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NUCLEAR REGULATORY COMMISSION

10 CFR PART 2

RULE ON THE SUBMISSION AND MANAGEMENT OF RECORDS AND DOCUMENTS RELATED TO THE LICENSING OF A GEOLOGIC REPOSITORY FOR THE DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE; ESTABLISHMENT OF AN ADVISORY COMMITTEE FOR NEGOTIATED RULEMAKING

AGENCY: Nuclear Regulatory Commission.

ACTION: ~~Notice of establishment of an advisory committee to negotiate a proposed rule, and notice of first meeting.~~

SUMMARY: The Nuclear Regulatory Commission is establishing an advisory committee, under the authority of Federal Advisory Committee Act (FACA), to develop recommendations for revision of the Commission's Rules of Practice in 10 CFR Part 2 related to the adjudicatory proceeding for the issuance of a license for a geologic repository for the disposal of high-level waste (HLW). Specifically, the committee will attempt to negotiate a consensus on proposed revisions related to the submission and management of records and documents for the HLW licensing proceeding. The committee will be composed of organizations representing the major interests likely to be affected by the rulemaking. This notice announces the establishment of the committee and the time and place of the first committee meeting. The title of the committee will be the HLW Licensing Support System Advisory Committee ("negotiating committee").

DATE: The first meeting of the HLW Licensing Support System Advisory Committee will be held on September 16 and 17, 1987, beginning at 10:00 a.m. The meeting will be open to the public.

ADDRESSES: The September 16-17, 1987 meeting of the HLW Licensing Support System Advisory Committee will be held at the Conservation Foundation, 1250 24th Street, Washington, DC 20037. Obtain single copies of the feasibility report prepared by the Conservation Foundation and the LSS Background Paper from Francis X. Cameron, Office of the General Counsel, Washington, DC 20555, telephone (301) 492-8689.

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FOR FURTHER INFORMATION CONTACT:

NRC Staff

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Facilitators

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SUPPLEMENTARY INFORMATION:

Background

Section 114(d) of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10134, requires the Commission to issue a final decision on the issuance of a construction authorization for the HLW repository within three years after DOE submits the license application (with a one year extension for cause). The HLW licensing proceeding will not only involve novel and complex technical issues, but will also involve millions of documents, a substantially larger number than the volume of documents involved in the average nuclear power reactor licensing proceeding. In view of this, the Commission does not believe that the use of traditional licensing procedures will enable the Commission to meet the statutory timetable, or will provide all parties with an opportunity for the most effective review of the license application. In order to meet the statutory schedule, and to provide for the most effective

review of the license application by the Commission and other parties, the Commission is initiating measures to streamline the licensing process.

One of these measures is the development of an information management system that would contain all of the data supporting the DOE license application, as well as all of the potentially relevant documents generated by the NRC and other parties to the licensing proceeding, in a standardized electronic format. All parties would then have access to this system. Because all relevant information would be readily available through access to the system, the initial time-consuming interrogatory discovery process involving the physical production and on-site review of documents by parties to a NRC licensing proceeding would not be necessary.

Implementation of this system is intended to accomplish the following objectives--

- ° to facilitate discovery by providing comprehensive and easy access to potentially relevant licensing information;
- ° to establish the information base for the licensing proceeding, to the extent practicable, before the DOE license application is submitted and the three year statutory time period begins;

- to facilitate review of the relevant licensing information by all parties and eventually the boards through the provision, to the extent practicable, of full text search capability;
- to reduce the time associated with the physical submission of motions and other documents associated with the licensing proceeding by providing for the electronic transmission of these documents;

The Commission intends to develop this rulemaking through the process of negotiated rulemaking. In negotiated rulemaking, the representatives of parties who may be affected by a proposed rule, including the Commission, convene as a group over a period of time to try to reach consensus on the proposed rule. The agency then uses this consensus as the basis for a proposed rule which the agency issues for notice and comment. The consensus is not the basis per se for the final rule which the agency will develop after traditional notice and comment procedures. The Commission, however may ultimately find it useful to rely on, or to refer to, the consensus in connection with its adoption of the final rule.

The negotiated rulemaking process facilitates the comprehensive treatment of the rulemaking issues because those groups that may be affected by the rulemaking are present at the discussions and can react directly to each other's concerns and positions. The Commission believes that negotiated rulemaking is an appropriate process for this rulemaking because it will help

to establish the credibility of the LSS, i.e., the belief that all relevant documents will be entered into the system and that the system is free from tampering. In addition, because the LSS will constitute a new process for managing a Commission licensing proceeding, it is important that affected and knowledgeable organizations directly participate in establishing the rules for system operation, particularly because individual parties to this proceeding will possess substantial research data that should be placed into the LSS.

