

**Tribal Discussions on Implementation of the  
Section 180(c) Grant Program**

**Annotated Outline and Appendices**

**January 19, 2006**

## INTRODUCTION

The U.S. Department of Energy (DOE) seeks increased input from Tribal nations and tribal groups regarding the design of the Section 180(c) financial assistance program. The attached annotated outline and discussion papers serve as a communication tool to aid the discussions between DOE and Tribal nations and groups. The papers define the key issues and will be updated regularly to reflect key aspects of the discussions and the resulting changes to the Section 180(c) program. DOE staff will use the information presented in these papers as the basis of their recommendations to management.

### **What is Section 180(c)?**

Section 180(c) of the Nuclear Waste Policy Act (NWPA) requires the U.S. Department of Energy to provide “technical assistance and funds to States for training appropriate units of local government and Indian tribes through whose jurisdiction the Secretary plans to transport spent nuclear fuel or high-level radioactive waste to NWPA-authorized Federal storage and disposal facilities. Section 180(c) further provides that training cover procedures for safe routine transportation as well as procedures for dealing with emergency response situations.”

DOE has stated that eligible Federally recognized Indian tribes will receive Section 180(c) funds directly from DOE rather than through the States, consistent with DOE’s American Indian Policy.

### **History of Section 180(c)**

The Office of Civilian Radioactive Waste Management (OCRWM)<sup>1</sup> issued five *Federal Register* Notices during the 1990s to solicit input on the development of Section 180(c) policy. This work culminated in the April 30, 1998, *Notice of Revised Proposed Policy and Procedures* (63 FR 23753). Many tribal individuals and organizations submitted comments to these five notices.

By 2004, several events made it timely to revisit the 1998 *Revised Proposed Policy and Procedures*. These included the President’s 2002 recommendation of Yucca Mountain, Nevada, as the nation’s first repository; Congress’s approval of the recommendation; changes in homeland security initiatives; and updates to DOE’s transportation practices.

OCRWM began meeting with stakeholders in July 2004 to update the Section 180(c) policy and procedures and to write a grant guidance document. The documents were discussed in Transportation External Coordination (TEC) Working Group meetings and with the six organizations with which OCRWM has cooperative agreements. The TEC Working Group, comprising representatives of state, tribal, local, professional, technical, and industry associations, meets biannually to identify and discuss issues related to the transport of radioactive materials. Two subgroups of TEC, the Section 180(c) Topic Group and the Tribal Topic Group, also work on these issues. These groups include

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<sup>1</sup> OCRWM is the DOE office created by the Nuclear Waste Policy Act and assigned to develop and manage a federal system for disposing of spent nuclear fuel from commercial nuclear reactors and high-level radioactive waste from national defense activities, including the transportation of the waste.

stakeholders from states, tribal representatives such as the Umatilla and Oneida Nation and emergency response organizations. The cooperative agreement groups are with four State Regional Groups (SRGs): the Southern States Energy Board, the Western Interstate Energy Board, the Council of State Governments' Midwestern Office and Eastern Regional Conference, and with two additional organizations: the Commercial Vehicle Safety Alliance, and the National Conference of State Legislatures.

**Next Opportunities to Participate:**

While tribal nations and tribal groups have participated in Section 180(c) program development over the years, OCRWM seeks more in-depth discussions and deliberations. OCRWM will take the following steps to meet with Tribal nations and elicit ways to make the Section 180(c) program responsive to Tribal needs.

180(c) Policy Development and Implementation:

DOE is scheduled to publish, by the end of 2005, in the *Federal Register* two draft notices for public comment. Both notices will apply to tribal applicants but may be changed, or even reissued separately, to adjust the program for tribal needs. DOE will mail copies of these notices to the 39 tribes that have been tentatively identified as potentially located along transportation routes to the repository. These notices are the:

- Notice of Draft Policy and Procedures for Section 180(c), and the
- Notice of Draft Grant Guidance Document for Section 180(c)

DOE has scheduled the publication of the final version of these notices for September 2006. After resolution of tribal-specific issues DOE may issue a separate notice for tribal applicants.

