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August 25, 1998

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U.S. Department of Energy
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cc: Secretary of Energy
Bill Richardson

**RE: Proposed Revision of Nuclear Waste Policy Act, as Amended,
Section 180(c) Policy and Procedures**

The National Congress of American Indians (NCAI), the oldest and largest national tribal government advocacy organization in the country is dedicated to advocating on behalf of our 250 tribal government members on a broad range of issues. We now take this opportunity to submit comments to the U.S. Department of Energy (DOE) Office of Civilian Radioactive Waste Management (OCRWM) regarding plans to implement policies and procedures for safe routine transportation, emergency response training, and technical assistance and funding, under Section 180(c) of the Nuclear Waste Policy Act, as amended, to ship spent nuclear fuel and high-level radioactive waste.

The NCAI previously submitted comments and some of our concerns were incorporated into the revised plans. We appreciate DOE's acknowledgment of its trust obligation, as evidenced in the revised implementation plan. The following recommendations are submitted in the interest of the health and safety of citizens of the respective Indian nations impacted by the serious ramifications of DOE-OCRWM's nuclear waste management mandates.

Timing of the Grants Program

The four-years out starting point for the grant application process is too close to the projected shipping date to give assurance that tribal jurisdictions will have adequate emergency response capability in place. As we have noted in previous comments, very few tribal governments have

been able to upgrade their emergency response organizations on par with states and surrounding jurisdictions. DOE-OCRWM officials are aware of the significant outlay of human resources and funding involved in emergency preparedness program implementation. Also required is an investment of several years for planning, training and exercising. DOE-OCRWM still does not agree with this point as the timing of the grants program did not change in the revised plans. We urge the DOE-OCRWM to reevaluate the timing of the application and funding process.

We cite the Waste Isolation Pilot Plant (WIPP) program as an example of unfulfilled promises made to enable tribal communities in preparation of a DOE shipping campaign. As early as 1985, tribal governments were promised emergency preparedness equipment, training, and tracking systems for the Transuranic Waste shipments. The WIPP Program, throughout the years, has publicly extolled the operational readiness of jurisdictions along WIPP routes. The tribal viewpoint is different, however. Most tribal and pueblo officials attest that sufficient emergency preparedness programs are not in place. In our estimation, perhaps two out of several tribal jurisdictions along the slated WIPP corridor could fully respond to a radiological transportation accident scenario requiring alert and notification and precautionary evacuation.

Allowable Activities for Funding

A passage in this section states that 180(c) assistance is not meant to build basic emergency preparedness capabilities. We understand the purpose of 180(c) is not to initiate an emergency preparedness program.

It is this organization's position that the DOE, as trustee, is obligated to assist a tribe or pueblo in assuring protection of their human, ecological, and cultural resources. Were it not for the radiological shipments, the tribe would not be placed in harm's way or have the need to initiate or upgrade their emergency response organization. Therefore, if development of radiological emergency preparedness transportation accident capability includes building a basic emergency response infrastructure this phase is merely incidental and should be an allowable activity. It is the responsibility of tribal government officials to choose whether they need to attain a state of radiological emergency preparedness, and if so, they should be provided resources to pursue that goal.

We remind the DOE-OCRWM that while hundreds of non-tribal communities have enjoyed the benefits of nuclear energy, tribal communities have not shared in these rewards. As most everyone is aware, uranium production began in Indian country. The early uranium mining and milling operations which resulted in this modern era of nuclear-fueled energy, have created a detrimental health and environmental legacy with no resolution in sight. Few, if any, tribal communities adjacent to commercial nuclear reactors receive electricity from nuclear generated utilities. Furthermore, these tribal

communities are the least prepared for radiological transportation accidents but have the same responsibilities as those jurisdictions which are better prepared and have benefitted from nuclear power generation. Also, the utilities provide electricity and radiological emergency response funding to the non-Indian communities adjacent to commercial reactors.

Greater latitude should be given in equipment acquisition procedures. The provision for a 10% cap on equipment purchase assumes that a tribal program will have all necessary equipment after "Transportation Years" TY-2 and TY-1. The NCAI has always recommended a needs assessment for tribal programs but this suggestion has been overlooked. It is not too late to initiate a needs assessment upon which to base an appropriate cap on equipment purchases. But until that is done, we believe that the 10% cap after TY-1 may be arbitrary and should be used only as a guideline.