On December 18, 1986, the Commission's intent to conduct a negotiated rulemaking was published in the Federal Register (51 FF 45338). Comments were due by February 17, 1987. The Federal Register Notice invited expressions of interest from those who might want to participate in the negotiations. The Notice also solicited comment on the feasibility of negotiation, and on a preliminary list of rulemaking issues associated with the LSS.

Twenty-four comments were received. The comments came from State governments (six from first round repository States, two from second round repository States); Tribal governments (three from first round repository Tribes, one from a nonprofit organization representing second round repository Tribes and those Tribes affected by the transportation of HLW to a first or second round repository); three national environmental groups; three industry organizations; two Federal agencies (the Department of Energy, and the Bureau of Land Management, Department of Interior); the

National Association of Regulatory Utility Commissioners; and three individuals.

The Commission has retained the Conservation Foundation, a nonprofit organization with expertise in the area of mediation and negotiated rulemaking, to assist the Commission in conducting the negotiation. The Foundation will provide the Commission with support in the areas of convening (assessing the feasibility of the negotiated rulemaking), facilitating (chairing the negotiating sessions and assisting the participants in arriving at consensus), training for participants on the negotiating committee (on the principles of negotiated rulemaking), and technical and administrative support to the negotiating committee on the rulemaking issues. The Conservation Foundation's initial responsibility was to evaluate the feasibility of conducting the negotiated rulemaking based on discussions with potential participants. The Foundation submitted its feasibility report on May 27, 1987.

Based on the public comments, and the Conservation Foundation's feasibility report, the Commission has decided to establish the negotiating committee for this rulemaking.

Feasibility

The Conservation Foundation recommended that the Commission proceed with the negotiated rulemaking. The Foundation concluded that--

" with certain cautious reservations,...it is feasible for the NRC to form an advisory committee to negotiate revisions to its...rules to support the development of a Licensing Support System (LSS). Our recommendations regarding both procedural and substantive issues are grounded upon the judgments of the potential committee participants. There is already a broadly held view among them that genuine efforts by all concerned made within such a committee structure should yield a superior proposal. They also genuinely believe that the proposed regulatory negotiation process can contribute very positively not only to improvements in the licensing procedure, but also to their many other working relationships. We concur in these judgments and look forward to the committee's initiation."

Although in the judgment of the Foundation it would be unrealistic to expect an ultimate consensus on all matters in issue, it believes that--

"even where consensus is not reached a valuable report can be developed identifying areas of agreement and disagreement, narrowing the issues in dispute, identifying the information necessary to resolve remaining issues, and setting priorities for potentially acceptable solutions."

The comments submitted in response to the Commission's Federal Register Notice were generally supportive of the negotiated rulemaking concept. These favorable comments came from both the supporters of repository siting and also from those groups who have been critical of the siting process. The comments on the advisability of developing the LSS were primarily directed

towards specific aspects of the LSS, rather than on the general feasibility of establishing such a system. However, several commenters, again from both sides of the repository siting issue, expressed support for the LSS.

Participants

In the Federal Register Notice announcing the Commission's intent to conduct a negotiated rulemaking, the Commission identified several interests that might be affected by this particular rulemaking. These interests included Indian Tribes, State governments, local governments, and public interest groups affected by repository siting, utilities, ratepayers, and Federal agencies such as the NRC and DOE.

The Commission stated that it would consider parties for membership on the negotiating committee on the basis of (1) whether they have a direct, immediate, and substantial stake in the rulemaking, (2) whether they may be adequately represented by another party on the committee, and (3) whether their participation is essential to a successful negotiation. However, the Commission welcomed expressions of interest from all groups potentially affected by the rulemaking and stated that it would use the selection criteria to exclude interested parties only as a last resort. The Commission also noted its concern that the negotiating committee be kept to a manageable size in order to maximize the potential for arriving at a consensus, and that the Commission would encourage the consolidation of groups with similar interests in order to achieve this goal.

The Conservation Foundation has recommended that the Commission establish three tiers of participation in the negotiated rulemaking proceeding. The first tier would be composed of committee "members," i.e., those participants whose views will constitute any consensus or disagreement. The first tier would include not only individuals acting as a representative of a single party but also individuals acting as representatives of a coalition of parties. A coalition would collectively only hold a single seat, in the first tier of committee membership.