Meetings with Individual Tribal Nations:

OCRWM has begun contacting and meeting with the 39 tribes involved in transportation to a repository because of their location along a potential route. OCRWM will use these meetings, and subsequent meetings with the appropriate tribal representatives to discuss Section 180(c).

TEC and Its Topic Groups:

Several Tribal organizations<sup>2</sup> participate in the biannual meetings of the Transportation External Coordination (TEC) Working Group. Subcommittees of TEC, including the Tribal Topic Group and the Section 180(c) Topic Group, offer additional opportunities to discuss Section 180(c) and other issues of interest to tribes. Tribal organizations are invited to participate in both Topic Groups to discuss Section 180(c) issues.

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<sup>2</sup> Council of Energy Research Tribes, National Congress of American Indians, National Tribal Environmental Council, State and Tribal Working Group

**ANNOTATED OUTLINE  
Policy and Procedures**

This annotated outline briefly describes the Section 180(c) Draft Policy and Procedures that DOE staff recommends based on discussions with the TEC Section 180(c) and Tribal Topic Groups. Sections B and C (Appendices A and B) need particular input from Tribes, although DOE is asking to discuss all issues. The material below may be modified, as it applies to Tribes, based on the outcome of the discussions with Tribal officials.

All of the material below is subject to approval by DOE management and the DOE's Office of General Counsel.

**A. Funding Distribution Method**

Funding will be distributed through grants from OCRWM directly to States and Tribes. There are two grants available, one for planning and assessment and one for training.

**B. Funding Allocation Method**

This remains under discussion for Tribes. See Appendix A.

**C. Timing and Eligibility**

This remains under discussion for Tribes. See Appendix B.

**D. Allowable Activities**

DOE allows a broad array of planning and training activities, providing the recipients flexibility to direct funds towards their individual needs. Within reason, the recipients of the grant will decide who should be trained along the shipping routes, to what level, and with what curriculum. Those receiving training may include State, Tribal, and local personnel who are involved with emergency public safety, inspection and enforcement, emergency response, emergency medicine (including hospital emergency services), and related personnel, agencies, and authorities. The applicant must describe the proposed activities, training, and purchases in the application package to ensure compliance with program goals.

Grant funds can be used to purchase equipment and be used to calibrate and maintain equipment as long as the equipment is training-related and specific to the needs created by the NWPA shipments.

Training shall meet all applicable Federal, State, Tribal, and local standards. All training must comply with 29 CFR 1910.120(q) training standards from the Occupational Safety and Health Administration (OSHA). It is recommended that applicant jurisdictions comply with National Fire Protection Association (NFPA) standards.

Potential activities for the Assessment and Planning Grant may include:

- Participation in DOE, regional, and national transportation planning meetings.
- Intra-state and tribal planning and coordination.
- Inter-state and tribal planning and coordination.
- The activities described in the definition of Technical Assistance (see page 6).
- Review of DOE transportation, emergency management, communications, and security plans, including threat assessments and civil disobedience/law enforcement planning.
- Obtaining access to DOE data and systems, such as TRANSCOM (equipment and internet links) for information and shipment tracking.
- Evaluation and identification of alternative routes for DOE non-classified radioactive materials shipments according to HM-164.
- Risk assessments.
- Participation in DOE's Transportation Emergency Preparedness Program (TEPP).
- Coordination with DOE's Regional Assistance Program (RAP) training, exercises, and planning activities.
- Work with TRAGIS or other DOE route or risk assessment models used in preparing for training.
- Activities related to accident prevention (e.g., planning for safe parking, bad weather, and road conditions).
- Participation in carrier evaluation programs that may be implemented.
- Train-the-trainer classes.
- Staff costs.

