has prepared a Notice of Proposed Policy and Procedures to implement Section 180 (c) of the Nuclear Waste Policy Act of 1982 as Amended (NWPAA) for providing technical assistance and funds to States and Indian tribes in areas through which OCRWM plans to ship spent nuclear fuel and high-level waste. The following comments reflect the views of the National Congress of American Indians (NCAI), the oldest and largest national tribal advocacy organization in the country with a current membership of 215 American Indian and Alaska Native governments, and the National Indian Nuclear Waste Policy Committee (NINWPC), a body of tribal representatives who meet periodically to discuss nuclear waste issues that currently, or will, impact their lands and culture. The NCAI and the NINWPC appreciate the opportunity to comment.

The NINWPC was formed in 1984 and meets twice annually for the purpose of developing ideas and initiatives for tribal government policymakers on radioactive waste issues. The founding principle of the NINWPC is that the Nuclear Waste Policy Act of 1982 should be implemented in the clearest context of the federal government's obligations and trust responsibilities to honor the rights and interests of Indian Nations under treaties and other laws. The NINWPC recently met on June 4-5, 1996 in Tulsa, Oklahoma at the NCAI Midyear and discussed the 180(c) policy.

Since 1983, the NCAI has had a cooperative agreement with OCRWM. Through the agreement, NCAI assists OCRWM in meeting its mandate under the NWPAA to provide timely information to and accumulate feedback from tribal governments on OCRWM programs and policies. As a national organization representing many tribes on potential transportation routes, NCAI has a sustained interest in the safe transportation of spent nuclear fuel. The NCAI Nuclear Waste Program facilitates the meetings of the NINWPC and twice annually conducts workshops and training in radiological emergency response procedures and planning for tribal government employees.

In general, NCAI and the NINWPC approve of the policy's even-handed treatment of tribal governments and state governments. However, there are aspects of the policy that interpret Section 180(c) in a way that could result in tribal governments being unprepared for transportation of spent nuclear fuel and high-level waste through Indian country. NCAI and the NINWPC believe that it is necessary to refocus the proposed 180(c) policy on its central goal: achieving preparedness for nuclear waste transportation. This adjustment will lead to a policy that actually protects Indian citizens, lands and resources and is necessary for the DOE to meet the federal treaty, trust and statutory obligations to Indian tribes. The following specific comments are intended to assist the DOE in developing a policy for distributing technical assistance and funding under Section 180(c) that will achieve preparedness for safe transportation of nuclear waste.

I. Funding Mechanism is Equitable in Treatment of Tribes and States

Section 180(c) of the Nuclear Waste Policy Act (NWPA) begins as follows:

The Secretary shall provide technical assistance and funds to States for training public safety officials of appropriate units of local government and Indian tribes through whose jurisdiction the Secretary plans to transport spent nuclear fuel....

Past discussions with OCRWM on this language have noted that it is susceptible to two distinct interpretations. The first, and the one supported by NCAI and NINWPC, is that assistance and funds are provided to States and Indian tribes on an equal standing and these resources are provided to local governments through the State government. This interpretation is the most logical given that the NWPA provides equally for States and Indian tribes throughout the rest of the Act, and that it is consistent with the federal policy of direct government-to-government relations with tribal governments. The second interpretation is that States would provide training to local governments and Indian tribes. This interpretation was rejected, wisely, by OCRWM in its 180(c) policy. In Indian country, Indian tribal governments have exactly the same responsibility for protecting the health and welfare of their people as do State governments. Throughout the 180(c) policy statement, Indian tribes are recognized as being on an equal footing with State governments, and this policy should be retained.

II. Retain the Current Exclusion of Population in Funding Allocation Formula

The funding allocation formula as described in the appendix of the 180(c) policy would give a "base amount" for all jurisdictions to be crossed by NWPA shipments, plus a variable amount for every 160 miles along a route. This formula does not use population as a factor, and NCAI and the NINWPC encourage OCRWM to retain the exclusion of population in the funding allocation formula.