The second tier would consist of individuals representing entities that, for specific reasons, were not invited to the first tier but whose views are important to the negotiations. These second tier participants would have a seat at the negotiating table, but their views would not constitute any consensus or disagreement.

The third tier would be comprised of any members of the general public who have an interest in the proceeding but who are not included in tiers one and two. The third tier will not have a seat at the negotiating table. As with the meetings of any advisory committee chartered under FACA, 5 U.S.C. App., the meeting will be open to the public and members of the public will be able to offer written comments to the committee, and if practicable, to offer oral comments at appropriate times during the meetings. Further, any individual or group and the public generally, will be provided with an opportunity to comment on any proposed rule developed as a result of the negotiating process.

The Commission has invited the following groups, each to have one seat, to participate in the first tier of the negotiating committee--

- (1) State of Nevada
- (2) State of Washington
- (3) State of Texas, representing itself and affected Texas local governments
- (4) Yakima Indian Nation
- (5) Nez Perce Indian Tribe
- (6) Confederated Tribes of the Umatilla Indian Reservation
- (7) Department of Energy
- (8) National Congress of American Indians, representing all tribes affected by the siting of the second repository and by the transportation of HLW
- (9) Utah, Oregon, and Mississippi (jointly), representing a coalition of all other states affected by the siting of the first repository

- (10) Minnesota and Wisconsin (jointly), representing a coalition of all states affected by the siting of the second repository, and by the transportation of HLW
- (11) The Sierra Club, Environmental Defense Fund, and Friends of the Earth (jointly), representing a coalition of nonprofit environmental groups
- (12) Nuclear Waste Task Force, representing a coalition of local Texas nongovernmental groups
- (13) Edison Electric Institute and the Utility Nuclear Waste Management Group (jointly), representing the nuclear industry
- (14) Nuclear Regulatory Commission

There are a total of fourteen first tier participants including the NRC.

Those invited to participate in the second tier of the negotiating committee are--

- (1) U.S. Council for Energy Awareness
- (2) National Conference of State Legislatures

(3) National Association of Regulatory Utility Commissioners

The Conservation Foundation also recommended that the Commission invite any other tribes or states affected by the siting of a repository or the transportation of HLW to the repository, and not specifically included as a member of the coalitions in the first tier of committee membership, to participate as second tier members of the committee. The Commission agrees, and is extending an invitation for second tier participation to affected tribes and states that are not specifically named in the first tier coalitions (Groups 8, 9, or 10). Membership in these first tier coalitions was based on a timely request for participation in response to the Commission's December 18, 1986 Federal Register Notice. To the extent that any affected tribe or state may wish to participate as a named member of a first tier coalition, a request should be made to the appropriate coalition. It is within the discretion of the coalition as to whether it wants to accept any additional members.

The Commission emphasizes that the groups invited to participate as a member of the negotiating committee are those who might be broadly affected by the LSS rulemaking. These groups do not necessarily correspond to the groups or persons who might have standing to participate as a party to the Commission's HLW licensing proceeding. Participation in the HLW proceeding is governed by the Commission's regulations set forth in 10 CFR 2.714 and 2.715.

Convenor/Facilitators

As noted above, the Commission has retained the Conservation Foundation to oversee the negotiated rulemaking process. The Conservation Foundation

has had extensive experience in multi-party dispute resolution, including experience in negotiated rulemaking, but has not had any prior involvement with the substantive content of this particular rulemaking.

Howard S. Bellman of the Conservation Foundation will serve as the senior facilitator for the negotiated rulemaking, assisted by Timothy J. Mealey, also of the Conservation Foundation, and Matthew A. Low of TLI Systems. The facilitator will chair the negotiating sessions, assist individual parties in forming and presenting their positions, and offer suggestions and alternatives to help the negotiating committee reach consensus. Support to the facilitators and the negotiating committee on the technical and legal aspects of the rulemaking will be provided by TechLaw, a subcontractor to the Conservation Foundation.

Funding

Two interests - local non-governmental groups and national environmental public interest groups requested funding by the Commission in order to participate in the negotiations. The Commission reiterates the position set forth in the Federal Register Notice announcing its intent to negotiate that it is unable to provide any direct funding to individual participants on the negotiating committee. The Commission's inability to do so derives from a specific provision in the NRC appropriations legislation. For example, Section

502 of the Energy and Water Development Appropriations Act for Fiscal Year 1986 provides that--

None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act. Pub. L. No. 99-141, 98 Stat. 578.