Activities for the safe routine transportation aspects of the Training Grant may include:

- The activities begun in the Assessment and Planning grant may also be conducted with funds from the Training Grants.
- Training and staff costs associated with the U.S. Department of Transportation's (DOT) State Rail Safety Participation Program. The Federal Railroad Administration will provide informal outreach and training opportunities to tribal nations, since there is no statutory authority for participation by Indian tribes in the State Safety Participation Program as outlined in 49 CFR 212.
- Training for public safety officials in safety and enforcement inspections of highway shipments (drivers, vehicles, and shipping containers), including participation and support for Commercial Vehicle Safety Alliance (CVSA) activities such as training assessment, delivery, and monitoring.
- Training for appropriate local and state officials on the proper handling of information and documents, including secure and confidential shipments.
- Training for radiological inspections, both rail and truck.
- Training on a satellite tracking system.
- Equipment purchases, calibration, and maintenance.
- Staff costs.

Activities for the emergency response procedures for the Training Grant may include:

- Planning activities begun in the planning grant may be continued under the Training Grants.
- Development of mutual aid agreements among neighboring jurisdictions and agreements with federal agencies.
- Development/enhancement of emergency response plans and procedures, including conduct of capabilities/vulnerability/needs assessment.
- Training for public safety officials in hazardous materials emergency response procedures. The training should be consistent with 29 CFR 1910.120 and the jurisdiction’s emergency response plans.
- Participation in DOE’s Transportation Emergency Preparedness Program (TEPP).
- Equipment purchases, calibration and maintenance as described above.
- Personnel who are involved in training for emergency medical personnel, including hospital emergency medical personnel.
- Designing, conducting, and evaluating drills and exercises.
- Staff costs.

**E. Definitions**

DOE staff proposes three definitions for terms used in implementing Section 180(c): Safe routine transportation, technical assistance, and responsible jurisdiction. The definition of “responsible jurisdiction” is particularly relevant to Indian Tribes because it raises the question of eligibility (see Appendix B, Timing and Eligibility)

1) Responsible Jurisdiction

“The definition of responsible jurisdiction for the purposes of determining eligibility under the Section 180(c) program will be as follows:

Responsible jurisdiction, for emergency response procedures, means a governmental entity at any level of government, whether state or tribal, that has the authority to conduct part or all of an emergency response to a radiological materials transportation accident or incident. Responsible jurisdiction for safety and enforcement inspections means a governmental entity, whether state or tribal that has the authority to conduct safety inspections and initiate law enforcement using the appropriate federal and/or jurisdiction’s laws and regulations.”

2) Technical Assistance

“The legal definition of *Technical Assistance*, for the purposes of the Section 180(c) program, has been defined as follows:

*Technical assistance* means assistance, other than financial assistance, that the Secretary of Energy can provide that is unique to the Department to aid training that will cover procedures for the safe routine transportation and for emergency response situations during the transport of spent nuclear fuel and high-level

radioactive waste pursuant to the NWPA. Technical assistance will include, but not be limited to, access to the Department’s regional and headquarters representatives involved in the planning and operation of NWPA transportation or emergency preparedness, provision of information packets that include materials about the OCRWM program and shipments, and provision of training materials and information to insert into curricula. Recognizing the Federal government’s government-to-government relationship with, and Trust responsibility toward, tribal nations, and in response to comments about the lack of hazardous materials response capability on some tribal lands, the Department will consider making additional technical assistance available to tribes upon request.”

### 3) Safe Routine Transportation

*Safe routine transportation* for NWPA shipments has generally meant shipment inspections, although other activities also qualify. The list of allowable activities in Section 4.4 serves as a guide to what constitutes *safe routine transportation* as does the following definition.

