



NEW MEXICO ENERGY, MINERALS
& NATURAL RESOURCES DEPARTMENT

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OFFICE OF THE SECRETARY
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-5950

Jennifer A. Salisbury
CABINET SECRETARY

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Ms. Corinne Macaluso
U.S. Department of Energy
c/o Lois Smith
TRW Environmental Safety Systems, Inc.
600 Maryland Avenue S.W., Suite 695
Washington, D.C. 20024

Subject: **STATE of NEW MEXICO'S COMMENTS on SECTION 180(c)
NOTICE of PROPOSED POLICY and PROCEDURES**

This responds to the U.S. Department of Energy's (DOE) *Notice of Proposed Policy and Procedures (Notice)* for implementing Section 180(c) of the Nuclear Waste Policy Act, as amended (NWPA). The solicitation of comments on the proposed Section 180(c) policy and procedures was noticed in the Federal Register of May 16, 1996, Vol. 61, No. 96, p. 24772; and August 12, 1996, Vol. 61, No. 156, p. 41778.

INTRODUCTION and BACKGROUND INFORMATION

The following comments are submitted on behalf of the State of New Mexico's Radioactive Waste Consultation Task Force. The Task Force was created by statute in 1979 [Laws of New Mexico 1979, Chapter 380; Section 74-4A-6 New Mexico Statutes Annotated (NASA) 1978]. It is composed of the Cabinet Secretaries of the Energy, Minerals and Natural Resources Department; Environment Department; Department of Public Safety; Highway and Transportation Department; Department of Health; and the Taxation and Revenue Department. In addition, the Chairman and Vice-Chairman of the joint interim Radioactive and Hazardous Materials Committee of the New Mexico State Legislature serve as advisory members. The Task Force Chairman is appointed by the Governor of New Mexico.

The duties of the Task Force are set out in Section 74-4A-7 NASA 1978. That statute specifies the Task Force "...shall negotiate for the State with the federal government in all areas relating to the siting, licensing and operation of new federal disposal facilities, including research, development and demonstration, for high-level radioactive wastes, transuranic radioactive wastes and low-level radioactive wastes." Consequently, activities relating to management of civilian spent nuclear fuel and defense high-level waste fall within the purview of the Task Force.

To date, the State of New Mexico has been an active participant in addressing Section 180(c) issues. Through its Radioactive Waste Consultation Task Force, 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 F.R. 8119]; May 17, 1995, on DOE's Section 180(c) *Notice of Inquiry* [60 F.R. 99 & 13715]; and comments dated September 26, 1995, on DOE's Section 180(c) *Notice of Inquiry; Supplemental Information* [60 F.R. 36793].

In addition, New Mexico is a member of the Western Interstate Energy Board's 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, and September 30, 1995. Consistent with this history, we fully endorse WIEB's comments and recommendations of September 12, 1996, on DOE's currently pending *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 Section 180(c) issues, the State of New Mexico respectfully requests that DOE review and consider all previous comments referenced above, as well as those which follow, in formulating an effective Section 180(c) assistance program for affected state, tribal, and local governments.

GENERAL COMMENTS

The State of New Mexico continues to strongly support a Section 180(c) program that will provide sufficient flexibility for each eligible party to plan, develop and implement an NWPA transportation safety program which best meets its respective individual needs. Unfortunately, the Section 180(c) policy and procedures proposed by DOE will not accomplish that goal.

As you are well aware, each state, tribal and local government is organized somewhat differently, with widely varying levels of personnel, equipment, and capabilities to prepare for NWPA shipments. Consequently, we believe it imperative that DOE structure the Section 180(c) program in a manner which is flexible enough to accommodate the myriad and diverse requirements of all potential participants. The program must therefore provide for the allocation of funds and technical assistance based on a current assessment of needs by each grant applicant. The Western Governors' Association (WGA), a bipartisan organization of some 20 western governors, endorsed this approach in its unanimous adoption of *WGA Resolution 96-019: Funding for Emergency Preparedness for Spent Nuclear Fuel and High-Level Radioactive Waste Transportation*, dated June 24, 1996.

We concur in DOE's affirmative interpretation of NWPA Section 180(c) regarding the provision of funding and other assistance directly to eligible Indian tribes. In previous comments on this issue, the State of New Mexico has called for tribal governments to be granted separate but equal standing with that of state governments on the issue of Section 180(c) implementation. This

interpretation is certainly consistent with the federal policy of dealing with Indian tribes on a government-to-government basis, and one which is in everybody's best interest.