Most Indian tribes have a relatively small number of members and live in rural areas. Any funding formula which uses population as a factor will weigh so heavily in favor of urban areas

that Indian tribes and rural jurisdictions would be left unprotected. Population based formulas for hazardous waste clean-up have been tried in the past and they have repeatedly led to the exclusion of Indian tribes and rural jurisdictions, creating environmental justice concerns. A population based formula in the 180(c) context would be a particularly unwise policy as Indian tribes and rural jurisdictions cover most of the route miles in the U.S. and do not have the developed emergency response infrastructure that urban areas have. Indian tribes and their members should not be put at greater risk because they live on rural reservations. Further, certain secluded areas of Indian country contain significant cultural sites and receive special attention for protection and preservation. Regardless of existing population count, a culturally significant area may require additional resources to ensure adequate protection in the event of a spent nuclear fuel transportation accident. Excluding population from the formula is the best and simplest way of ensuring that 180(c) resources are distributed to those jurisdictions that most need the assistance, and this policy should be retained.

III. States and Tribes Eligibility for 180(c) Technical Assistance and Funding Should Be Based on Their Authority to Respond to an Emergency and on Their Authority to Enforce Vehicle Regulations

Section 180(c) directs the DOE to provide technical assistance and funds to States and Indian tribes “*through whose jurisdiction*” the DOE plans to transport NWPAs. NCAI and the NINWPC believe that technical assistance and funding should also be provided to states and tribes who are near, but not on, transportation routes because their people and lands would be at risk in the event of a transportation accident. Nevertheless, DOE may be limited by the language of 180(c) to providing assistance to only those states and tribes with “*jurisdiction.*” However, NCAI and the NINWPC do not agree with the determination of jurisdiction in the proposed 180(c) policy which states: “Assistance will not be provided to jurisdictions that do not have NWPAs shipments *through their borders....*” (61 FR 24778 [italics added]). Instead, states and tribes eligibility for 180(c) technical assistance and funding should be based on jurisdiction; their authority to respond to an emergency and their authority to enforce vehicle regulations.

Jurisdiction is a legal term meaning the authority to perform an action, and this authority does not necessarily begin and end at state or tribal geographic borders. This concept of jurisdiction is particularly important in the context of emergency response actions. Tribes and neighboring local governments often share memorandums of agreement or cross-deputization arrangements that authorize and sometimes obligate them to respond to emergencies outside of their geographical boundaries. Some tribes also have authority under their treaties to perform actions outside their reservation boundaries. These arrangements come in many forms and may sometimes be a matter of custom more than formal agreement, but the common feature salient to 180(c) considerations of jurisdiction is that a government has legal authority to respond to an emergency on a planned NWPAs route.

Safe routine transportation functions, such as inspections and enforcement of vehicle codes are more likely to coincide with the geographical boundaries of a state or tribal government.

However, there are some instances where neighboring counties or tribes have cross-deputization arrangements for vehicular-code enforcement. In these instances, 180(c) eligibility should also include those states and tribes with authority to enforce vehicle regulations on a planned NWPA route. Because jurisdiction to respond to an emergency may not coincide with jurisdiction to enforce vehicle regulations, it may be necessary in some instances for DOE to provide assistance for one function and not the other.

As tribal governments achieve self-determination, their efforts will include the entire range of transportation regulatory authority. The enhancement of tribal governance will result in a significant increase of tribal/state cross-boundary agreements for civil and criminal enforcement. NCAI and the NINWPC encourage the DOE to revisit the issue of jurisdiction in 180(c), and adopt a policy that will prepare all tribal governments with authority to respond to an emergency or authority to enforce vehicle codes on a planned NWPA route.

