



Western Interstate Energy Board/ WINB

September 9, 1997

Lake Barrett, Acting Director
Office of Civilian Radioactive Waste Management
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Barrett:

Enclosed are the comments of the Western Interstate Energy Board's High-Level Radioactive Waste Committee on the Department of Energy's *Notice of Revised Proposed Policy and Procedures for Safe Transportation and Emergency Response Training; Technical Assistance and Funding* for the transportation of spent nuclear fuel and high-level radioactive waste.

The Committee appreciates the opportunity to again provide input during the Department's process of developing its program for implementing assistance to states under Section 180(c) of the Nuclear Waste Policy Act (NWPA). The Committee also recognizes that the current version of the *Notice* represents positive progress for DOE in developing its 180(c) program. The Committee is particularly pleased that the latest *Notice* discards the rigid and unworkable funding "formula" advocated by the previous *Notice of Proposed Policy and Procedures*. Allowing states and tribes to determine their needs in preparing for NWPA shipments as part of the grant application process represents a step in the right direction.

However, on the whole, the Committee continues to find the 180(c) policy outlined in the current *Notice* unacceptable because it continues to ignore key policy decisions made by Western Governors over the past five years, and because it fails to ensure that an effective emergency response mechanism will be in place to handle NWPA transportation accidents that will occur.

The Committee urges DOE to more closely model its Section 180(c) assistance program after the Waste Isolation Pilot Plant program and the 180(c) Strawman Regulations produced in 1994 by the Committee in conjunction with the Western Governors' Association (WGA). The Committee also calls upon DOE to bring its 180(c) program into compliance with WGA resolutions concerning: 1) the establishment of routes; 2) the funding of all costs borne by states/tribes in preparing for NWPA shipments; 3) the application of 180(c) assistance for shipments to private as well as publicly operated facilities; 4) the prohibition on shipments unless assistance is provided three years in advance of shipments; and 5) the establishment of the 180(c) program in regulations.

Sincerely,

Ken Niles, Co-Chair
High-Level Radioactive Waste Committee

Richard C. Moore, P.E., Co-Chair
High-Level Radioactive Waste Committee

cc: Corinne Macaluso

**Comments of the High-Level Radioactive Waste Committee
of the
Western Interstate Energy Board (WIEB)
on
DOE's Notice of Revised Proposed Policy and Procedures for Safe Transportation
and Emergency Response Training; Technical Assistance and Funding (*Notice*)**

Following are comments of the Western Interstate Energy Board's High-Level Radioactive Waste Committee (the Committee) concerning the Department of Energy's Notice of Revised Proposed Policy and Procedures (*Notice*) published in the Federal Register on July 17, 1997. The *Notice* describes the Department's plan for implementing Section 180(c) of the Nuclear Waste Policy Act with regard to providing funds and technical assistance to states and tribes to prepare for shipments of spent nuclear fuel and high-level radioactive waste (SNF/HLW).

The Committee's comments are presented in two parts. The first part provides the Committee's views concerning issues raised by Section III of the current *Notice*, while the second portion focuses on Section IV of the *Notice* covering DOE responses to stakeholder comments.

COMMENTS ON SECTION III OF THE REVISED NOTICE

Critique of Funding Mechanism

The Committee recognizes that progress has been made in the current *Notice* when compared to the Department's previous Notice of Proposed Policy and Procedures (NOPPP) on Section 180(c). One major improvement is the elimination of the funding allocation formula espoused by the NOPPP. The establishment of funding levels based on applications prepared by states and tribes is a far more appropriate means of allocating funding than relying upon an inflexible and arbitrary funding formula mandated by DOE.

However, the Committee still finds serious inadequacies in the funding mechanism established by the *Notice*. For instance, DOE states that the provision of funding and technical assistance will be subject to appropriations, and that "[i]f Congress does not fully appropriate the funds requested, the funding to eligible jurisdictions will be decreased accordingly."(p38273) These statements, combined with the fact that DOE has never even requested funding from Congress to support a 180(c) program, demonstrate to the Committee that DOE still fails to grasp the importance of the 180(c) program in any attempted nuclear waste shipping campaign through western states. Without adequate assistance and funding, such shipments will unacceptably jeopardize the health and safety of citizens in corridor jurisdictions. DOE policy should reflect this reality by including a mandate of "no shipments if no assistance" to ensure that no shipments occur unless states and tribes have first been properly prepared. [See page three of these comments] When compared to the vast amount of funds which the Department has spent—and continues to spend—on the development and study of Yucca Mountain as a potential nuclear waste repository, the Committee is certain that DOE has the ability to guarantee the levels of funding and technical assistance necessary to properly implement the Section 180(c) program.