In addition, the Continuing Appropriations Act, Fiscal Year 1987, Pub. L. No. 99-591, contains the same provision, as do the NRC Appropriations Acts for previous fiscal years. The legislative history of this provision indicates that the prohibition would apply to rulemaking proceedings. See Energy and Water Development Appropriations for 1982, Part 4, Nuclear Regulatory Commission, Hearings before the Subcommittee on Energy and Water Development of the House Subcommittee on Appropriations, 97th Cong., 1st Sess. 210 (1981); S. REP. NO. 767, 96th Cong., 2d Sess. 13 (1980); 126 CONG. REC. 20665 (1980); Public Participation in Agency Proceedings, Hearings on H.R. 3361 before the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee, 95th Cong., 1st Sess. 114 (1977). Although each negotiated rulemaking must be evaluated to determine whether the negotiating phase of the rulemaking would constitute a "proceeding" within the intent of Section 502, the better view is that this provision applies to this particular negotiated rulemaking. In this case, the stated objective of the negotiating committee is not merely to exchange information, but to also reach consensus on the text of a proposed rule. Furthermore, the Commission, within certain

stated limitations, has agreed to use the consensus as the basis for a proposed rule. The Commission believes that, in this context, the negotiating phase would constitute the beginning of a rulemaking "proceeding" for purposes of Section 502.

However, the Conservation Foundation advised the Commission that the negotiating committee will not provide a representative sample of LSS users if the groups who requested funding do not participate. Therefore, the Foundation recommended that the NRC, the convenors, and the affected organizations explore ways to develop funding for the participation of these interests. The Commission agrees that it is important to facilitate the participation of environmental groups and local nongovernmental groups in this negotiated rulemaking. Accordingly, the Commission has requested the Conservation Foundation, its convenor, to seek funding assistance from such organizations as the National Institute for Dispute Resolution (NIDR).

The Commission anticipates that the other participants will either be able to cover their own expenses through funds provided by DOE under the NWPA or through their own financial resources. The Commission is providing complete support for the operation of the negotiating committee, including funding for the professional facilitator to assist the negotiating committee in reaching consensus, funding for the training of participants on the principles of negotiation, provision of background information to the negotiating committee on the technical and legal aspects of the rulemaking, provision of

administrative support for committee operations, and provision of Commission legal and technical staff to assist the committee.

Federal Advisory Committee Act (FACA)

In accordance with the requirements of FACA, and the Commission's regulations in 10 CFR Part 7, the Commission is, by this notice, indicating its intent to charter the negotiating committee as an advisory committee. The draft charter will be reviewed by the General Services Administration (GSA) under 41 CFR Part 101-6.

In accordance with the Commission's regulations in 10 CFR Part 7, advance notice of negotiating committee meetings will be provided in the Federal Register, the meetings of the full negotiating committee will be open to the public, members of the public will be allowed to submit written statements to the committee, and detailed minutes of each meeting will be made available for public review and copying.

Committee Procedures and Meetings

Under the general guidance of the facilitator, the negotiating committee will establish detailed procedures for conducting committee meetings. To assist the committee, the facilitator is preparing draft procedures for committee review and approval. These draft procedures will address such issues as the definition of consensus and the use of working groups and caucuses.

The Commission anticipates that approximately nine two-day meetings will be required to complete the negotiating process. This series of meetings will take place over a period of nine months beginning in September 1987. Approximately one-half of the meetings will be held in Washington, D.C., and the remaining meetings will be held at regional locations. The first meeting of the negotiating committee will be organizational in nature, focusing on dates, times, locations, and procedures for future meetings. The Commission also intends to sponsor a one-day training session on the principles of negotiation for the committee as part of this first meeting. The second meeting will be devoted to familiarizing the participants with the legal and technical aspects of the rulemaking. The actual negotiating sessions would begin approximately one month after the second organizational meeting and will continue monthly thereafter through May 1988.

Notice of Proposed Rulemaking

The negotiating committee's specific objective will be to reach consensus on the terms of a notice of proposed rulemaking. To the extent that the negotiations are successful, the facilitator will prepare a report describing the basis on which the committee developed its proposals. If consensus is not reached on some issues, the report should identify the areas of consensus, the areas in which consensus could not be reached, and the reasons for non-agreement.

The Commission agrees to issue for comment any proposed rule resulting from a consensus of the negotiating committee unless the Commission finds that the proposed rule is inconsistent with its statutory authority or is not appropriately justified. In that event, the Commission would explain the reasons for its decision. Adoption of any final rule will be based on consideration of any comments received on the proposed rule and other materials constituting the rulemaking record.