IV. Some Elements of Needs Assessment Must Be Added to the Proposed 180(c) Incremental Assistance Policy

The proposed 180(c) policy describes two differing philosophies of the structure of the 180(c) program; needs assessment vs. incremental assistance. (61 FR 24475). The policy takes the position that 180(c) is not intended to supply complete emergency response capabilities, but is designed to supplement existing capabilities in order to prepare for NWPA shipments; thus a fixed amount of incremental assistance will be given to each impacted jurisdiction and no needs assessment is necessary. The funding formula described in the appendix follows this policy and each jurisdiction is given a fixed “base amount.” NCAI and the NINWPC agree that the incremental assistance approach is the simplest and most efficient method to distribute 180(c) assistance, but believe that some elements of needs assessment must be incorporated into the incremental assistance policy in order to achieve the central goal of 180(c): to ensure that Indian tribes and states are prepared for NWPA shipments.

Section 180(c) directs the DOE to provide “technical assistance and funding” for training related to the safe transportation of nuclear waste and emergency response procedures. Clearly the intention is for the agency to use its expertise and to some degree measure the needs of the various jurisdictions and develop a program that will actually result in the jurisdictions being prepared for such transportation. The intention was not for the DOE to simply develop a fixed package of training and funding to deliver to every jurisdiction regardless of its ability to make use of these resources. However, this is the position that the policy takes and justifies with the claim that spent nuclear fuel transportation is so safe that there is no need for the jurisdictions to be prepared.¹

¹ “[T]he Department believes that a jurisdiction’s lack of emergency response infrastructure does not compromise shipment safety when a jurisdiction is aware of the steps taken to ensure safety and the Department’s readiness to provide on-site assistance.” 180(c)

The Congressional direction in 180(c) is that the impacted jurisdictions do need to be prepared. Simply providing a fixed package of training and funding to each jurisdiction without any knowledge of existing capabilities in any jurisdiction may amount to an arbitrary and capricious use of agency power under 180(c). NCAI and the NINWPC encourage OCRWM to recognize that some use of needs assessment is not mutually exclusive from the incremental assistance policy, and that even if the agency has committed to incremental assistance as a policy decision, some elements of needs assessment would greatly assist the agency in accomplishing the purposes of 180(c). Some form of needs assessment is necessary to:

- 1) comply with the DOE trust responsibility to Indian tribes;
- 2) ensure that the 180(c) program achieves preparedness for NWPAs shipments;
- 3) determine what the increment of assistance will be;
- 4) determine the total budget to allocate to the 180(c) program.

- 1) Needs Assessment Necessary to Comply with the DOE Trust Responsibility to Indian Tribes

All federally recognized tribal governments are beneficiaries of the federal trust responsibility, which makes it incumbent on every federal agency, including the Department of Energy, to protect tribal lands and resources, their treaty rights, and their way of life. The trust responsibility stems directly from the tribes' treaties with the federal government and their status as sovereign nations. The DOE has promulgated its own Indian Policy that recognizes the federal trust responsibility as being applicable to the DOE, yet the proposed 180(c) policy fails to analyze the requirements of the trust responsibility. Perhaps nothing is more vital to the persistence of Indian tribes as culturally distinct entities than the integrity of their lands and resources such as water and wildlife. NCAI and the NINWPC strongly urge that the 180(c) policy address the trust responsibility issue.

The DOE fiduciary duties to Indian tribal governments have been reinforced under President Clinton's Administration via the Memorandum of April 29, 1994, Government-to-Government Relations With Native American Tribal Governments. The Memorandum reiterates the unique legal relationship between Indian tribes and the United States set forth in the Constitution, treaties, statutes, and court decisions. The Memorandum, as it pertains to 180(c) Policy implementation, directs the DOE to: ensure open and candid consultation with tribal governments prior to taking actions that affect federally recognized tribal governments; assess the impact of federal plans, projects, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, programs and activities; take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes; and, design solutions and tailor federal programs, in

appropriate circumstances to address specific or unique needs of tribal communities.

