



National Congress of American Indians  
Nuclear Waste Program  
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**Re: Comments on Section 180(c) Policy and Procedures**

The Department of Energy (DOE), Office of Civilian Radioactive Waste Management (OCRWM) has published for public comment a revised proposed policy statement setting forth its plans for implementing Section 180(c) of the Nuclear Waste Policy Act of 1982 as Amended (NWPA). Section 180(c) provides for financial and technical assistance to States and Indian tribes through whose jurisdiction DOE plans to ship spent nuclear fuel and high-level waste. Section 180(c) further provides that training cover procedures required for safe routine transportation of these materials, as well as procedures for dealing with emergency response situations. The following comments reflect the views of the National Congress of American Indians (NCAI), the oldest and largest American Indian organization in the United States, representing over 200 American Indian and Alaska Native governments nationwide, and the views of the National Indian Nuclear Waste Policy Committee (NINWPC), a body of tribal government representatives who meet periodically to discuss nuclear waste issues that currently, or will, impact their lands and culture. NCAI and the NINWPC appreciate this opportunity to comment.

Since 1983, NCAI has had a cooperative agreement with OCRWM. Through the agreement, NCAI assists OCRWM in meeting its mandate under the NWPA 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.

Overall, the 180(c) policy does incorporate the interests of tribal governments and we applaud the Department's efforts to treat tribal and state governments equally. NCAI and the NINWPC

believe that it is critical that the Department's 180(c) policy achieve its central goal: preparedness for nuclear transportation. This can only be achieved in Indian country through a policy that actually protects Indian citizens, lands, and resources in recognition of the DOE's federal treaty/trust responsibilities to Indian tribes and nations. By acknowledging the unique needs and interests of tribal governments in the implementation of Section 180(c), DOE ultimately serves its own interests in attaining the highest and safest level of preparedness possible before shipping begins.

The following specific comments are intended to assist DOE in further developing a policy for distributing financial and technical assistance in Indian country that will achieve the preparedness necessary for safe routine transportation of nuclear waste.

## **I. General Themes**

While in our initial comments we approved of most of the basic principles of the policy, we also expressed concern that it may not provide guidance language clear enough to adequately prepare tribal and rural jurisdictions; areas where public safety measures may be lacking. We agreed that the incremental approach to assistance funding was reasonable, yet requested that some kind of needs assessment be a part of the 180(c) grants process in order to account for the unique needs of Indian tribes and the DOE's trust responsibilities to tribal governments.

NCAI and the NINWPC approve of the DOE's decision to revise the grants application process by requiring the applicant to determine the assistance needed to obtain the training objectives. Whereas, simply providing a fixed package of training and funding to each jurisdiction without any knowledge of their existing capabilities would be arbitrary and ineffective. 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; a directive which applies to all jurisdictions. NCAI and the NINWPC believe that the DOE must use its expertise, and to some degree measure the needs of the various jurisdictions to develop a program that will actually result in those jurisdictions being prepared for such transportation. Also, the DOE's own Indian Policy recognizes the federal trust responsibility and the Department's obligation to protect tribal lands, resources, treaty rights, and ways of life. In the context of the 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. These fiduciary responsibilities to tribal governments should also be cited and outlined within the policy.

Also, in the Department's response under "General Themes," it was stated that "OCRWM's transportation contractors will be subject to all applicable federal, state, and local regulations." Such a statement omits the recognition of tribal sovereignty and the right of tribal governments to regulate activities on their lands. Compliance with tribal regulations must also be included in this requirement section. Tribes, in the same manner as states, have the ability to enhance their statutory and regulatory framework from time to time, within certain limitations. In the event tribes choose to enact applicable laws, the DOE contractors will be subject to these regulations as they are state laws.

## **II. Technical Assistance and Equipment**

As was mentioned in our initial comments, the language of Section 180(c) does not limit tribal assistance and funding to training only, as it does to state governments. In fact, there is nothing in the language of 180(c) that prevents DOE from funding tribal emergency response infrastructures. Although the cap on funds for equipment was raised from 10% to 25% of the total grant, Indian tribes still face major shortfalls in emergency response infrastructures at a disproportionate level. Clarification of the DOE's trust responsibilities in resolving this shortfall is needed. Resources could include equipment from the DOE as well as other federal agencies.

## **III. Timing and Eligibility**

Under Section 180(c), the DOE is required to provide financial and technical assistance to States and Indian tribes "through whose jurisdiction" the DOE plans to transport NWPA wastes. As was stated, NCAI and the NINWPC believe that financial and technical assistance should also be provided to states and tribes who are near, but not on, transportation routes because their people and lands would also be at risk in the event of a transportation accident. Tribes and states eligibility for 180(c) financial and technical assistance should be based on jurisdiction; their authority to respond to an emergency and their authority to enforce vehicle regulations. 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 their geographic boundaries. Some tribes also have authority under their treaties to perform actions outside their reservation boundaries. The DOE's decision to expand eligibility to permit states and tribes to transfer funds to those jurisdictions with mutual aid or cross-deputization agreements and to provide technical assistance to a tribe who has rights to culturally significant lands is a step in the right direction; however, it does not adequately or fully address the problem. This transfer of funds may not always occur, leaving those entities with authority ill prepared and undertrained. How will DOE ensure that these funds are transferred?

Also, technical assistance may not be the only assistance needed by a tribe in order to properly protect certain culturally significant sites on and off-reservation. Tribal and federal cultural resource assessments and evaluations may be needed once shipping routes have been determined. The DOE has a Historic Preservation Officer who may need to provide services to those tribes concerned about potential impact to historic and traditional areas, including Indian communities.