DOE also fails to provide states and tribes with the necessary funding to prepare the grant applications called for in the *Notice*. According to the *Notice*, these applications are to include "a three-year plan detailing how the funds would be spent each year."(p38275) It is DOE's responsibility to pay the full costs associated with preparation of the state and tribal grant applications. As stated in the 1994 Section 180(c) Strawman Regulations prepared by the Committee in conjunction with the Western Governors' Association, the Committee believes that \$150,000 per state or tribe is the minimum level of funding

necessary to identify critical transportation needs, including: (1) the minimum elements necessary to ensure safe routine transportation and procedures for dealing with emergency response situations, (2) the current capabilities along each corridor, (3) the activities needed to achieve minimum elements, and (4) performance measures to evaluate programs implemented under the plan.

The Committee believes that DOE is correct in attempting to ensure a yearly base level of funding for states and tribes in the *Notice*. However, it is inappropriate for DOE to establish this base level of assistance until states and tribes have received planning grants and have determined the appropriate amounts of funding required. Furthermore, the Committee continues to insist that the variable funding amount allocated to states and tribes take into account the disparity of impacts of NWPA shipments. DOE should therefore combine the individual state and tribal grant applications and allocate twenty-five percent of this total amount to ensure minimum funding levels and program capability levels in each NWPA shipment corridor state or tribe. Seventy-five percent of the combined grant applications should then be allocated to states and tribes based on the proportional number of projected shipment-miles in each jurisdiction as compared to the total number of shipment-miles. This will help ensure that states which see greater numbers of shipments through their jurisdictions will have the resources necessary to properly prepare and respond to any accidents which may occur. Such increased preparation is especially necessary for these states, since increased numbers of shipments will necessarily increase the probability of a transportation accident occurring within that jurisdiction.

In the "Eligibility and Timing of the Grants Program" section of the *Notice*, DOE provides that "[i]f there is a lapse of NWPA shipments for three or more years, the state or tribe would receive no funds for those years and would regain eligibility three years prior to another NWPA shipment through its jurisdiction." (p38275) How exactly will OCRWM know in advance that there will be a three year lapse in shipments through a state or tribe? As stated in the *Notice*, it is not clear whether DOE means that a state would continue to receive funding until three years have passed without a shipment, or if the provision in the *Notice* is based upon "expected" shipments projected in advance. If based upon projected shipments, the Committee believes that it would be nearly impossible for a DOE grants manager to guarantee that an expected lapse of three or more years will actually occur. This leaves open the very real and potentially dangerous possibility that a state could be denied funding based upon a projected lapse of shipments, have to lay off its training and planning staff and shut down its training programs, and then be faced with shipments starting up again in less than three years. Such a scenario would unacceptably jeopardize the safety of citizens in corridor states and tribes.

The current *Notice* does improve upon the NOPPP by increasing the percentage of funds which a state can budget to purchase training-related equipment and supplies from ten percent to twenty five percent. However, the Committee continues to find such funding limitations unacceptable in attempting to ensure the safe and uneventful transport of nuclear waste. In order to effectively meet the varying needs of states and tribes, an effective Section 180(c) program must allow each jurisdiction to determine for itself how to appropriately allocate funding to properly prepare for nuclear waste shipments. In an NWPA shipping campaign which would last approximately 30 years, two years of increased flexibility is insufficient. States and tribes must be allowed the flexibility to determine equipment and supply needs on a long-term rolling basis.

Although OCRWM now correctly allows funding to be used for exercises and drills, the Department fails to provide for resources either under Section 180(c) or other authority to allow states and tribes to conduct critical activities, including, but not limited to: alternate route designation; route and risk analysis; record keeping; infrastructure improvements; equipment maintenance; and other direct and incremental costs incurred. The Committee reiterates that DOE must provide a means of funding these activities for states and tribes.