Failure to Reach Consensus

The Commission anticipates that the potential for reaching consensus will be demonstrated by the conclusion of the eighth meeting of the negotiating committee (April 1988) and will dissolve the negotiating committee if it does not appear that consensus is possible. The Commission retains the discretion to dissolve the committee at an earlier time if the Commission determines that the committee's activities are not being carried out in the public interest. In the absence of consensus, the Commission has directed the NRC Staff to develop a proposed rule on an expedited basis.

Comments on the Negotiated Rulemaking

The public comments on the Commission's Federal Register Notice announcing its intent to conduct a negotiated rulemaking are summarized below. The comments have been organized into the categories of "feasibility," "participants," "funding," "consensus," "timing," and "procedural issues."

Feasibility. As noted earlier, most commenters were generally supportive of using negotiated rulemaking. However, several commenters were concerned that the Commission is focusing too much attention on meeting the NWPA three year deadline, and thereby may be sacrificing a thorough review of the license application. The Commission does not intend to sacrifice a thorough review of the DOE license application to meet the statutory deadline. The legislative intent, and the Commission's efforts to satisfy that intent, are to accomplish a thorough and effective review of the license application within the statutory time period. The Commission is pursuing various initiatives, such as the development of the LSS, to achieve this objective. The Commission emphasizes that the LSS is intended not only to facilitate the discovery process, but to provide for a comprehensive and effective review of the license application by all parties, and ultimately by the boards.

Other commenters supported the development of the LSS, and also recommended that the LSS be established as soon as possible. The Commission is working expeditiously, with DOE and all affected parties, towards the establishment of the LSS. The intent of the negotiated rulemaking is to provide for the most efficient method of establishing a credible and effective LSS. In this regard, the DOE, in its comments on the negotiated rulemaking, emphasized its commitment to coordinate the LSS design with the negotiated rulemaking and to make any changes that may be required as a result of the negotiated rulemaking.

Another commenter was concerned over the need to ensure the validity of any rule resulting from the negotiated rulemaking even though potential parties to the licensing proceeding had not participated in the negotiated rulemaking. As with any other rulemaking, the Commission will ensure that any rule resulting from the negotiated rulemaking process meets all applicable legal requirements, including the Administrative Procedure Act, 5 U.S.C. 553, requirements for notice and comment rulemaking. The Commission intends to publish any rule based on a consensus of the negotiating committee for notice and comment unless the Commission finds that the proposed rule is inconsistent with its statutory authority or is not appropriately justified. The Commission will also ensure that there is an adequate rationale for any provisions contained in such a rule. The final rule will be generally applicable to all parties to the HLW licensing proceeding within the limits of the Commission's jurisdiction, and will apply to any party to the licensing proceeding regardless of whether it participated in the negotiated rulemaking.

The Bureau of Land Management in the Department of Interior questioned the basic authority of an advisory committee to "develop rulemaking under FACA." The negotiated rulemaking mechanism has been used several times by various agencies to develop recommendations on a proposed rule. The consensus recommendations form the basis for a notice and comment rulemaking proceeding. Any such negotiating committee would constitute a committee established by an agency for the purpose of obtaining advice or recommendations on issues or policies that are within the scope of agency

responsibilities, and therefore would be subject to FACA. Thus, the Commission believes it is within the authority of the negotiating committee to provide this type of advice to the Commission.

Participants. One commenter urged the Commission to define "affected states" broadly. As is apparent from the groups invited to participate on the negotiating committee, the Commission has defined "affected states" broadly to include all first round and second round states that may be potentially affected by the siting of a repository. Another commenter requested that second round repository Indian Tribes and those Indian Tribes affected by the transportation of HLW, be represented on the committee. The Commission has invited the National Congress of American Indians to represent these Tribes. Another commenter recommended that the Commission consider participation by local groups. In addition to the Commission's original Federal Register Notice, which invited expressions of interest from local groups and other organizations, the convenor made several inquiries regarding the interest of local governments and local non-governmental groups in participating in the negotiated rulemaking. Based on the response to these inquiries, local government and local non-governmental groups have been invited to participate in the negotiated rulemaking.

An environmental public interest group stated that the negotiating committee must have more than one participant from the public interest sector. Three environmental public interest groups requested participation. In response,

the Commission has invited these three groups to participate as a coalition on the negotiating committee.

An industry group suggested that the committee have broader industry participation, e.g., the U.S. Council for Energy Awareness, a trade association, reactor vendors and other suppliers. In response to requests for participation, the Commission has invited the Edison Electric Institute and the Utility Nuclear Waste Management Group to participate in the first tier of the negotiating committee. The U.S. Council for Energy Awareness has also been invited to participate as part of the second tier of participants.