SPECIFIC COMMENTS

The following review comments correspond to the four subject headings listed in **Section III. Proposed Section 180(c) Policy and Procedures** of the *Notice*: 1) Proposed Funding Mechanism; 2) Definitions of Key Terms; 3) Eligibility and Timing of the Grants and Technical Assistance Program; and 4) Allowable Activities for Funding.

Proposed Funding Mechanism. The State of New Mexico fully concurs in DOE's intent to implement Section 180(c) through a grants program administered by its Office of Civilian Radioactive Waste Management (OCRWM). We continue to believe this will prove to be the most efficient, cost-effective implementation mechanism for a program of this type--and the least administratively burdensome for OCRWM and all participants.

The State also concurs in DOE's decision to make the grants specific to the Section 180(c) program and not combine them with any other Department-sponsored transportation preparedness or training programs. We do agree, however, that Section 180(c) initiatives should be coordinated to the extent possible with other appropriate DOE programs. The *Notice* states that such coordination "...would be encouraged," but does not specify how. This issue should be investigated in greater detail and actively pursued.

In addition, New Mexico supports inclusion in the Section 180(c) program reasonable measures which would increase communication and coordination among the many applicant jurisdictions in preparing and implementing NWSA transportation safety plans. Such communication and coordination is particularly important among state, tribal, and local governments operating within a state's geographical boundaries. We again urge DOE to look closely at the considerable benefits to be gained by establishing "Regional Training Advisory Teams" and a "National Training Advisory Committee" to ensure this is accomplished in a uniformly structured, systematic manner along the numerous prospective NWSA shipment corridors. Our experience with the Waste Isolation Pilot Plant (WIPP) transportation program indicates that such advisory groups are extremely cost-effective in terms of facilitating coordination and minimizing duplication and overlap.

On a related note, we believe that substantial cost savings and better customer service would be achieved in the Section 180(c) program through enhanced internal coordination of transportation-related functions within the DOE complex. Indeed, the integration of DOE's various complementary transportation program elements, including training and radiological assistance, was a primary objective behind the establishment of its Transportation External Coordination Working Group--an objective that we, as a member of the TEC/WG, are committed to attaining. With the advent of the Section 180(c) program not far away, it is even more critical that DOE

continue to pursue integration of transportation-related functions within the Department through the TEC/WG.

The State of New Mexico takes exception to DOE's plans not to codify the Section 180(c) policy and procedures in substantive regulations. We continue to believe that establishing the Section 180(c) program in regulations will provide greater program continuity and stability through changes in administrations. The only explanation offered by OCRWM in defense of its preferred option (policy and procedures) is "...in order to preserve flexibility" and "...in order to work through unforeseen problems without committing to binding regulations." Yet not one of the Section 180(c) Federal Register notices issued by DOE since 1992 includes information comparing and contrasting the two options for establishing the program. Absent such information, we cannot determine whether one option is in fact any more flexible than the other. It is not even clear, for example, what guidelines, rules, or processes govern DOE "policies and procedures" and amendments thereto. Could DOE change them unilaterally in the future? If not, how would affected jurisdictions be involved; and how would that process differ from a DOE rulemaking procedure? Participants in the development of the Section 180(c) program require straightforward answers to these and other important questions relating to future program administration and management.

The issues surrounding selection of the most appropriate mechanism for establishing the Section 180(c) program are further exacerbated by the prospect that NWPA shipments may commence much earlier than currently projected by DOE, given the U.S. Court of Appeals (D.C. Circuit) decision of July 23, 1996 in *Indiana Michigan Power Company, et al., v. Department of Energy and the United States of America* and pending federal legislation (S. 1936) to amend the NWPA. Shortly after Congress adjourns later this month or in early October, DOE will know whether such near-term shipments to an interim storage facility are a realistic possibility. If they are not, DOE should take immediate action to establish the Section 180(c) program in substantive regulations. Even if the prospects for such shipments are good, DOE could still establish the program in regulations--and do it in a timely manner--through use of an expedited rulemaking procedure. Such a procedure has been used successfully by the Department in the past on various other programs and is a seemingly appropriate option here.

Definitions of Key Terms. The State of New Mexico disagrees with the definitions of "safe routine transportation" and "technical assistance" as proposed by DOE in the *Notice*. As written, both definitions are too narrow in scope and not sufficiently explicit in terms of allowable activities. Moreover, DOE should consider adding a definition for "emergency response" to further define and clarify the scope of eligible activities within this context.