In the context of the proposed 180(c) policy, the trust responsibility requires that the DOE address the problem of the lack of infrastructure and trained personnel on many tribal lands. The NCAI Nuclear Waste Program has developed extensive experience with emergency response training for tribal governments in the last three years as it has conducted radiological emergency preparedness workshops for tribal responders in conjunction with Argonne National Laboratory. Interactions with the individuals responsible for tribal emergency response indicates that there is a critical lack of trained people and infrastructure on most Indian lands. In addition, the only compilation of tribal emergency response capabilities for radiological transportation incidents also concludes that: "most tribes surveyed have very little capability to protect their own citizens in the event of a disaster or emergency of any type, nor have they negotiated formal agreements through which they could obtain assistance from adjacent state or local jurisdictions."²

The trust responsibility requires the DOE to assure the incremental resources it intends to provide can actually be utilized by the tribes in a manner that will protect tribal trust resources. It is notable in this regard that the language of Section 180(c) does not place the same limitations on tribal assistance and funding that it does on state governments:

The Secretary shall provide technical assistance and funds to States for training public safety officials of appropriate units of local government and Indian tribes through whose jurisdiction the Secretary plans to transport spent nuclear fuel....

The modifier "for training public safety officials..." applies to States but not to Indian tribes. Thus it is a reasonable interpretation of 180(c) that Congress intended the DOE to generally supply technical assistance and funds to tribes to ensure that the tribes are prepared, and that this funding may encompass emergency preparedness infrastructure as well as training. This interpretation that Indian tribes may receive infrastructure funding is supported by the well-developed canon of construction of federal Indian law that, generally, statutes affecting the rights of Indian tribes shall be liberally construed in favor of supporting the tribal right.³ The proposed 180(c) policy did not adequately address these issues by merely stating that a lack of infrastructure does not compromise shipment safety.⁴ DOE has a responsibility under 180(c) and under its trust obligations to ensure that the tribes are prepared for NWPA shipments.

² Office of Nuclear Material Safety, U.S. Nuclear Regulatory Commission, *Survey of State and Tribal Emergency Response Capabilities for Radiological Transportation Incidents*. 4-3 (1990 NUREG/ CR-5399).

³ Felix Cohen, *Handbook of Federal Indian Law* 224 (1982 Ed.); David H. Getches et al., *Federal Indian Law: Cases and Materials* 348 (3rd Ed. 1993).

⁴ *Infra.*, footnote 1.

NCAI and the NINWPC recognize that the DOE does not have the sole or even the primary responsibility for developing basic tribal emergency response and safe transportation infrastructure. Clearly other agencies such as the Federal Emergency Management Agency, the Department of Transportation and the Department of Interior have significant roles to play that they have not fulfilled. However, the DOE does have a specific responsibility defined in the DOE Indian Policy to coordinate with these agencies:

6. THE DEPARTMENT WILL WORK WITH OTHER FEDERAL AND STATE AGENCIES THAT HAVE RELATED RESPONSIBILITIES TO CLARIFY THE ROLES, RESPONSIBILITIES AND RELATIONSHIPS OF OUR RESPECTIVE ORGANIZATIONS AS THEY RELATE TO TRIBAL MATTERS⁵

NCAI and the NINWPC would encourage the DOE to take up this issue of developing tribal emergency response and safe transportation infrastructure at the highest levels of the agency and begin to request coordination with other responsible federal agencies. Cooperation with other agencies that have related responsibilities would recognize the principle of comity, serve the best interests of all, and lead to the fulfillment of DOE's trust responsibility to Indian tribes with regard to Section 180(c).

DOE now has a particular opportunity to begin this cooperation, as the Department of Transportation is currently seeking informal suggestions for the reauthorization of the Hazardous Materials Transportation and Uniform Safety Act (49 U.S.C. 5101 *et seq.*), the statute that authorizes grant programs for emergency response. There is a particular need in Indian country for new funding for managers of hazardous materials programs and emergency management infrastructures. Because there is generally no permanent base to which to attach grant based training and planning projects, many tribes cannot even take advantage of existing grants.