One commenter suggested that the Commission needs to select participants carefully to keep the committee balanced and manageable. The Commission agrees and, based on the convenor's report, has structured participation on the committee to ensure not only broad participation, but also a manageable number of participants.

Several commenters addressed the FACA requirement of balanced membership. One commenter was concerned that it may be impossible to achieve the FACA requirement of balanced membership because of many opposing interests. Another commenter suggested that the balanced membership requirements of FACA would best be achieved by having numerically equal representatives from energy and environmental interests, utilities and ratepayers, federal government and state/local/tribal

government. On a related point, one commenter asked how the membership on the committee would be weighted to reflect degrees of interest.

Section 5(b)(2) of FACA requires "the membership of the advisory committee to be fairly balanced in terms of the points of view to be represented and the functions to be performed by the advisory committee." 5 U.S.C. App., The courts have held that the "balanced membership" provision must be interpreted in terms of the function to be performed by the advisory committee. National Anti-Hunger Coalition v. Executive Committee of the Private Sector Survey on Cost Control, 557 F. Supp 524 (D.D.C. 1983), aff'd., 711 F.2d 1071 (D.C. Cir.1983). In regard to the LSS, the function of the advisory committee is to reach consensus on the rules governing the use of an information management system in the Commission's HLW proceeding. This directly affects the potential parties to that proceeding, and also those individuals and groups that are not parties to the HLW proceeding but who would traditionally seek access to the document data base as concerned citizens, as well as those groups who may be contributing to the cost of developing such a system. In order to ensure that the design and operation of the LSS, to the extent practicable, accommodates the needs of all those who will have to use it, the Commission extended a broad invitation to those groups. The Commission believes that this is consistent with the FACA requirements for "balanced membership," and that the composition of the committee does reflect equal representation of affected interests.

Furthermore, the groups invited to participate represent a wide spectrum of interests with different viewpoints, not only on the procedural issues of concern in this rulemaking, but also on the substantive repository siting issues. This will inevitably involve some opposing interests. However, the Commission disagrees with the commenter who suggested that the presence of opposing interests would make it "impossible" to achieve balanced membership. In fact, it may be one indication that the committee does have balanced membership. Although no formal appeal of the Commission's choice of participants is being provided, the Commission will accept comments from any group that believes its interests are not already represented on the negotiating committee. The Commission anticipates that additional requests for participation will be evaluated by the negotiating committee itself.

The Nez Perce Indian Tribe emphasized that although the Tribal representative has the full confidence of the Nez Perce, only the Tribal Executive Committee can bind the tribe. The Commission recognizes that the individual representatives of participants on the negotiating committee will need to confirm proposed consensus positions with their organization. The Commission would also take this opportunity to reiterate that it is important to the success of the negotiation for each participant to be represented by a senior individual within the organization. Although the representative will not be required to "bind" the party he or she represents in terms of making an "on the spot" commitment on any issue that may arise at a particular negotiating session, the representative must have sufficient seniority and delegated responsibility to represent authoritatively the views of the

organization. In this regard, the Commission has designated William J. Cimstead, Assistant General Counsel for Hearings, as its representative.

Funding. Two commenters suggested that the NRC provide broad funding to interested participants. Another commenter stated that the Nuclear Waste Fund established under Section 302 of the NWSA can be used for State participation. The Commission would refer these commenters to the discussion on "Funding", supra.

Consensus. One commenter suggested that the Commission consider the difficulty of reaching consensus before embarking on negotiations. Another commenter suggested that the NRC should address the nature of the consensus, including the ability of a participant to seek judicial review. Another commenter suggested that the NRC commitment to issue the consensus rule should be clear.

The Commission has considered the difficulty of reaching consensus. The Commission's intent in issuing the December 18, 1986 Federal Register Notice on negotiated rulemaking and initiating the Conservation Foundation's feasibility report was to evaluate the feasibility of reaching consensus. As noted above, based on the public comments on the Federal Register Notice, and the Conservation Foundation's feasibility report, the Commission believes that consensus is possible on at least some matters, and is proceeding with the negotiated rulemaking. As stated in the Federal Register Notice announcing the Commission's intent to negotiate, the Commission agrees to

issue for public comment any proposed rule resulting from a consensus of the negotiating committee unless the Commission finds that the proposed rule is inconsistent with its statutory authority or is not appropriately justified. Any judicial review would follow a final rulemaking on the LSS in accordance with the traditional procedures for challenging final agency rules.