*Safe routine transportation*, for the purposes of the Section 180(c) program, means the shipment of spent nuclear fuel and high-level radioactive waste pursuant to the NWPA through State, Tribal, and local jurisdictions in a manner compliant with applicable Federal, State, Tribal, and local laws, regulations, policies, and agreements. Examples of these can be described as follows:

- Safe routine highway transportation is characterized by adequate vehicle, driver, and package inspection and enforcement of the U.S. Department of Transportation’s Federal Motor Carrier Safety Regulations and the Hazardous Materials Regulations, as well as the Commercial Vehicle Safety Alliance’s inspection procedures and out-of-service criteria as consistent with state and tribal requirements.
- Safe routine rail and barge transport is characterized by compliance with the Hazardous Materials Regulations, as well as rail and barge transportation policies and regulations, including those of the Federal Railroad Administration and the U.S. Coast Guard.
- Safe routine transportation is also characterized by compliance with the Nuclear Regulatory Commission’s package certification and pre-notification regulations and the Department of Energy’s applicable transportation requirements.

## **F. Contingency Re-Routing**

There may be instances when unforeseen events force the closure of a primary or alternate route, requiring shipments to be re-routed to a less prepared or unprepared route. In the event of unforeseen circumstances requiring shipments to be re-routed to a less prepared or unprepared route, the Department will work with State, local, and Tribal

governments to reach a mutually acceptable solution, and will make funds available, if necessary.

**G. Policy or Rulemaking**

DOE will issue a rule for implementation of a portion of the policy and grant application. The rulemaking process will begin in 2008 or after completion of a pilot program for Section 180(c). The scope of the rulemaking will cover the entire policy, except for the funding formula, the base amount of funding, and all of the grant application and review process. The funding formula is exempted so that if better, surrogate risk factors are identified, the formula can be more easily adjusted. The base funding amount and the application process are also exempted, again, for ease of adjustment if necessary.

**H. Fees Levied on Radioactive Materials Shipments**

DOE will work with States and Tribes on an individual basis to determine whether fees levied on radioactive materials shipments will impact the amount of funds received.

## **APPENDIX A**

### **Funding Allocation Method**

#### **Funding Allocation Method:**

Funding allocation refers to how the Department should allocate Section 180(c) funds: according to a formula, a set-aside for tribes, based upon jurisdictions' needs assessments, or a combination approach. The challenge is to balance the competing interests of recipient need, risk, equity, and program efficiency.

#### **Input from Tribal Topic Group members and Tribal officials:**

- Population is not an appropriate measure for funds for Tribes because some Tribes do not have a large population.
- Funding should be based on protecting all aboriginal lands.
- Don't base funding or eligibility on population within a half mile of route. The whole population of a Tribe and all aboriginal lands should be covered by the funding. [Note: the ½ mile distance on the potential routes that was used to determine which Tribes to include on the notification list for the Tribal letter was not meant as a basis for population measurement to determine the funding allocation for that Tribe]
- Would Tribes be eligible for the initial \$300,000 planning and training grants that the States are currently discussing?
- The 3% set-aside that HMEP (DOT's Hazardous Materials Emergency Preparedness Program) does for Tribes may not be sufficient for 180(c). The set-aside might need to be as much as 6%.

#### **Possible outcomes:**

1. Tribes could use the formula proposed for the States or a different formula.
2. Tribes could apply for funds that have been set aside from the total funds that Congress eventually allocates for Section 180(c). Within a set-aside, Tribes could:
  - Apply for funds determined through a needs assessment.
  - Apply for a pre-determined base amount of funds. The application must justify the use of funds before the whole amount would be awarded. Additional funds may be awarded if the applicant demonstrates the need.

#### The Needs Assessment Approach

In a needs assessment, there are three steps. The Tribe would 1) assess their current readiness, 2) compare that to the readiness needed in case of an accident, and to conduct safe routine transportation activities, and then 3) measure the gap between them. The Department has tools that it provides to jurisdictions to help them conduct the needs assessment.

Specifically, the steps of a grant awarded through a needs assessment would look something like the following:

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1. DOE announces availability of funds and notifies Tribal leaders of their eligibility.
2. The Tribal government notifies DOE of their interest to conduct a needs assessment.
3. DOE and the Tribal develop a schedule, bring in appropriate personnel to assist with the needs assessment (DOE regional TEPP coordinators perhaps, or regional tribal liaison, or headquarters personnel as needed), and schedule a time for the needs assessment.
4. The Tribe submits the results of the needs assessment as part of their application for funds and technical assistance.
5. DOE reviews the application and award assistance as determined by the application review process defined in Federal regulations and DOE guidance.