Another area of consideration should be the influence of greater perceived risk on reservation communities. Although the risks of properly handled and protected radioactive wastes may be low, the DOE's own studies show that the perceived risks of living near a nuclear waste route are quite high.⁶ While many non-Indian people feel free to uproot and move in response to perceived risks, Indian communities will not move because of ties to the land and culture. These Indian communities may pay a high price in the distrust and resentment sown by being forced to live next to a nuclear waste route. In addition, although the Indian communities as a whole will not move, a few members of the tribe may move away in response to perceived risk. This also

⁵ U.S. Department of Energy American Indian Policy, November 29, 1991, p. 3.

⁶ Hank Jenkins-Smith and Carol Silva, *Results of National Survey on Public Perceptions of Transportation Risks*, Presented at the U.S. Dept. of Energy Transportation External Coordination Working Group, July 17, 1996.

would have a negative effect on reservation communities. It has been repeatedly shown that adequate preparation will dramatically reduce the anxieties of perceived risk. The DOE's 180(c) policy should analyze and carefully consider the impacts that perceived risks could have on tribes and their traditional way of life and ensure that the tribes are adequately prepared in order to ameliorate the impacts of perceived risks.

The DOE must continue to keep the tribes informed on a timely and direct basis and elicit participation and input on a government-to-government level. Impacted tribes should be consulted at the time that routes are selected to determine whether other issues that are critical to the continued survival of Indian tribes should be considered in the context of the trust responsibility and changes made to the 180(c) policy. Most of all the DOE must incorporate the tribal comments and concerns into DOE policy, and fulfill the DOE Indian Policy by taking affirmative steps to protect the way of life of reservation communities.

2) Needs Assessment Necessary to Ensure That the 180(c) Program Achieves Preparedness for NWPA Shipments

NCAI and the NINWPC are concerned that the proposed policy has focused too narrowly on meeting the bare minimum requirements to comply technically with Section 180(c), and has lost sight of the goal of actually achieving preparedness for NWPA shipments. As has been discussed many times with the DOE, creating a sense of preparedness for the nuclear waste shipments is critical if the impacted communities are to peaceably accept the potential risks of devastating transportation accidents. In addition, the risk of further delays and costs overruns are high if a number of communities protest vocally against the NWPA shipments. Most importantly, if a serious accident were to occur and get out of control because the States and Indian tribes were not prepared, the cost in lives could be very high.

The prepackaged plan of training and funding that is described in 180(c) may not result in creating preparedness, or a sense of preparedness, if it is not paired with more attention to the actual needs of the community. This type of "technical assistance" is what was intended by 180(c) and should not be too difficult or expensive to achieve. The assistance and funding process should have a mechanism to follow up with the impacted communities to check that the resources are meeting the needs. In many instances, the incremental assistance that is planned by DOE will be adequate. In some instances, and with some Indian tribes, it will be necessary to supply a little more individualized assistance to assure that the tribe is able to take advantage of the package of assistance that is offered. This type of technical assistance and flexibility, to ensure that tribes are actually prepared, will be greatly appreciated by tribal governments and should lead to greater acceptance of NWPA transport.

3) Needs Assessment Necessary to Determine What the Increment of Assistance Will Be -

The appendix to the 180(c) policy, "Basis for Cost of Program," describes the methods that DOE will use to estimate the costs for 180(c) activities. To determine which and how many people should be trained, what type of training, and to what levels, the DOE intends to look to industry regulations, the DOE's own capabilities to support state and tribal governments, and the comments provided by stakeholders. The appendix indicates that these determinations have been made and describes a plan to provide, for each jurisdiction, funding to train 5 emergency responders and 3 vehicle inspectors and to provide "a percentage" of the salary of a health physicist for planning and coordination costs. NCAI and the NINWPC encourage the DOE to do further analysis to determine if this incremental assistance is adequate and to do a sample needs assessment to determine if these resources will actually result in adequate preparedness for NWPA shipments.

