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P.O. BOX 309  
ACOMA, NEW MEXICO 87034

**PUEBLO OF ACOMA**  
OFFICE OF THE GOVERNOR

TELEPHONE 505/552-6604  
FAX 505/552-6600

September 23, 1997

Ms. Corinne Macaluso  
United States Department of Energy  
c/o Lois Smith  
TRW Environmental Safety Systems, Inc.  
600 Maryland Avenue, SW, Suite 695  
Washington, D.C. 20004

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

Dear Ms. Macaluso:

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 carrying out Section 180(c) of the Nuclear Waste Policy Act (NWPA) of 1982 as amended. 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, and procedures for dealing with emergency response situations. The following comments reflect the views of the Pueblo of Acoma, the oldest continuous village in the United States and a body of tribal Hazardous Materials Safety Committee representatives who meet periodically to discuss nuclear waste issues that currently, or in the future impact their lands and culture. The Pueblo of Acoma and the Hazardous Materials Safety Committee appreciates the opportunity to comment.

Overall, the 180(c) policy does incorporate the interest of tribal governments and we applaud the Department's efforts to treat tribal and state governments equally. The Pueblo of Acoma and the Hazardous Materials Safety Committee believe 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 which 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 help DOE in further developing a policy for distributing financial and technical assistance in Indian country that will achieve the preparedness necessary for safe 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 the incremental approach to assistance funding was reasonable, yet requested that some kind of need assessment be a part of the 180( c ) grants process to account for the unique needs of Indian tribes and the DOE's trust responsibilities to tribal governments.

The Pueblo of Acoma, a body of tribal Hazardous Materials Safety Committee approve of the DOE's decision to revise the grants application process by requiring the applicant to decide 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 108 ( 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. The Pueblo of Acoma, and a body of tribal Hazardous Materials Safety Committee believe that the DOE must use its expertise, and 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 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.

## **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 and 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 NHPA wastes. As was stated, Pueblo of Acoma, the oldest continuous village in the U.S.A. and a body of tribal Hazardous Materials Safety Committee 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 case 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 arrangement 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 to properly protect certain culturally significant site's off-reservation. Cultural resource assessments and evaluations may be needed once shipping routes have been determined.

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 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," Pueblo of Acoma, and a body of tribal Hazardous Materials Safety Committee 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*. Considering 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 carrying out 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. The Pueblo of Acoma is a member of NCAI, the Nuclear Policy Committee, and the NCAI Nuclear Waste Program. 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 carried out. This approach will help the DOE in meeting its trust responsibilities and assist tribes in attaining the proper readiness for NWPA shipments.

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

The Pueblo of Acoma, and a body of tribal Hazardous Materials Safety Committee 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 decide the assistance they need to be prepared for NWPA shipments.

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

Although the revised policy and procedures increase the type 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

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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.

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.

In our experience, drills and exercises are not merely a means to measure preparedness, they are the most important aspect of any emergency response training program. The Pueblo of Acoma is a member of NCAI, the Nuclear Policy Committee, and the NCAI Nuclear Waste Program has developed extensive experience with emergency response training as it has conducted a series of TREP workshops using Argonne National Laboratory emergency management consultants and a tribal regulatory authority expert. Each workshop consisted of several days of classroom learning, followed by a day of field exercises. In each workshop, the value of the classroom was only realized once the field exercises put that knowledge to work. Each field exercise offered the valuable opportunity to develop emergency response skills, with the guidance of experienced teachers that simply cannot be taught in a classroom. Clearly the policy on drills and 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

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 applicable to the Department, yet the proposed 180(c) policy still fails to cite the requirements of that trust responsibility. Again, the Pueblo of Acoma, the oldest continuous village in the U.S.A. and a body of tribal Hazardous Materials Safety Committee urge the DOE to cite and outline the requirements of the federal trust responsibility within the 180(c) policy and procedures.

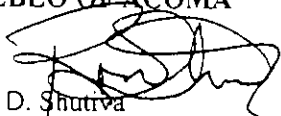
### Conclusion

The Pueblo of Acoma, and a body of Tribal Hazardous Materials Safety Committee look forward to working with OCRWM in further developing a Section 180(c) policy that is focused on actually achieving preparedness for NHPA shipments.

If you should have any questions or require additional information, please feel free to contact Mr. Stanley Paytiamo, Environmental Protection Specialist at (505) 552-9700.

Sincerely,

**PUEBLO OF ACOMA**

  
Ron D. Shutiva  
Governor

cc: Environmental Protection Agency  
Hazardous Materials Safety Committee Chairperson  
ATO Files