The needs assessment approach can be very labor intensive. This labor intensiveness can divert a Tribe's resources away from more immediate risks. On the other hand, if properly executed, the readiness for these shipments could be integrated with other transportation preparedness activities the Tribe may be undertaking. A benefit of a needs assessment can more easily accommodate the variation in Tribal priorities and preferences.

Some Tribes already conduct periodic needs assessments for their participation in other Federal preparedness programs. For example, the National Congress of American Indians together with the Federal Emergency Management Agency developed the Tribal Capability Assessment for Readiness (CAR) Instrument. Some Tribes have completed the CARs as well as other assessments. To avoid duplication, these tools can be used in conjunction with technical assistance from DOE to help Tribes assess their specific needs for shipments to a repository.

Formula Approach

For a distribution of funds by formula, the steps are similar to those of a needs assessment but they occur in different order.

1. DOE announces availability of funds and notifies Tribal leaders of their eligibility.
2. Tribes apply for a base amount of funds (still to be determined) and use those funds to conduct their needs assessment.
3. DOE awards the funds and provides technical assistance with the needs assessment as necessary.
4. DOE announces a second round of availability of funds, notifies Tribal leaders of their eligibility, and announces the funds available to each eligible tribe according to the formula.
5. Tribes apply for the second round of funds, basing their request on the completed needs assessment.

6. DOE reviews the application and awards assistance as determined by the application review process defined in Federal regulations and DOE guidance. Funding above the amount determined by the formula could be awarded if Congress appropriated sufficient funds and the grant application justified the additional funds.

For a formula to provide sufficient funding, the factors selected must be surrogates for risk and need. Otherwise, the funding amount will seem arbitrary and not correspond to the needs of the applicant. The factors selected to distribute funds to states are pretty standard – population, route miles, number of shipments, number of sites of origin. However, these factors, especially population, may not reflect real need on an Indian reservation. In addition, not all Tribes exercise authority over the routes on their land. The funding required for a Tribe that exercises both law enforcement and emergency response authority may be very different than for a Tribe that does not exercise its authority. The formula approach could not account for these variations.

**Discussion:**

- What is being done with other Tribal grants?
- What is equitable?
- How should DOE take into account existing capabilities?

**Current DOE Policy:**

Current staff recommendations to management make tribes and states eligible to apply for the Assessment and Planning Grant of \$200,000 and the Training Grant with a base amount of \$100,000 plus a variable amount determined by formula. The grant application must justify these funds before the total amount is awarded. The variable amount would be determined by the following formula:

- + 0.3 (Percentage of Population along Route Corridors)
- + 0.3 (Percentage of Route Miles)
- + 0.3 (Percentage of Number of Shipments)
- + 0.1 (Percentage of Shipping Sites)

All factors would be specific to the shipping year, not the life of the program. The population figure, calculated from U.S. Census Bureau data, would capture either the number of responders requiring training or the number of jurisdictions requiring training. Total route miles (for all modes) would act as a surrogate for the accident risk. The number of shipments addresses the additional burden placed on the states that are heavily impacted by shipments. Lastly, the number of shipping sites (including storage facilities) would factor in the additional training burden placed on states that must prepare for point-of-origin inspections of both the package and the vehicle. Shipping sites would include power plants, DOE sites, and any other entity shipping spent fuel or high-level radioactive waste to Yucca Mountain.

## APPENDIX B Timing and Eligibility

### Timing and Eligibility:

- Which tribes are eligible for funds and technical assistance? Does eligibility depend on whether a Tribe exercises their authority for emergency response and safe routine transportation activities along a route?

### Input from Tribal Topic Group and Tribal officials:

- Eligibility should not be restricted to those jurisdictions within ½ mile<sup>3</sup> of a route, because that is not sufficient for those Tribes who have cultural, religious, and aboriginal lands to protect.