Critique of Training Levels

The Committee agrees with DOE that the Section 180(c) policy and procedures should provide funding and assistance “to obtain and maintain awareness-level training” for all local response jurisdictions. (p38273) However, the Committee finds unacceptable the provisions in the *Notice* regarding initial training and refresher training at both the operations and technician level. With regard to these levels of training, the *Notice* states that assistance will only be provided “to the extent funds are available.” (p38273) Funding and assistance to provide states with sufficient operations- and technician-level emergency response capability must be guaranteed in the Section 180(c) program in order to ensure a rapid and efficient response to an NWPA transportation accident. The costs for this training should be calculated by states and tribes and included in the grant applications filed with DOE. In addition, the Committee believes that the costs for providing training to emergency medical staff along proposed routes should also be covered by the *Notice*.

The Committee is aware that DOE has agreed to provide funding and technical assistance for each of these critical areas of transportation preparedness for other DOE shipping programs, including the program to ship transuranic waste to the Waste Isolation Pilot Plant in New Mexico and the program to return foreign research reactor spent nuclear fuel to the United States. The Committee can see no reason why similar funding provisions cannot be incorporated into the Section 180(c) program.

No Shipments if No Assistance

Western Governors have clearly articulated a policy that “no shipments of spent fuel and HLW shall be made to storage facilities or a repository until DOE has identified shipping routes and Section 180(c) funds and assistance have been made available to states at least three years prior to the start of shipments, notwithstanding any sudden changes in DOE’s shipping schedule.” [WGA Resolution 96-019, June 24, 1996; WGA Resolution 95-020, June 26, 1995; WGA Resolution 94-005, June 14, 1994] The Committee finds it unacceptable that the *Notice* fails to guarantee assistance to states at least three years in advance of any major NWPA shipping campaign.

Furthermore, the Committee believes that the contingency “plan” outlined in the *Notice* is inadequate to ensure the safety of shipments of SNF/HLW in the event that such shipments occur with less than three years of preparation. In its response to stakeholder comments, OCRWM states that, “[w]ith the contingency plan in place, OCRWM sees no public health or safety reason to limit or prohibit shipments through a jurisdiction until all training is completed.” (p38277) In truth, the contingency “plan” does not mandate any action from DOE should shipments occur with less than three years lead time. Instead, it provides only that if asked to complete preparation activities in less than three years, a state “may” receive additional funding, and that DOE “may” use escorts “with more training and equipment than those currently used for the purpose of security until a reasonable time period for training has expired.” (p38276) The Committee supports DOE’s recognition of the extra expenses which necessarily accompany a lack of systematic transportation planning in the event early shipments occur. However, the safe and uneventful transport of nuclear waste must be paramount in all federal policies affecting nuclear waste transportation. Increasing the amount of funding and technical assistance to states cannot fully compensate for inadequate preparation and planning time. Reliance on the weak and unspecific contingency “plan” espoused in the *Notice* will only further erode the public’s confidence in the NWPA shipping program and, even for limited shipments, will jeopardize the safety of citizens in corridor states.

On a related note, regarding the provision of escorts used for shipments conducted on a contingency basis, the Committee asks DOE to provide justification for the statement in the *Notice* that “[t]here is no safety reason to increase the number of escorts beyond the Nuclear Regulatory Commission’s regulatory requirements.” (p38281)

In light of the United States Court of Appeals Decision in *Indiana Michigan Power Company, et al. v. Department of Energy and United States of America*, in which the court decided that DOE has an obligation to begin disposing of utility spent nuclear fuel in January 1998, the Committee is greatly concerned that the Department will attempt to begin an NWPA shipping campaign without providing 180(c) funding at least three years in advance. A crash program to implement Section 180(c) will be chaotic and expensive, and could jeopardize the safety of citizens in corridor states. This is particularly true in light of the fact that the Department has failed to identify shipping routes or develop a comprehensive transportation plan or to allow for state adjustments to chosen routes, as authorized under HM 164. In order to properly focus limited funds for emergency response preparedness, states and tribes must be made aware of shipping routes well in advance of when Section 180(c) assistance begins to be received. This means that routes must be determined by DOE earlier than "two years prior to the shipments going through a jurisdiction" as stipulated in the *Notice* (p38275). The Committee reemphasizes the position of western governors that "...as a result of federal government inaction and delays, and inadequate strategic planning involving stakeholders, a national transportation system cannot be in place in time to begin accepting spent nuclear fuel in 1998." [WGA Resolution 95-020, June 26, 1995]