As tribal governments achieve self-determination, their efforts will include the entire range of transportation regulatory authority. The result of enhanced tribal governance may be a significant increase in tribal/state cross-boundary agreements for civil and criminal enforcement. While we agree that the DOE may be limited by the language of 180(c) to providing assistance to only those states and tribes with jurisdiction, NCAI and the NINWPC encourage the DOE to revisit the issue of jurisdiction in 180(c), and adopt a policy that will prepare all affected tribal governments.

The second issue in this area is timing. In light of the recent U.S. Court of Appeals decision that the DOE must fulfill its obligation under the NWPA and begin accepting spent nuclear fuel from

civilian nuclear power plants by January 31, 1998<sup>1</sup>, and recent legislation introduced in Congress calling for an interim storage facility<sup>2</sup>, the DOE should reconsider its decision to wait until four years before a planned shipment to begin implementing 180(c) activities. There is a vital need for trained people and infrastructure development on most tribal lands. 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. NCAI conducted a series of Tribal Radiological Preparedness Workshops (TREP) that were well received by both tribal representatives and the emergency preparedness community, but were subject to major budget cuts. We believe the 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 responsibilities and assist tribes in attaining the proper readiness for NWPA shipments.

#### **IV. Funding Allocation Formula**

NCAI and the NINWPC approve of the DOE's decision to change the funding formula in the proposed policy to include a more needs-based approach. This new approach, which excludes the population factor and other arbitrary variables, will enable tribes to more accurately determine the assistance they need to be prepared for NWPA shipments.

#### **V. Allowable Use of Funds**

Although the revised policy and procedures increases the types of activities that Section 180(c) funds may cover, the policy for drills and exercises still remains unclarified. According to the DOE, the base grant can be used "to offset the cost of salaries, to conduct planning activities such as route and risk assessments, to coordinate with neighboring grant recipients and local jurisdictions, or interact with the private transportation contractors or federal employees." The revised policy for the base amount of funding also doubled the original salary estimate to allow states and tribes to pay the salary of one person each to carry out safe routine and emergency response procedures planning, if that is what the state or tribe chooses to do. While this does provide tribes with more flexibility to conduct planning, drills and exercise are not specifically addressed.

It is a well-known fact that drills and exercises are not merely a means to measure preparedness, they are the most important aspect of any emergency response training program. The value of the classroom is only realized once the field exercises put that knowledge to work. Each field exercise offers the valuable opportunity to develop emergency response skills, with the guidance of experienced teachers which simply cannot be taught in a classroom. The policy on drills and

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<sup>1</sup> *Indiana Michigan Power Company v. Energy Department*, CA DC, No. 95-1279, 7/23/97.

<sup>2</sup> H.R. 1270 and S. 104.

exercises must be clarified, and it is our opinion that they should be separately funded under the base grant as they are the most crucial aspect of any emergency response training program.

## **VI. Concerns of Local, Rural, and Tribal Governments**

There appears to be no DOE liability or legal responsibility to tribal governments with regard to spent nuclear fuel transportation to a privatized non-federal interim storage facility. However, one tribal viewpoint is that because of the unavailability of a federal storage facility under the NWPA, in the event tribal community is impacted, responsibility should vest for the health and safety of that tribal community with the federal government. The question is whom the responsible party should be, the DOE or another agency. But indeed, under the trust doctrine, this issue needs to be addressed.

The geographical boundaries of the states and counties are a known quantity which will not likely change to a significant degree. However, jurisdictional responsibilities of many tribal governments have increased to accommodate an expanding land base. As the tribal land base was reduced from hundreds of millions of acres to millions of acres, an increase of land base is part of the tribal government dynamic. An increased land base will bring on a heightened need for a larger emergency response network in the near future for many tribes. Such conditions call for the establishment of a tribal funding formula with provisions which factor in expanding tribal boundaries and infrastructure.

The DOE has set forth that it is not going to support a "from the ground up" radiological emergency preparedness program for a tribe. It will take minimal effort to assist states with technical and financial assistance to reach an acceptable level of comfort for spent nuclear fuel and radioactive waste shipments. However, with minor exception, tribes have not been in the position of states which have received millions of dollars in program funding from various federal agencies. This disparity needs to be given careful scrutiny because an assessment of the current actual capability of most tribes will readily display how much needs to be done to reach that similar comfort level of state organizations. Once again, this project is a federal action and the trust responsibility and notions of equity and fairness call for tribes to attain the state of readiness which they and their citizens should be entitled.

All federally recognized tribes are beneficiaries of the federal trust responsibility and it is incumbent on every federal agency, including the Department of Energy, to protect tribal lands and resources, their treaty rights, and their way of life. This trust responsibility stems directly from the tribes' treaties with the United States government, their status as sovereign nations, and the U.S. Constitution. The DOE fiduciary duties to tribes has also been reinforced via President Clinton's Memorandum of April 29, 1994, "*Government-to-Government Relations with Native American Tribal Governments.*" This memorandum reiterates the unique legal relationship between tribal governments and the United States government as set forth in the Constitution, treaties, statutes, and court decisions. The DOE has also promulgated its own Indian Policy that recognizes this trust responsibility as being applicable to the Department, yet the proposed 180(c) policy still fails to cite the requirements of that trust responsibility. Again, NCAI and the

NINWPC urge the DOE to cite and outline the requirements of the federal trust responsibility within the 180(c) policy and procedures.

**Conclusion**

NCAI and the NINWPC look forward to working with OCRWM in further developing a Section 180(c) policy that is focused on achieving preparedness of tribal governments and communities for NWPA shipments. Please contact Robert Holden or Brian Stockes at (202) 466-7767 if you have any questions or need more information.

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