Safe Routine Transportation: The proposed definition focuses predominantly on inspection and enforcement activities. While these are certainly important, they are not the only activities that may contribute to "safe routine transportation." We strongly believe the definition should allow Section 180(c) funding of various accident prevention activities, including but not limited to:

record-keeping compliance audits; mechanical and radiological inspections of highway/rail transport vehicles and cargo; development and application of bad weather procedures; identification and use of safe parking areas; advance notification and monitoring of NWPA shipments; alternate route analysis and designation; requisite transportation infrastructure improvements; and public outreach and involvement efforts.

The State disagrees with OCRWM's stated position in the *Notice* that these types of activities "...are outside the realm of training for safe transport of NWPA shipments." In this instance, it appears that OCRWM is interpreting the language in NWPA Section 180(c) very selectively and inconsistently from its other NWPA interpretations. In evidence of this, OCRWM proposes in the same *Notice* allowing applicants to budget up to ten percent of each year's 180(c) funds to purchase appropriate (i.e., training-related) equipment. Even though such equipment purchases are not expressly authorized in NWPA Section 180(c), OCRWM exercised common sense and good judgement here through a broader, more flexible interpretation of Congressional intent--all in the name of safety. It must do the same in formulating a workable, realistic definition of "safe routine transportation." In essence, each program participant must not be unduly restricted in regard to determining what elements constitute an effective program for the safe routine transport of NWPA shipments within its jurisdiction.

Emergency Response: The State of New Mexico believes this program would benefit by inclusion of a definition of "emergency response," as that term is used in NWPA Section 180(c). All levels of response, particularly first-on-scene, awareness, operations and technician, must be addressed. Similar to our stated position on the definition of "safe routine transportation," we support having the Section 180(c) program bear the costs of all corresponding NWPA emergency preparedness and response activities, including but not limited to: execution of mutual aid agreements; development and implementation of response plans and procedures; training, including functional drills and field exercises; purchase, maintenance, and calibration of appropriate equipment; and public outreach and involvement efforts.

Technical Assistance: It is unclear why this definition proposes to limit the technical assistance to be provided by DOE to that which is "unique to the Department." Nowhere in the NWPA does it state that technical assistance shall be limited in such a manner. We believe DOE has an obligation to deliver whatever technical assistance is required to support the training mandated under the NWPA--whether or not it is something only the DOE can provide. The restrictive wording should be deleted; alternatively, DOE could clarify that Section 180(c) funds can be used to obtain any technical assistance that is not unique to the Department.

Clarification is also required with respect to state and tribal government access to DOE's contractors. We believe that state and tribal governments, working through appropriate DOE channels, should have reasonable and timely access to the Department's contractor personnel. Indeed, in some instances it will be the contractor--not DOE--who possesses the special experience or expertise sought by the applicant jurisdiction. Explicit guidance on this important issue should be provided.

As to what “technical assistance” would include, we believe OCRWM’s listing in the *Notice* is not sufficiently comprehensive and should be supplemented. Specific examples of appropriate technical assistance to be added are: interpretation of applicable laws, regulations, and DOE Orders; DOE and its contractors’ participation in emergency response drills and exercises; radiological protection guidance; recommendation of appropriate emergency response procedures and equipment; and identification of available DOE resources, including personnel, training and radiation detection instrumentation.

Eligibility and Timing of Grants. DOE proposes to begin the application process for Section 180(c) grants and technical assistance approximately four years prior to transportation (*i.e.*, about one year for the application process itself and approximately three years to implement the program). Based on our experience with the WIPP Project, the State of New Mexico is convinced that four years is the bare minimum amount of time required for the planning, development, approval and implementation of any such comprehensive transportation safety program. DOE should not underestimate how much lead time will be required for the application review process, particularly given the expected significant number of eligible applicants. It is therefore advisable that DOE err on the side of conservatism and initiate the Section 180(c) program five years before the commencement of NWPAs shipments. This will provide an extra year for the preparation, review and approval of applications.

We generally concur in OCRWM’s proposal to require applicants to develop a three-year NWPAs transportation safety program plan detailing how the requested funds would be spent each year. Funding would then be disbursed annually based on the approved plan. This approach (*i.e.*, negotiation of a multi-year work plan and budget, with yearly disbursements of funds) make much sense in terms of both administrative efficiency and strategic program planning. It is recommended, however, that OCRWM prepare a user-friendly “format and content guide” to assist applicants in preparing their proposals. Such a guidance document would also promote consistency among plans, thereby facilitating OCRWM’s review and approval process. State and tribes should be consulted in developing the guide.

