

ACHIEVING GREATER PUBLIC CONFIDENCE IN THE
APPLICATION OF TRANSPORTATION POLICIES AND PROGRAMS

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ABSTRACT

Transportation policies deserve a higher level of priority in the national repository siting program. Affected Indian Tribes and States hold that transportation policies and activities are critical to all stages of the program. They are concerned that the lessening of public confidence brings into question the ability of DOE to successfully carry out the Congressionally-directed effort to find two suitable sites for national repositories. DOE must strive to develop a technically-excellent program and treat, with equal importance, the critical need for a more open participatory process. DOE needs to increase its knowledge of and sensitivity to cultural issues affected by the program and with other impacts facing Tribes and States with recommended sites. The success of the repository activity by DOE is dependent upon the successful resolution of institutional, as well as technical issues.

There are a number of ways in which program improvements can be made to assist in regaining the level of public confidence needed. An improved program will result from the application of earlier and continuous opportunities for Tribes and States to participate. The rewards will lessen delay, deal with conflict in a participatory context, and build incrementally improved public confidence in the transportation element of the repository program.

INTRODUCTION

Transportation policies and programs are gradually attaining a higher level of importance in the national repository siting program. However, affected Indian Tribes and States are continuing to express significant concerns and reactions about transportation issues indicating that the needed confidence in the national program to find and develop acceptable sites for a high level repository does not yet exist. In fact, it would appear that the confidence levels have diminished in the past several months.

Partly, the lack of confidence on the part of the Yakima Indian Nation and other affected Tribes and States is the reluctance of the Department of Energy to recognize the extensive levels of interdependence that need to exist as it carries out responsibilities mandated by the Nuclear Waste Policy Act of 1982. This interdependence exists within the various program components and across jurisdictional lines. It is an interdependence of agency responsibilities, working with other federal agencies, working with state governments in the constitutional framework, working with the public, and working with affected Indian Tribes on a Government-to-Government basis.

The United States Government has emphasized its desire to carry out treaty obligations. In an Indian Policy Statement, the President, in 1983 declared that "This Administration honors the commitment this Nation made in 1970 and 1975 to strengthen tribal government and lessen federal control over tribal government affairs." In a reference to the nuclear waste management system, Ben C. Rusche, Director of the Office of Civilian Waste Management said, in a speech to the 43rd Annual Convention of the National Congress of American Indians, "The Department of Energy takes seriously our statutory trust relationship with the Nation's Native American populace. We

don't have extensive experience in working with Indian Tribes. We need and want your assistance; we welcome your suggestions and ask for participation, in strengthening your participation and in strengthening our future ties and working relationships." The application of the foregoing commitment will require substantially more attention than has been received to this time.

The Act clearly expressed the necessity of close working relationships among affected Tribes, States and the general public in order to develop publicly acceptable programs. However, the Department, in its initial and following efforts appeared to not fully understand the unique participatory requirements of the Act and continued to work in traditional interactive patterns, without recognizing the need for the extraordinary care needed in dealing with jurisdictions that have specific authorities and entitlements.

The participation activities appeared to be largely a process of disseminating information for formal review and comment, often after firm positions on policies and programs were established by intra-agency and federal inter-agency negotiations. This typical way of doing business created a program inertia which has been difficult to adjust. When DOE attempted to expand interactive possibilities for affected Tribes and States, it too often was the result of long and protracted requests which were, it appeared, to be grudgingly given.

In order for Tribes and States to participate in the manner expected under the authority of the NWPA there must be a broader and deeper and continuing visibility of Tribal and State input in policy and program development and evaluation. Fortunately, there has been some discernible improvements in recent months. However, there continues to be a

sense that key issues are not yet treated in sufficient detail nor are there yet available the full array of opportunities available for input by Tribes and States. The most recent example was the issuance of the first amendments to the Mission Plan for public review which were announced without any opportunity for participation or contribution by Tribes or States. Although sixty (60) days are now available for public review, the Yakima Indian Nation had no opportunity to comment on the draft language as it was being prepared.

A HIGHER PUBLIC CONFIDENCE NEEDED

The following observations concerning Tribal and State perspectives have evolved from close observation of the program and its execution by DOE. Following these are comments suggesting ways in which the federal repository program's transportation elements can be improved so that reasonable expectations for achieving national objectives may result in a better public sense of confidence.

1. Public confidence in and understanding of transportation issues and programs, as they affect the national repository program and its stewardship by DOE is presently inadequate for the successful execution of the Congressionally directed program.

2. Program confidence has eroded, in part, due to the public perception of the politicalization of several program actions by DOE and the consequent perception of the subordination of technical excellence. This attitude permeates all aspects of the program, including transportation.

3. The treatment of selected transportation issues as "downstream" or subsidiary to other important issues has left many unanswered questions.

4. The difficulty that Tribes and States have had in gaining access to several DOE Coordinating Groups (including Transportation) has, until recently, deprived DOE of the opportunity to gain comprehensive insights into how program activities will affect constituent parties.