The first issue to define is what constitutes a sufficient emergency response by a jurisdiction and what constitutes a sufficient inspection program. Basic determinations such as how many people to train and what equipment they should have are not analyzed in the 180(c) policy and the referenced industry standards relate only to training goals. A closely related issue is DOE's capabilities and plans to support state and tribal governments. This issue is not discussed in the 180(c) policy, and to our understanding the DOE has not released any plans for supporting state and tribal governments. Determining DOE capabilities and plans is a prerequisite to determining what constitutes an adequate response by a state or tribe.

Once these issues are defined, the DOE must have an adequate basis to determine what incremental level of assistance and funding is necessary to achieve preparedness by the impacted jurisdictions. NCAI and the NINWPC suggest that instead of relying solely on comments, the DOE should conduct a sample needs assessment to gain experience with the emergency response and inspection capabilities of potentially impacted jurisdictions. For example, DOE could choose at random 5 state/local jurisdictions and 5 tribal jurisdictions along likely routes, and send trained DOE personnel to visit these jurisdictions to conduct interviews and view the available equipment and facilities and the emergency response plans that are in place. In this manner the DOE may have a basis to determine what level of incremental resources will actually result in adequate preparedness for NWPA shipments.

With regard to the funding for "a percentage" of a health physicist's salary for planning and coordination costs, NCAI and the NINWPC strongly urge the DOE to fund this position at 100% for impacted Indian tribes. Most tribal governments have limited or no emergency response infrastructure and current personnel are stretched to their limit. In order to develop any kind of institutional cohesion in the planning and preparedness for NWPA shipments, the average tribe needs to have at least one full-time employee with the ability to plan and coordinate the tribe's efforts.

4) Needs Assessment Necessary to Determine the Total Budget to Allocate to the 180(c) Program

The 180(c) policy seems to take the position that some fixed amount of money will be allocated for 180(c) purposes and the only issue is the allocation formula. At some point, the DOE or Congress will have to decide on an amount of money to allocate to the 180(c) program. Even though the 180(c) program is not intended to provide all of the emergency response needs of a jurisdiction, some sort of needs assessment will have to be performed to determine the total 180(c) budget allocation. First, the level of incremental assistance must be calculated and, as suggested above, a sample needs assessment would be very useful in that process. Second, transportation routes must be determined and the number of impacted jurisdictions must be calculated. These steps will lead to a rational and defensible budget allocation to 180(c) programs and will help to avoid an arbitrary allocation that may prove inadequate to prepare the impacted jurisdictions.

V. Policy on Funding of Drills and Exercises Needs to be Clarified

The 180(c) policy's analysis of allowable activities for funding states that 180(c) funds are not available for conducting drills and exercises, as these activities are considered a means to measure preparedness, an activity which the DOE views as beyond the scope of the 180(c) program which is limited to provision of funds and assistance for training. (61 FR 24774). NCAI and the NINWPC strenuously object to this policy as it will greatly devalue the 180(c) training program. In our experience, drills and exercises are not merely a means to measure preparedness, they are in fact the most crucial aspect of any emergency response training program.

The NCAI Nuclear Waste Program has developed extensive experience with emergency response training in the last three years as it has conducted radiological emergency preparedness workshops utilizing Argonne National Laboratory emergency management consultants and a tribal regulatory authority expert. Each workshop consists of several days of classroom learning, followed by a day of field exercise. In each workshop, the value of the classroom is only realized at the time when the field exercise puts that newfound knowledge to work. Each field exercise also offers a valuable opportunity to develop emergency response skills, with the guidance of experienced teachers, that simply cannot be taught in a classroom. In addition, most educators have great doubts about the retention of classroom learning by adults unless it is reinforced with hands-on experience.

The "no drills and exercises" policy is contradicted in part in the DOE responses to comments. In the responses, the policy seems to be that recipients may use their funding for participation or observance of exercises and drills, but such activities are not included in the proposed basis for estimating funding levels. (61 FR 24779). Clearly drills and exercises must be funded by 180(c). As stated above, drills and exercises are in fact the most crucial aspect of any emergency response training program.