With respect to eligibility, New Mexico certainly supports an interpretation of Section 180(c) that would provide grants and technical assistance for activities of state, tribal, and local governments through whose jurisdictions DOE plans to transport NWPAs shipments. Equally important, however, is to allow for the program to fund similar activities conducted by entities with the authority and responsibility for handling NWPAs transportation emergencies that do not occur within the geographical boundaries of their individual political subdivisions. We are aware of fire departments, law enforcement agencies, and emergency medical organizations that have entered into mutual aid agreements which require them to respond outside their normal jurisdictional boundaries. In such cases, it is imperative the Section 180(c) program allow funding of appropriate NWPAs-related activities, irrespective of whether NWPAs shipments traverse an applicant’s geographical jurisdiction. What is critical is for the Section 180(c) program to fund the activities of those entities with “response” jurisdiction over the NWPAs shipping route.

Appendix--Basis for Cost of Program. The State of New Mexico vehemently rejects the DOE assumption, embodied in its proposed funding allocation formula, that the Department can at this time predict with a high degree of precision and accuracy the total amount of funds required to prepare all affected entities for NWPAs shipments. It is obvious to us that the "one size fits all" approach will not work for a program of this nature. There are simply too many and diverse jurisdictions, all with varying emergency response capabilities. We therefore reiterate our call for funding to be based (at least in part) on individual "needs" assessments. Such a fair and equitable basis for the appropriation/allocation of funds serves as the foundation of the Section 180(c) program proposal endorsed by the Western Governors' Association in *WGA Resolution 94-005: Fulfilling a Federal Obligation to Fund Preparations for Shipments of Spent Nuclear Fuel and High-Level Radioactive Waste*, dated June 14, 1994. DOE/OCRWM should take another look at this recommended approach and seriously reconsider its adoption.

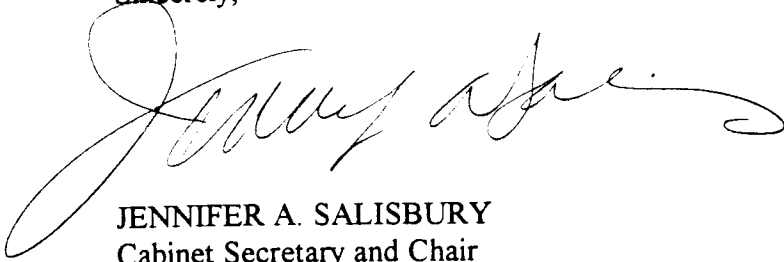
Allowable Activities for Funding. We concur in DOE's proposal that the applicant should largely determine who gets trained, the level of training obtained, and the organization that administers the training. This is the only approach that will work effectively and efficiently across the board, given the fact that the applicant is in the best position to make these determinations within its own jurisdiction. Leaving such important decisions to the applicant will concurrently promote and facilitate the integration of Section 180(c) budgeted funds with other available training such as that offered through the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), Federal Emergency Management Agency (FEMA), Conference on Hazardous Materials Enforcement Development (COHMED), or by the states.

On the issue of equipment purchases, New Mexico wholeheartedly supports the concept of allowing applicants to budget some percentage of each year's Section 180(c) funds for obtaining appropriate equipment for NWPAs-related activities. It is highly questionable, however, whether the proposed maximum percentage of funds to be used for equipment purchases (*i.e.*, 10%) will be sufficient for each and every applicant. For this reason, the DOE should include in the Section 180(c) program a mechanism to allow for special circumstances where additional purchases of equipment--beyond the established maximum cap--may be justified. The applicant should bear the burden of proof in demonstrating such additional purchases are warranted.

Finally, we disagree with DOE's proposal that Section 180(c) funds would not be available for the conduct of drill and exercises. This makes no sense in that the conduct of functional drills and field exercises is, in our opinion, the best way of testing the effectiveness of emergency response plans and procedures. Similarly, it is the most accurate method to test and evaluate responders' capabilities to implement established emergency protocols safely and correctly. The Section 180(c) program must provide for the funding of emergency response drills and exercises if it is to be successful in facilitating adequate preparations for NWPAs shipments.

Thank you for providing us this opportunity to participate in the continuing development of the Section 180(c) program. In closing, we encourage DOE/OCRWM to structure this important program in a manner which does not create any new federal unfunded mandates. Affected state, tribal, and local governments must not be made to bear the costs associated with ensuring the safety of NWPA shipments through their jurisdictions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Salisbury". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JENNIFER A. SALISBURY
Cabinet Secretary and Chair
N.M. Radioactive Waste Consultation Task Force

c: Governor Gary E. Johnson
Task Force Memeber Agencies