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November 27, 1989

Samuel Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing and Service Branch

RE: RIN 3150-AD27, Proposed Changes to LSS Procedural Rules, 10 C.F.R. Part 2, Subpart J

Dear Mr. Chilk,

The Environmental Defense Fund (EDF) and Friends of the Earth (FOE) were two of the three participants in an environmental coalition (EC) in the negotiated rulemaking that led to the promulgation of Subpart J to the procedural rules -- 10 C.F.R. Part 2 -- of the Nuclear Regulatory Commission (NRC). EDF, FOE and the National Audubon Society (NAS), hereby submit the following comments on the changes to Subpart J that the Commission is now proposing.

In a word, EDF's, FOE's and NAS' reaction to the proposed rule is "Why?" The LSS negotiations took nine months. The process produced an unprecedented level of agreement between NRC, DOE, the State of Nevada, local governments in Nevada, Indian tribes and the EC over how NRC might go about licensing the nation's first high level nuclear waste repository. Rarely, if ever, have these disparate interests agreed about anything of even marginal importance. All parties to the negotiated rulemaking made concessions, in the spirit of achieving consensus. Although the parties did not ultimately fashion such consensus, due to the recalcitrance of the industry representatives, it was the EC's perception that the final negotiated rule even allayed most, albeit not all, of industry's concerns. Certainly with regard to the procedural rules for participation in the licensing, the negotiated rule accommodated many of industry's suggestions.

After the parties submitted the results of their negotiations to the Commission, the Commission sent the rule out for public review and comment, received and considered comments from several entities, heard from many of the LSS negotiation participants at a meeting during which the rule was discussed and eventually adopted a final rule that was substantially similar to that which the parties produced through negotiation. Yet, less than six months following that promulgation, the NRC has proposed substantial changes

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to the rule as adopted. Such action by the Commission is not only unwarranted, it makes a mockery of the negotiated rulemaking process and sends a strong message to the EC, as well as the to the broader environmental community, that there is little reason to expend the effort necessary to engage in negotiated rulemaking with the Commission, and potentially with other federal agencies, because the government will not abide by the deals it strikes.

The parties to the LSS negotiated rulemaking expressly rejected the changes that NRC now proposes to make in Subpart J. These parties spent two days a month for nine months hammering out a rule which was acceptable to all seated at the table, except industry, but including the NRC. In the Supplemental Information to the rule as adopted, NRC did reserve the right to make further changes to the rule at some time in the future to help NRC meet its three year licensing deadline; however, no parties to the negotiation intended, expected, anticipated, or would have agreed that NRC could unilaterally move to gut the central agreements of the rule less than 180 days after adopting it. During the year of negotiation, all parties were aware that NRC had under consideration other changes to Part 2. The EC, the tribes and the State of Nevada (as well as all other states who had commented on those changes) were on record as opposing those changes. There is no way that these parties would have accepted such provisions in the negotiated rule for the LSS. For the NRC to do so now suggests either that NRC acted in bad faith during the negotiations and/or in its original adoption of the rule as negotiated, or that NRC does not feel bound in any way by a bargain it struck less than one year ago. Neither of these positions is acceptable for a federal agency.

The changes that NRC proposes in the September 28, 1989 notice would severely limit the ability of third party intervenors to participate in the licensing proceeding for the high level waste repository. EDF, FOE and NAS object to the institution of such requirements; if adopted, these amendments would violate the spirit and the letter of the Nuclear Waste Policy Act, a law which stands for broad public participation in the repository process. As contrary to Congressional intent as were the general intervenor restrictions that the NRC promulgated this summer over the objections of all states and environmental groups that commented thereon, for the Commission to follow that path for this NWPA licensing would be worse.

If NRC proceeds with the proposed changes to Subpart J, the undersigned groups must refuse in the future to negotiate with the NRC. In addition, we must evaluate whether to negotiate with other federal agencies, because of the possibility that NRC's willingness to weazel out of commitments so quickly reflects an executive branch view that negotiated rules need not be followed. Moreover, we will disseminate to other members of the environmental and conservation community and to members of Congress a report explaining our concerns about negotiated rulemaking that have arisen as a result of NRC's proposal here. To the extent that recent developments at Yucca Mountain

suggest that Congress will again have to revisit the repository issue, we will express our opposition to these proposed changes, if adopted, as an NRC attempt to circumvent the public process that Congress sought to establish for building the country's first high level nuclear waste repository.

In sum, we are disappointed in the extreme with NRC's proposal and strongly urge the Commission to withdraw the proposed amendments to the rule.

Sincerely,

Melinda Kassen

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Environmental Defense Fund

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Brooks Yeager by mk

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cc: William Olmstead
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parties to the LSS negotiated rulemaking