5. There has been inadequate recognition of unique Tribal concerns which could severely, even devastatingly, impact Indian Tribal lands, culture, and life.

6. There is a lack of sufficient public understanding and acceptance of the "doableness" of this never-done-before effort and in devising a safe and secure transportation system to support storage and disposal activities.

7. There is an expanding preception by DOE that nothing they can say or do will have a salutary effect on the opposing viewpoints of many of the stakeholders in the process.

SUGGESTED METHODS TO IMPROVE CONFIDENCE LEVELS OF AFFECTED PARTIES AND THE PUBLIC RELATING TO TRANSPORTATION

The difficult nature of the program has been recognized by all parties. Selection of a site for a repository has connotations which appear to be chiefly negative for the state and adjacent areas of impact. The notion of increased economic activity and investment has not been compelling in gaining citizen support to date. The apparent positive attribute of economic activity and development

that can result from the program have been overwhelmed by the potential negative impacts of the facility. In the light of this array of concern and opposition, there still are numerous opportunities for the Department to move in a direction that will enable transportation issues to be better understood. Adhering steadfastly to commitments to deal sensitively and positively on this issue can provide needed impetus to counter the presently growing divisiveness of public attitudes.

Public confidence in the program will grow as the performance level improves with the persistently pursued inclusion of a wider--more open process. Some of the ways in which the Department of Energy could proceed to enhance the public acceptability of the transportation element include:

1. Recognize that Transportation Planning and Programming is not an Autonomous Activity.

Acceptance of the fact that the Department cannot carry on a largely autonomous activity in which decision-making is made and then defended. As a standard practice, DOE should insist that program activities and policies are to be perceived, analyzed, and developed with the assistance (and the possible hesitation) of NWSA identified affected parties. It is necessary to maintain the innovations in policy development that are beginning to take place in certain aspects of the program and to organize the effort to insist on early interactions (defined as opportunities to exchange views prior to taking positions that have to be defended).

A needed and appropriate step has been the recent opening of the DOE Transportation Coordinating Group for the participation of Tribes and States. This action has been seriously overdue and has been pointed to as an example of the reluctance of DOE to meaningfully participate with Tribes and States. With the opening of the Coordinating Group, it is now possible to establish rules of procedure for the work of the Group's members which must go beyond mere attendance and comments on the agenda items during meetings.

2. DOE must demonstrate that the transportation side of the repository program takes its proper place as one of the key elements in the siting, as well as the operation of a repository. For some of the affected parties it is a paramount issue. The interest of the Yakima Indian Nation is demonstrated by its action, in June of 1979, nearly eight years ago. At that time, the Tribal Council unanimously adopted a resolution that banned the entry or transit of nuclear materials across the Nation's lands. The authority for the resolution is based on the Treaty of 1855 with the United States where it is recognized that the Yakima Indian Nation possesses sovereign authority to exercise control within its boundaries and at its usual and accustomed hunting and fishing sites. The Resolution recognizes the health hazard to all the residents within and at the areas identified in the Treaty. That Resolution has not been modified and remains in effect.

3. While there may be merit to delay the development of route-specific data while the generic issues are addressed in a more typical development activity, the public, Tribal and State concerns require that DOE deal with key issues currently rather than when a PERT chart might dictate. Therefore it is recommended that no transportation issue be relegated to future consideration on the notion that current discussion is premature.

4. DOE should build upon the knowledge that States and Tribes have about their transportation systems and facilities and gain data and information readily available. Physical characteristics and the impact of weather conditions should be more clearly understood by DOE officials and their knowledge will be improved through specific working relationships with state and local transportation officials. The intercourse of ideas that can be generated if DOE takes the initiative in providing input opportunities of significance can improve the program measurably and will provide a basis for a better understanding of the attitudes and values of those affected.

5. States, other than potential host States, which lie on a corridor route likely to be used for the transit of spent fuel, are equally concerned with the potential for adversity. DOE should determine how affected Tribes and host States, as well as corridor States and Tribes can be intimately involved in the transportation policy and program analysis activities on a firm, continuing basis and should aggressively insist on their inclusion, individually as well as collectively. The establishment of a working group of these affected parties should merit careful consideration and should build upon the work of the Western Interstate Energy Board, the Southern States Energy Board, and other regional organizations. Participation in the Transportation Coordination Group may provide the appropriate mechanism, but DOE should not hesitate to provide a forum for substantive participation by corridor states, Indian tribes and other parties.