Routing Analysis

The Committee disagrees with OCRWM's statement in the *Notice* that "strict compliance with Department of Transportation (DOT) and Nuclear Regulatory Commission (NRC) regulations and applicable state, tribal, and local laws and regulations combined with state and tribal safety and enforcement inspections of NWPA highway shipments and continuous satellite tracking of all shipments will provide for safe routine transportation." (p38273) The Committee continues to insist that OCRWM meet the demand of western governors for DOE policy commitments to: develop responsible routing criteria; develop a sound methodology for evaluating optional mixes of routes and transportation modes; and fix the shipping origins and destinations points as early as possible. [WGA Resolution 93-003, Modified and Readopted June 24, 1996] Strict reliance on DOT and NRC regulations will result in too many potentially viable routes to allow states and tribes to effectively focus scarce funds and training resources on those routes which are the most heavily used. States and tribes cannot properly determine assistance needs for 180(c) funding until DOE has identified the modes of transportation and the routes to be used in transporting radioactive waste to a repository or interim storage facility.

Rail Inspections

The *Notice* states that "[r]ail inspections are not included because the Federal Railroad Administration (FRA) conducts inspections of rail cars and tracks used to ship radioactive materials." (p38274) According to its own officials, however, manpower shortages are a problem for FRA. According to these officials, although FRA may be equipped to conduct inspections for the current level of nuclear waste shipments, it is not equipped to handle the magnitude of shipments which will occur during an NWPA shipping campaign. In view of this lack of manpower, the Committee recommends that Section 180(c) funds be made available to states and tribes for the purpose of providing training under the Federal Rail Safety Act (FRSA) in order to increase the number of federally-certified state railroad inspectors.

COMMENTS ON SECTION IV OF THE REVISED NOTICE

Interaction With States and Tribes

Regarding OCRWM's responsibility for interacting with communities along potential transportation routes, the Committee is disturbed by the statement made in the *Notice* that "OCRWM intends to provide public information to jurisdictions along the routes and to make Departmental representatives, whether federal employees or contract employees, available to communities as budgets permit. The training objectives in this proposal were developed with the crucial role of local responders in communicating risk and preparedness in mind." (p38277) It is DOE's responsibility to communicate with and provide information to the public regarding its nuclear waste shipping program. This responsibility cannot appropriately be placed in the hands of a private contractor. The public will justifiably perceive that a private contractor will only be acting in its own, profit-driven interests. Nor can DOE place the responsibility of communicating risk to the public on the shoulders of state or local emergency responders. It is DOE's responsibility to secure the public's confidence by demonstrating that it will provide strong guidance and supervision of its contractors and by taking clear responsibility for interacting with states and tribes regarding its nuclear waste transportation program.

Other Continuing Conflicts With the Policies of Western Governors

Western governors have adopted clear policies on the implementation of Section 180(c) of the Nuclear Waste Policy Act in three separate Western Governors' Association (WGA) resolutions. These comments of the High-Level Radioactive Waste Committee ("Committee") amplify on the key points addressed by western governors in these resolutions and relate the governors' policies to the contents of the proposed Section 180(c) policies and procedures.

- 1. The Governors believe it is the responsibility of the generators of spent fuel and HLW and the federal government, not the states, to pay for all costs associated with assuring safe transportation, responding effectively to accidents and emergencies that will inevitably occur, and otherwise assuring public health and safety. [WGA Resolution 96-019, June 24, 1996]**

The Committee reminds DOE that the Nuclear Waste Fund was created to fund all aspects required of a program to dispose of spent nuclear fuel and high-level waste. Transportation has always been an essential part of such a program. The Committee believes that it is penny-wise and pound-foolish for DOE to reduce the amount it spends on transportation in order to divert a larger and larger share of funds towards the construction of a repository or interim storage facility.

The Committee strongly disagrees with the statement in the *Notice* that Section 180(c) funding is only to provide jurisdictions with assistance in obtaining access to financial and technical assistance "in an increment above their current level of preparedness rather than to supply complete emergency response or safe routine transportation capabilities along NWSA transportation." (p38277) The Committee finds no justification in law or logic for the conclusion that Section 180(c) funds should not be used to pay the full cost of preparing for shipments of spent fuel and HLW. Failure to fund such costs out of Section 180(c) funds will result either in shipments occurring without needed preparations or a new federal unfunded mandate, the cost of which will be picked up by taxpayers along the shipping route.