Timing. A few commenters believed that eight months is too short a time for the committee to reach consensus. Other commenters believed that there should be fewer negotiating committee meetings over a shorter timeframe. Several commenters recommended that the negotiating committee be terminated if no consensus is reached by a certain date, and that the Commission be prepared to terminate the negotiating committee if the participants are using it to delay the licensing process.

The Commission believes that the time allotted for the negotiations is appropriate for the complexity of the rulemaking and the need to establish the LSS as expeditiously as possible. Although the Commission anticipates that all participants will negotiate in good faith, the Commission has stated that it retains the discretion to dissolve the committee at an earlier time if the Commission determines that the committee's activities are not being carried out in the public interest. Furthermore, considering that a time limit has been specified for achieving consensus, and that the Commission intends to proceed with a rulemaking on the LSS if consensus is not achieved, the Commission does not believe that the activities of the negotiating committee could be used to "delay the licensing process."

Procedural Issues. Several comments addressed the process of negotiated rulemaking. For example, one commenter stated that the NRC should follow notice and comment rulemaking procedures. Another comment requested that the Interagency Coordinating Committee (ICC), whose purpose was to provide a preliminary evaluation of LSS issues, be disbanded. Another commenter suggested that subcommittee meetings of the full negotiating committee be open to the public. Another commenter suggested that negotiating committee deliberations should be part of the rulemaking record. Finally, one commenter requested that parties should be able to comment on the choice of facilitator.

The Commission will follow notice and comment procedures on any proposed rule issued as a result of a consensus reached by the negotiating committee. The ICC will be disbanded. The negotiating committee will determine to what extent subcommittees will be used, and whether these meeting will be open or closed. The Commission anticipates however that all formal committee and subcommittee meetings will be open. Consistent with the need to provide an adequate rationale for any rule that is issued, the Commission intends to make the negotiating committee deliberations part of the rulemaking record. As for the choice of facilitator, it was necessary for the Commission to make its selection of the facilitator early in the negotiated rulemaking process, and, therefore, it could not invite comment on this matter.

Comments on LSS Issues

In the Federal Register Notice announcing its intent to conduct a negotiated rulemaking, the Commission identified a number of issues appropriate for

consideration by the committee. The Commission staff has prepared a background paper that summarizes the existing framework for the disclosure of documents relevant to a Commission licensing proceeding, and provides more detail on the preliminary rulemaking issues. Copies of the background paper will be provided to the groups invited to participate on the negotiating committee and will be available on request from the NRC contact listed at the beginning of this Notice. The Commission anticipates that the negotiating committee will supplement the list of preliminary issues, as appropriate. The public comments on the LSS are summarized below.

Several commenters addressed the coverage of the LSS. One commenter recommended that the LSS be limited to HLW licensing at this time. Another commenter suggested that the Commission should evaluate the implications for other Commission activities of changing the rules on privileged information, particularly insofar as they relate to drafts and handwritten annotations. Another recommended that the Commission consider whether it is appropriate to have discovery rules for the HLW proceeding different from those for other NRC licensing proceedings.

The Commission has considered the implications of the proposed revisions for other Commission licensing proceedings, and is limiting them to the HLW proceeding at this time because of the novel and complex issues involved, the volume of documents, and the statutory deadline for the Commission's

decision. However, if implementation of the LSS for the HLW proceeding is successful, the Commission may explore its feasibility for use in other types of licensing proceedings.

On a related point, one commenter recommended that the negotiating committee follow a rigid set of issues, i.e., it would be undesirable to have a wholesale rewriting of NRC adjudicatory principles. The Commission does not intend to have a "wholesale rewriting" of Commission adjudicatory principles. The preliminary issues identified by the Commission are confined to the implementation of the LSS in the HLW licensing proceeding, and any related changes that may be necessary to allow for effective operation of the LSS.

One commenter recommended that the Commission should establish an interim system as soon as feasible and that this should be an issue for discussion by the negotiating committee. The Commission recognizes the importance of establishing an interim system to ensure the capture of all relevant documents. Both the NRC and DOE are developing procedures for use in the interim period until the LSS is established. The negotiating committee will be kept informed of these efforts and the interim system will also be an appropriate issue for discussion by the negotiating committee. Any interim procedures will be revised to conform to the rule emerging from the negotiated rulemaking process.