6. DOE should initiate special efforts to increase its understanding of the role of affected Indian Tribes. While they are mentioned in the NWPA along with the States that are affected, they are indeed, recognized as a separate Nation and not as a sub-unit of the federal government nor the state government. Indian Tribes have not had, generally, a happy experience negotiating with the federal government and DOE unfortunately and inadvertently has not understood Indian sensitivity to the many abrogations of Treaty rights they have experienced for well over a century. Additional attention to the particular rights and perspectives of the Tribes would enable DOE to gain a better understanding of their concerns and could enable Tribal officials to better understand its work as well. As Russell Jim observed in a 1979 speech:

"The formation of the United States more than 200 years ago created new demands on tribal societies to make radical changes in their thinking and their method for preserving the tribal way of life. Relations between the United States and Indian tribal governments created a new dimension in the concept of balance. The U.S. Government's national objectives of growth, progress, and consumption violently conflicted with the relatively stable and more limited objectives of tribal governments. This fundamental divergence of national and tribal strategies for human survival has been at the center of every conflict between the United States and its citizens and Indian Tribes and their citizens."

The Transportation component contains many of the many institutional problems as do other parts of the repository program. However, there is an opportunity for earlier resolution of many of them which can assist in raising understanding of the public and a greater feeling of confidence in the program. DOE should raise the priority of dealing with those issues for which greater coordination and interaction and decision-making can be made. There are a number of examples of current application.

1. The application and adaptation of technology (existing and that for which performance can be verified) to deal with safety and security concerns of the affected Tribes, States, and the public. DOE is exploring the use of real-time satellite tracking of nuclear shipments. This proposed system offers sound technical promise and, if properly implemented can be of significance in providing better management and safety control over radioactive waste shipments. The involvement of States, Tribes, local governments in this system and the dissemination of information for tracking can provide significant safety and confidence benefits.

2. Closely related to possible use of technology to improve performance in monitoring movement of wastes is the issue of advance notification. States, Tribes, and local governments want such notification to ensure that emergency response teams are prepared and available. There are other reasons, as well, including provision of escorts, shipment inspections, and perhaps others. DOE's policy of generic notification, if continued, may elicit more actions similar to the state of Colorado which passed a law last year specifying a seven-day pre-notification period for transuranic waste shipments being sent to the WIPP site in New Mexico. The availability of satellite tracking and electronic communications offer attractive ways in which to accommodate State, Tribe, and local governments legitimate concerns.

3. The development of emergency response planning and operational capability is an example of an issue whose application will be necessary as the construction of a repository takes place. However, the public sense of urgent concern as to how and what kinds of responses will be available and who will be paying the costs need to be answered substantially before the system needs to be operational. An improved level of confidence will develop if the public (including State, local governments, and Indian Tribes) can be assured that the response capacity is available and that planning and exercising is sufficient to deal with any possible incident. It should be noted that the Yakima Indian Nation feels that no matter how sufficient a response to an intolerable situation, an event that could prove cataclysmic to its peoples and lands. In the case of the Nation, evacuation could be tantamount to extinction, since without the reservation, tribal members would have no lands available to them. Again, the enhancement of technological applications in the areas of communications will help to establish an improved baseline of public understanding of DOE's efforts to be sensitive to public concerns.

4. Highway Routing Designation

Tribes and States are concerned that with the increased amount of shipments of waste there may not be sufficient control over the carriers. The selection of routes is highly important and where States or Tribes will have designated alternate routes. Route selection affects planning for emergency response and pre-notification actions. DOE should not consider the implementation of their transportation business plan and program to be a bi-lateral effort between it and the transportation industry.

5. Inspection and Enforcement

Maintaining an adequate level of inspection and enforcement is an issue of much interest to States, Tribes, and local governments. There is little conflict in the objectives of sufficient levels of

inspection, but there is a need for coordination of efforts. The potential duplication of activities needs to be addressed by all parties. The Washington State Legislature is considering an interstate compact on transportation to deal with the needs for adequate inspections on a coordinated basis. The proposed compact would seek to foster cooperation among the members on emergency response and to coordinate activities to eliminate duplication of rules and regulations regarding the transportation and handling of radioactive material. The Department of Energy should support actions by States and Tribes which can assist in meeting program objectives. DOE must not ignore the regulatory authority that can be exercised by States, Tribes, and local governments. In those areas where interpretation of authority is not definitive, there should be discussions leading toward effective coordination of efforts, rather than a conflict of predicated on the notion of superior legal authority.

While other examples of positive action by DOE can improve the transportation planning and development activities, the foregoing activities provides illustrative examples of areas in which progress can be made.

SUMMARY

Proper program performance by DOE in the area of transportation will be nurtured by less attention to historic prerogatives which could inhibit the solving of the waste problem. The need is for demonstrated actions to enable transportation and other issues to be dealt with to the satisfaction of principal affected parties. The basic question of how the decision-process can be improved and confidence restored is easier stated than demonstrated.

The context of DOE thinking is important, however. Participation in the multi-faceted transportation area will be aided by the understanding that participation is not a take-over of the organic law of federal agencies. The inclusion of States and Tribes in the decision-making process does not mean a full partnership, nor a joint-venture. It is a process in which there are opportunities for early input and a receptiveness for ideas at a stage when policy-formation and program development are at initial stages. The better product will result from a negotiated decision-development process. The opportunity is unique, but affirmative and consistent action by DOE will assist in adding some needed stability, order, and confidence in the program.