The “no drills and exercises” policy was discussed at the DOE Transportation External Coordination Working Group in Pittsburgh, PA on July 16-18, 1996. Here, DOE personnel stated that the “no drills and exercises” policy was intended to apply only to large-scale, regional exercises and that small drills and exercises were not excluded. Clearly there is a need to clarify the policy on drills and exercises, and it is our strong opinion that they should be allowed and funded by the 180(c) program.

VI. Technical Assistance Definition and Ten Percent Limitation on Equipment Purchases Should Be Revised

The proposed 180(c) policy states that “technical assistance” from the DOE does not include the provision of equipment, and that recipients may allocate only up to 10 percent of their allocated funds to purchase equipment if they choose. (61 FR 27773). There is no rationale provided for either of these policies, except for a generalized statement that Section 180(c) technical assistance and funding is limited to “training” only. As discussed earlier in Section IV (1) of these comments, the language of Section 180(c) does not limit tribal assistance and funding to training only, as it does state governments. In fact, there is nothing in the language of 180(c) that prevents DOE from funding tribal emergency response infrastructure. NCAI and the NINWPC would greatly appreciate a clarification of the “technical assistance does not include equipment” policy in the context of Indian tribes and the DOE trust responsibility to Indian tribal governments.

The greatest problem facing Indian tribes in preparing for NWPA shipments is a lack of emergency response infrastructure. The policy as currently written would further thwart the development of such infrastructure. It would allow tribes to train individuals to deal with radioactive emergency situations, but would have them face such situations barehanded. NCAI and the NINWPC object to both of these policies and request that they be revised so that tribes receive the necessary equipment to prepare for NWPA shipments.

VII. The 180(c) Policy Should Be Reconsidered In Light of *Indiana Michigan Power Company v. Energy Department*

On July 23, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the DOE must fulfill its obligation under the NWPA to begin accepting spent nuclear fuel from civilian nuclear power plants by January 31, 1998. (*Indiana Michigan Power Company v. Energy Department*, CA DC, No. 95-1279, 7/23/96). The court found that the plain language of the statute requires the DOE to begin accepting commercial nuclear waste by January 31, 1998, whether a repository exists or not.

The court did not fashion a remedy, finding that the DOE had not yet defaulted on its responsibilities, but remanded the case to the DOE for further proceedings consistent with the opinion. DOE has said that the earliest date that Yucca Mountain would be ready for accepting waste would be 2010. As DOE does not have statutory authority to build a large interim storage

facility under current law, the only remedy would be to pay money damages to the utilities for the on-site storage of the waste. The court's decision clearly puts more pressure on Congress and the DOE to find a solution to the problem of commercial nuclear waste storage and makes it very likely that some types of transportation under the NWPA will begin by 1998. Such scenarios include consolidation of spent fuel at commercial facilities with extra capacity or transportation to a small facility at an existing DOE site.

Because this court decision has occurred since the publication of the 180(c) policy, the DOE should reconsider the policy's decision to wait until four years before a planned shipment before beginning any 180(c) activities (61 FR 24773). The policy should consider beginning a program of training and infrastructure development for tribal governments at the earliest opportunity, and should begin direct training and funding for those tribes that are most likely to be on an early transportation route. In addition, the NCAI Tribal Radiological Preparedness Workshops (TREP) have been well received by both tribal representatives and the emergency preparedness community, but are now slated for a two thirds budget cut. The NCAI TREP workshops should be funded to conduct training for impacted tribes until 180(c) funding is fully implemented. This approach will assist the DOE in meeting its trust responsibility and assist tribes in attaining readiness for NWPA shipments.

CONCLUSION

NCAI and the NINWPC look forward to working with OCRWM in further developing a Section 180(c) policy that is intently focused on actually achieving preparedness for NWPA shipments. Please contact Robert Holden or John Dossett at (202) 466-7767 for clarifications or more information.