The Committee is concerned that the magnitude of these unfunded costs, coupled with DOE's decision not to issue regulations to guide the implementation of Section 180(c) is an effort to avoid

complying with Executive Orders 12866 and 12875. Regardless of DOE's characterization of the *Notice* as "policies and procedures," the Committee believes the content of the *Notice* requires that Executive Orders 12866 and 12875 apply.

Executive Order 12866 defines "regulation" as "...an agency statement of general applicability and future affect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." The Committee believes that the action contained in the current Section 180(c) Notice of Proposed Policy and Procedures, which is designed to implement a DOE policy with regard to providing assistance to states and tribes, clearly meets this definition. DOE is therefore subject to the requirements of Order 12866 and, under Section 4 of Order 12875, is also subject to the requirements set forth in Order 12875.

According to the mandate of Order 12875:

"...no executive department or agency shall promulgate any regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless: (1) funds necessary to pay the direct costs incurred by the State, local, or tribal government in complying with the mandate are provided by the federal government; or (2) the agency, prior to the formal promulgation of regulations contained in the proposed mandate, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications submitted to the agency by such units of government, and the agency's position supporting the need to issue the regulation concerning the mandate."

The Committee believes that the policies and procedures outlined in the *Notice* violate the President's clearly stated regulatory objectives. To wit, the provisions of the current *Notice* may not provide the funding necessary to pay all of the direct costs which will be incurred by state and tribal governments to protect the welfare and safety of their citizens in the face of a federally mandated nuclear waste shipping campaign. Furthermore, to the Committee's knowledge, DOE has not provided the Office of Management and Budget with the required report.

Taken together, it is hard to avoid the conclusion that the effect of the *Notice* is to shift many of the costs involved in preparing for spent fuel and HLW shipments from those who will benefit from the shipments to local taxpayers in corridor states and tribes. As currently written, the *Notice* therefore violates the governors' tenet that the beneficiaries of the transportation of spent fuel and HLW, not local taxpayers, should pay for all the costs associated with such shipments.

2. **The Governors strongly recommend that Section 180(c) regulations should apply to all shipments to a Monitored Retrievable Storage facility and repository regardless of whether such facility is operated by the Department of Energy or another entity. [WGA Resolution 95-020, June 26, 1995; WGA Resolution 94-005, June 14, 1994]**

The *Notice* should provide that Section 180(c) funds will be provided regardless of whether shipments are made to a facility operated by the Department of Energy. Western states and tribes must be assured that assistance will be provided with respect to any spent nuclear fuel or high-level waste shipments through their jurisdictions. The Committee believes that the definition in the *Notice* of "safe routine transportation" should be expanded to clearly include shipments of spent nuclear fuel/high-level waste to a repository, interim storage facility, or any other facility that may be developed for storage or disposal, regardless of whether such facility is developed by the federal government or by private entities.

3. **The Governors believe that DOE must adopt regulations to implement Section 180(c).** [WGA Resolution 96-019, June 24, 1996; WGA Resolution 95-020, June 26, 1995; WGA Resolution 94-005, June 14, 1994]

As the Committee stated in its May 4, 1995 comments to DOE's January 6, 1995 Notice of Inquiry on technical assistance and funding to states under Section 180(c), the Committee believes that it is necessary for OCRWM to establish its grant program in regulations. The Committee therefore objects to OCRWM's response in the *Notice* that the Department does not presently plan to codify the policy and procedures as substantive regulations."(p38284) The implementation of Section 180(c) through regulations is needed to ensure program stability through changes of leadership at the Department. Such stability is essential for the successful implementation of a program which will cover 30 or more years and innumerable jurisdictions in more than 40 states. The Committee believes that DOE's enabling act (42 USCA §7191) and the Administrative Procedure Act both permit expeditious rulemaking that would not delay assistance under Section 180(c).

4. The Committee repeats the recommendation of western governors that, in order to provide states with a means of coordinating their approach to developing state and tribal plans, DOE should "[e]stablish **Regional Training Advisory Teams** of states and tribes to review and coordinate plans along shipment corridors and a National Training Advisory Committee to report to the Department of Energy on progress and needed additional actions." [WGA Resolution 94-005, June 14, 1994]