### Possible outcomes for this issue:

- Possible outcomes are open to discussion.

### Discussion of this issue:

- From a legal standpoint, must eligibility depend on whether a Tribe exercises responsibility along the route for emergency response and safe routine transportation actions?
- Does Section 180(c) of the Nuclear Waste Policy Act require DOE to provide assistance regardless of a Tribe’s responsibilities along a route through their jurisdiction?

### Current DOE Policy:

Staff recommendations to DOE management are as follows.

Eligibility. The definition of “responsible jurisdiction”<sup>4</sup> from 1998 *Federal Register* Notice of Proposed Revised Policy and Procedures.

Responsible jurisdiction, for emergency response procedures, means a governmental entity at any level of government, whether state or tribal, that has the authority to conduct part or all of an emergency response to a radiological materials transportation accident of incident. Responsible jurisdiction for safety and enforcement inspections means a governmental entity, whether state or tribal that has the authority to conduct safety inspections and initiate law enforcement using the appropriate federal and or jurisdiction’s laws and regulations.”

This definition, if used by DOE, has two implications for Tribes. First, Tribes that have no emergency response or law enforcement capabilities along transportation routes, who rely entirely on neighboring counties, cities, or states for these services, would not be eligible for Section 180(c) funds. Second, if a Tribe is not eligible to receive Section

<sup>3</sup> DOE contacted Tribal nations within a half mile of potential shipping routes about their potential involvement in planning and preparing for shipments to the repository.

<sup>4</sup> Federal Register Notice of Revised Proposed Policy and Procedures, 1998.

180(c) funds, DOE would continue to coordinate with and inform the Tribe about the shipments. Funds may even be available for certain activities, just not Section 180(c) funds.

Tribes that exercise their emergency response and/or law enforcement authority over their routes but their capabilities are minimal would be eligible for Section 180(c) funds under this definition. Similarly, Tribes that exercise their emergency response and/or law enforcement authority over the route and have mutual aid-type arrangements with neighboring jurisdictions would be eligible to receive Section 180(c) funds.

Timing. DOE has divided the 180(c) program into two parts – an Assessment and Planning Grant and a Training Grant. The timing would work as follows:

For Assessment and Planning Grants, the timing is as follows:

- The Department will send the governor or tribal leader a letter notifying them of eligibility about five years prior to the first shipment scheduled through their jurisdiction. The Department will send the letter, which will include a five-year projected shipment schedule through the State or Tribe, every year of eligibility. Applicants are not required to begin the grant this early and may apply for the Assessment and Planning Grant in subsequent years. However, applications will not be accepted year round but must be submitted within 90 days of the annual Notice of Funding Announcement.
- Once the State or Tribe applies for the Assessment and Planning Grant, subsequent letters will go to the recipient agency, not the governor or tribal leader.
- Thirty days after this letter, the Department will publish a Notice of Funding Announcement on the [www.grants.gov](http://www.grants.gov) website and the Department of Energy's website <http://e-center.doe.gov>.
- There will be 90 days from that Announcement to submit the applications for the Assessment and Planning grant.
- The Merit Review Board and the Department will review the application and make awards within 30-60 days of receiving the applications.
- This schedule will ensure that States and Indian tribes receive their initial funding as early as 4 ½ years prior to the first shipment through their jurisdiction.
- Recipients will then have a year to conduct the needs assessment and write their plan, the results of which create the basis for the training grant application.

For the Training Grants, the timing is as follows:

- The Department will publish a Notice of Funding Announcement 3 ½ years prior to the first shipment through a jurisdiction.
- States and Indian tribes will have 90 days to submit their application. Applicants are not required to begin training this early and may apply for the Training Grant in subsequent years. However, applications will not be accepted year round but must be submitted within 90 days of the annual Notice of Funding Announcement.

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- The Department will review and award the grants within 30-60 days of receiving the application.