



## High-Level Radioactive Waste Committee Position Paper

### Transportation Responsibilities Non-Delegable to Private Entities Number 2020-1

Version: Final  
Date adopted by WIEB: April 30, 2020

#### In General

This Position Paper represents the views of the Western Interstate Energy Board as developed by its High-Level Radioactive Waste Committee (HLRWC). WIEB was created under the Western Interstate Nuclear Compact in 1970, and the WIEB Board members are appointed by the governors of the Compact states. The [HLRWC is composed of nuclear waste transportation experts](#) who collaborate on this topic with the U.S. Department of Energy as well as many others. The HLRWC, in existence for over thirty years, has drawn from its members' extensive experience in order to create [Position Papers](#). Once approved by the WIEB Board, this and the other Position Papers represent WIEB's view of how to create and maintain an ideal nuclear waste transportation campaign. Although the HLRWC only speaks on behalf of the Western WIEB member states in these Position Papers, it acknowledges the essential involvement of many partners in assuring this ideal campaign: one that is safe, uneventful, and publicly acceptable.

#### Statement of Policy

The federal government, working through the Department of Energy (DOE) or any new management entity, should not delegate certain core responsibilities to agents or contractors it hires to perform spent nuclear fuel and high-level radioactive waste (SNF/HLW) transportation activities.

#### Background and Context

**1. DOE will likely use private industry for many aspects of SNF transportation.**

The Nuclear Waste Policy Act (NWPA) directs the Secretary of Energy to "utilize by contract private industry to the fullest extent possible" when providing for the transportation of

commercial spent nuclear fuel.<sup>1</sup> No further instruction is given, save that federal transportation services can be used in lieu of private industry based only on a cost determination.

**2. DOE has proposed different privatization approaches in the past.**

In line with the private industry transportation directive from the NWPA, DOE has since the mid-90s produced several different privatization proposals through draft statements of work (SOW) and requests for proposal (RFP). These proposals took two different tacks. The first was a regional servicing agent/contractor approach, which would have divided the U.S. into four regions serviced by up to four different contractors.<sup>2</sup> As set out in the RFPs, these contractor(s) would have had broad latitude over many aspects of transportation planning. The second approach was for a transportation integration contractor, whose role would have been more limited to merely assisting DOE with transportation planning.<sup>3</sup>

**3. Western state comments on DOE's transportation privatization proposals consistently encouraged DOE not to delegate core responsibilities.**

DOE requested stakeholder input on most of their previous transportation privatization draft SOWs and RFPs through Federal Register notices. The WIEB HLRW Committee provided input on each of these proposals during the comment periods.<sup>4</sup> Additionally, in 1998 WIEB signed a joint letter with the other state regional groups which expressed the regions' consensus views on DOE's regional servicing contractor approach.<sup>5</sup> A consistent main theme in the HLRW Committee comments and in the letter of consensus was that there are certain key responsibilities, defined in the letter, that DOE should not delegate to any transportation contractors.

**4. The Western states reaffirmed their stance on non-delegation when asked to review their past comments.**

In fiscal year 2018, DOE's Office of Nuclear Energy asked the state regional groups to review their comments on DOE's past privatization proposals and decide whether the groups stood by their previous statements. At that time, the WIEB HLRW Committee and all of the other state regional groups chose to reiterate their previous stances, including the emphasis on not delegating the defined key transportation responsibilities to a private contractor.

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<sup>1</sup> 42 U.S.C. 10101 Sec. 137(a)(2).

<sup>2</sup> Draft Statement of Work for Waste Acceptance and Transportation Services, June 1996, and Draft Waste Acceptance, Storage, and Transportation Concept of Operations, June 1996; Draft RFP Number DE-RP01-97RW00320, Acquisition of Waste Acceptance and Transportation Services for the Office of Civilian Radioactive Waste Management, December 27, 1996; Draft RFP Number DE-RP01-98RW00320, Acquisition of Waste Acceptance and Transportation Services for the Office of Civilian Radioactive Waste Management, November 24, 1997; Draft RFP Number DE-RP01-98RW00320, Acquisition of Waste Acceptance and Transportation Services for the Office of Civilian Radioactive Waste Management, September 1998.

<sup>3</sup> OCRWM (Draft) Statement of Work for a Transportation Integration Contractor, October 2002.

<sup>4</sup> These original comments can be found at: <https://westernenergyboard.org/library/hlrwc/>.

<sup>5</sup> <https://westernenergyboard.org/library/hlrwc/>.

## Policy Recommendation

It is the expectation of the Western states that the federal government, working through DOE or any new management entity, maintain certain core SNF/HLW transportation functions rather than allowing them to be handled by their contractors or non-federal entities.

The most important of these functions is the responsibility of the federal government to consult and negotiate directly with the states on most operational and planning decisions, in order to respect the states' equal sovereignty.<sup>6</sup> Other functions that should not be delegated to contractors or non-federal entities include:

1. Decisions about the provision of technical assistance and funding to states to prepare for shipments along transportation corridors.
2. Selection of transportation modes and routes, recognizing that the railroads will play a major role in selection of rail routes. However, that action should be consistent with direction by DOE or any other management entity after consultation with the states.
3. Decisions about actions and mitigation measures that are addressed in environmental impact statements, especially about transportation issues.
4. Development and implementation of critical transportation system policy decisions such as shipping oldest fuel first and full-scale cask testing.
5. Identification, assessment, and final selection of potential rail corridors for construction of new rail access.

The Western states also note that these and other important SNF/HLW transportation decisions will involve discussions with many important partners and affirm their commitment to working with these partners as well as the federal government.

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<sup>6</sup> For an exploration of the states' equal sovereignty with the federal government under the 10<sup>th</sup> Amendment of the U.S. Constitution, see, e.g., [\*Shelby County v. Holder\*, 570 U.S. 529 \(2013\)](#).