DOE-OCRWM has incorrectly assumed that other federal agencies have always provided financial assistance for tribal governments to attain comprehensive emergency response and hazardous materials safe routine transportation capabilities. Like most jurisdictions, tribes have witnessed a tremendous increase in hazardous materials traffic, yet they have not had access to funding from the Department of Transportation and the Federal Emergency Management Agency for hazardous materials emergency preparedness. Only recently have federal agencies acknowledged tribal transportation regulatory authority and the self-determination rights of tribal jurisdictions for direct funding separate from states.

Even when available, there is immense disparity in the level of funding states receive and the insignificant amounts available to tribes throughout federal programs. Last year the Federal Emergency Management Agency gave over \$96,000 to one state for pre-disaster funding while thirty-four tribes in the same region were told to divide \$5,000. The inequitable funding of tribal governments for emergency preparedness is a national travesty.

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.”¹

NCAI recognizes 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 MATTERS²

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 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-OCRWM will place tribal communities at greater risk based on the magnitude of NWPA spent nuclear fuel shipments through Indian country if it does not provide tribal governments with necessary personnel and infrastructure development funding. The need for a tribal-responsive 180(c) program cannot be overstated.

Other Issues

If a temporary private nuclear fuel storage facility is licensed, citizens of impacted communities should be assured their jurisdictions have the emergency response personnel and infrastructure to adequately respond to a nuclear waste transportation accident. DOE-OCRWM officials have the view that under the NWPA they have no legal obligations for transportation of spent nuclear fuel shipments to a private storage facility

¹ 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).

² U.S. Department of Energy American Indian Policy, November 29, 1991, p. 3.

such as, for example, the proposed interim storage facility at Skull Valley Goshute Indian Reservation.

The inability of the DOE to timely provide a disposal facility has caused nuclear utilities to store radioactive waste on site. The utilities which contracted with the DOE are seeking compensation from DOE-OCRWM for on-site storage costs due to the unavailability of a temporary storage or disposal facility. It is likely that the DOE will be required to provide relief to the utilities. It would seem that the tribal governments eligible for funding and technical assistance under NWPA guidelines are entitled to assistance for private shipments which may now come through some of the tribal borders. Although the DOE-mandated repository is not ready, these private shipments are the same shipments destined eventually for a federal NWPA repository and should be treated as such.

Through a longstanding Cooperative Agreement with DOE-OCRWM, the NCAI Nuclear Waste Program has provided outreach and information to tribal governments impacted by Nuclear Waste Policy Act activities including interim storage, transportation and disposal issues. DOE-OCRWM has several similar cooperative agreements which have served the respective parties well in outreach, issue tracking and stakeholder interaction. However, it appears the cooperative agreements will be discontinued soon, leaving a serious information dissemination and feedback gap between DOE-OCRWM and tribal governments most likely eligible for Section 180(c) funding.

The NCAI is aware that the DOE-OCRWM program has experienced staff attrition and its organizational capability to maintain contact with tribal governments has been reduced. We are concerned that the termination of the NCAI cooperative agreement will not be replaced by a viable government to government consultative relationship that will keep tribal leaders informed on NWPA program and policy developments related to 180(c) implementation. The DOE Yucca Mountain Site Characterization or other DOE branches do not have programmatic responsibility for working with tribal governments on 180(c) activities. As DOE-OCRWM reviews the NCAI and other comments from Indian tribes, we request that DOE-OCRWM develop a response for effectuating a communication effort with tribes on NWPA 180(c) program developments and activities.

The National Congress of American Indians on behalf of its constituent tribal government members calls upon the Department of Energy Office of Civilian Radioactive Waste Management to consider carefully its concerns and recommendations in fulfilling its government to government trust obligations to preserve and protect the integrity of Indian nations.

Thank you for the opportunity to comment on the Proposed Revision of the Nuclear Waste Policy Act, as Amended, Section 180(c) Policy and Procedures. If you have any questions, please contact Robert Holden, Director of the Nuclear Waste Program at the National Congress of American Indians, (voice) 202.466.7767 (fax) 202.466.7797.