One commenter recommended that the LSS should be evaluated to determine whether it is cost-beneficial compared to traditional procedures. Another commenter emphasized the need to consider technology and funding constraints in developing the rules for the LSS. This same commenter recommended that the committee avoid setting specific technical characteristics in order to allow DOE to obtain the best system available for the purpose to be served. Finally, another commenter recommended that the committee limit the consensus to broad guidance on requirements involving the nature and use of the LSS rather than detailed design specifications.

Although the Commission has not prepared a detailed cost/benefit analysis of the LSS, the Commission believes that the technology exists to implement the LSS at a reasonable cost. Furthermore, the Commission believes that the LSS will be more cost-effective than conducting the HLW licensing proceeding under the traditional hard copy approach. The Commission recognizes that the resolution of certain issues will be dependent on the cost and availability of the technology. These constraints will need to be considered by the negotiating committee. The Commission staff and other participants, as well as the technical and legal advisor to the facilitator, will assist the committee in determining the costs and benefits of various options. Although it may not be necessary or advisable to set detailed design specifications, the Commission believes that the resolution of some LSS issues will need to be explicit and detailed. The negotiating committee will have the responsibility for determining the extent of detail necessary. To assist the negotiating

committee in its deliberations on the level of detail needed, the Commission staff will prepare a sample regulatory text to illustrate the options available.

Several comments were submitted on the relationship of traditional discovery techniques to the LSS. A few commenters recommended that traditional discovery techniques be used in addition to the LSS and suggested that the LSS should enhance, not detract from a party's traditional rights of discovery. Another commenter believed that DOE will not provide all of the necessary information and therefore, asserted that discovery should not be eliminated. Still another commenter was concerned about whether the LSS would be the sole information base for discovery purposes. Another commenter recommended that the LSS at least provide for discovery by interrogatories and depositions. In contrast, one commenter recommended that the Commission eliminate all aspects of the traditional discovery process.

The extent of discovery under the LSS is an issue for the negotiating committee. However, the Commission would emphasize that the goal of this rulemaking is to develop an information management system that would contain all of the data supporting the DCE license application, as well as all of the potentially relevant documents generated by the NRC and other parties to the licensing proceeding, in a standardized electronic format. All parties would then have access to this system. Because all relevant information would be readily available through access to the system, the initial time-consuming interrogatory discovery process involving physical

production and on-site review of documents by parties to a NRC licensing proceeding would not be necessary.

One commenter suggested that all parties use uniform procedures for assuring the accuracy of the information submitted and that all relevant documents have been entered. On a related point, another commenter recommended that there be strong sanctions to ensure that all data is entered. Another commenter was concerned over the accuracy of information submitted and how to keep spurious documents out. One of the issues for negotiating committee consideration is what sanctions and procedures should be used to ensure the capture of all relevant documents. Another issue for committee consideration will be potential techniques for eliminating duplicative material and for minimizing the problem of "document dumping."

One commenter did not believe that privileged documents should be placed in the LSS. Another commenter recommended that there should be very little privileged information. Both the NRC Rules of Practice and the Federal Rules of Civil Procedure allow parties to claim certain privileges from discovery. The application of these privileges to the LSS, and the administration of privileged material, will be issues for discussion by the negotiating committee.

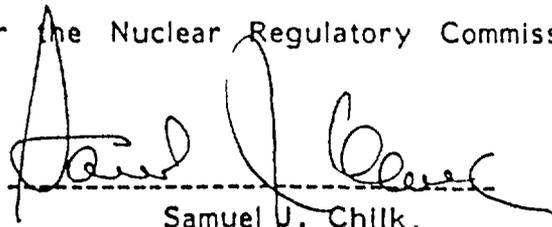
Other commenters were concerned over what type of administrative framework would be appropriate to control LSS input and output. Several commenters did not believe that DOE should develop or administer the LSS. One

commenter suggested that NRC should administer the system. The Commission recognizes the importance of this issue and has identified it as an issue for consideration by the negotiating committee.

Finally, several comments addressed the issue of access to the LSS. One commenter recommended that the Commission establish procedures to allow latecomers sufficient access to the data base. Another commenter was concerned about cost of access to the LSS for local governments, environmental groups, and concerned citizens. Another commenter recommended that access should be provided at no charge. The Commission's intent is that all parties to the HLW licensing proceeding will have access to the data base, as well as an obligation to place documents in the system. The Commission supports the principle of providing low cost and easy access to the LSS. These issues will be a subject for discussion by the negotiating committee.

Dated at Washington, D.C. this 31st day of July, 1987.

For the Nuclear Regulatory Commission.



Samuel J. Chilk,
Secretary of the Commission.