POLICY ISSUE
(Notation Vote)

October 21, 1986 SECY-86-308

For: The Commissioners

From: William C. Parler
General Counsel

Victor Stello, Jr.
Executive Director for Operations

Subject: INTENT TO FORM AN ADVISORY COMMITTEE TO NEGOTIATE A PROPOSED 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

Purpose: To notify the Commission of the progress towards the initiation of a negotiated rulemaking to develop revisions to 10 CFR Part 2 to establish the use of a centralized computer data base in the high-level waste (HLW) licensing proceeding; to seek Commission approval of the issuance of a Notice of Intent to form an advisory committee to negotiate this proposed rule

Background: Section 114(d) of the Nuclear Waste Policy Act (NWPA) provides three years, with a possible extension of 12 months, for the NRC to reach a decision on construction authorization for a high-level waste repository. In order for the NRC to be able to make its decision within the allotted time, ready access to all pertinent records must be assured to all parties in the licensing proceeding. The DOE has committed to developing an electronic information management system (the Licensing Support

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System or LSS) to provide this access to all parties to the HLW licensing proceeding. In SECY-86-133, the EDO informed the Commission of the Staff's intent to use the process of negotiated rulemaking to develop a proposed rule that would provide for the use of the LSS in the HLW licensing proceeding. This Paper informs the Commission of Staff progress on implementing the negotiated rulemaking and requests Commission approval of a Federal Register Notice indicating the Commission's intent to pursue negotiated rulemaking.

Discussion:

Need for the proposed rule Under Section 114(d)(2) of the NWPA, the NRC is required to issue a final decision approving or disapproving issuance of a construction authorization for the high-level waste repository no later than three years after the date of submittal of the DOE license application. However, the NRC could extend this deadline another 12 months for cause. If the NRC is to meet the statutory deadline for making its decision on construction authorization, specific measures must be taken to streamline the NRC review process. In SECY-86-133, the EDO informed the Commission of the Staff intent to use negotiated rulemaking to develop revisions to 10 CFR Part 2 that would establish the use of a electronic information management system in the HLW licensing proceeding as one measure to streamline the licensing process.

One of the most significant contributors to the length of licensing review has been the time associated with sending, receiving, and handling of information and data. This is true for docketed correspondence between receivers and applicants, for discovery by the production of documents and by interrogatories, and service of documents during adjudication. Current technology for electronic storage, retrieval, and mail could substantially reduce the time needed for information processing.

If the Commission is to reach its construction authorization decision within the allotted time, it will be necessary to facilitate the discovery process, as well as to reduce the time delays normally associated with the physical service of documents. Hence, the information and data supporting a DOE application should be made available to all interested parties, to the extent practicable,

before the application is submitted and formal NRC review begins. This would entail DOE development of a licensing information system that would provide ready access to all pertinent documents. The system would not involve the generation of new data, but rather, would capture in electronic form, all the data that would normally be generated relevant to the licensing decision. As such, it would serve as a means for efficient management of the information to be used in the licensing decision. To meet this intended purpose, all parties to the licensing proceeding would provide access to relevant data within their control by making it available in a standard electronic format for easy incorporation into a centralized computer data base in the licensing information system. The standardized electronic format will ensure compatibility of information and data submitted by parties to the licensing hearing. It would also eliminate the need to re-key information and data into an NRC-accessible system. The compatible information and data would then be accessible to all interested parties (States, Tribes, and others).

The Staff proposes to implement this process through a rulemaking which would require that all parties to the high-level waste licensing proceeding place all of their relevant documents in the data base and to use the licensing information data base as the sole information base for discovery purposes. Because all relevant licensing information would already be available through access to the LSS, this type of process would eliminate the traditional filing of first round discovery requests and the accompanying search times by the party from whom the records were requested. It would also eliminate the mailing time associated with the request and the response and eliminate, or reduce, requests for extensions of time because documents were not provided or because adequate search time was not available. Furthermore, it will ensure, to the extent practicable, the availability of data at the earliest possible time, thereby facilitating the early resolution of licensing issues. The rulemaking would establish provisions to ensure that the administration of the system would be under the control of a neutral party or for appropriate safeguards to eliminate any potential for tampering with the system.

Concept of negotiated rulemaking The development of the proposed rule that would revise the Commission's discovery procedures and motion practice in 10 CFR Part 2 for the high-level waste licensing proceeding would be accomplished through the process of negotiated rulemaking. In negotiated rulemaking, the representatives of parties who may be affected by the rulemaking, including the agency, convene as a group over a period of time to try to achieve consensus on the rulemaking issues. The agency represents one essential party in the negotiation, with the same rights and responsibilities as any other party. If the negotiating committee does reach a consensus, the committee prepares a report to the agency containing the proposed rule. The agency would then use the consensus report as a basis for a notice of proposed rulemaking. The consensus is the basis for the proposed rule published for public comment, not the final rule. The agency retains the responsibility to develop the final rule on the basis of notice and comment procedures. If consensus is not achieved within the agency-specified timeframe, the agency would then proceed to develop the rule on its own, through the traditional rulemaking process.

Negotiated rulemaking offers an opportunity for comprehensive treatment of the issues and creative solutions because all those with ideas on how to solve the problem are present at the discussions and can react directly to each others concerns and positions. It will be particularly important in this rulemaking for all affected parties to communicate directly on a uniform and compatible set of system requirements because of the diverse information systems now in use by these parties. In addition, because the intervenors in the HLW licensing proceeding may possess substantial research data, it is important that they participate fully in the licensing information management system. Negotiated rulemaking will encourage this participation.

Participation by affected interests in the development of the proposed rule will be important in terms of the credibility of the information management system, i.e. the belief that all relevant documents have been entered and that the system is secure from tampering. In this respect, negotiated rulemaking should increase the acceptability and enforceability of the rule. Affected interests will be less

likely to resist its enforcement, lobby against its implementation, or challenge it in court.

In the time since the EDO forwarded SECY-86-133 to the Commission, the Staff has further evaluated the negotiated rulemaking concept, and has drafted a Federal Register Notice on the Commission's intent to conduct a negotiated rulemaking for the Commission's review and approval. (Enclosure 1). The Staff efforts in this regard, and the major issues for the Commission's consideration follow.

Experience of other Federal Agencies This would be the NRC's first experience with the use of negotiated rulemaking. Its use, in appropriate situations, has been encouraged by the Administrative Conference of the United States (ACUS). The Environmental Protection Agency (EPA), Federal Aviation Administration (FAA), and Occupational Safety and Health Administration (OSHA) have completed four regulatory negotiations. The two negotiated rulemakings completed by EPA and the one completed by FAA were successful. The ACUS has reviewed these attempts and has found that its initial endorsement of regulatory negotiation was sound. The EPA and the Federal Trade Commission (FTC) are currently in the process of conducting negotiated rulemakings.

The Staff has had several discussions with representatives of the EPA, FAA, and the FTC. In addition to providing support for the use of negotiated rulemaking, these discussions have provided useful information for constructing the framework for the Commission's negotiated rulemaking effort.

Convenor/Facilitator Most negotiated rulemakings to date have used both a "convener" and a "facilitator/mediator" ("facilitator"). The convener develops a feasibility analysis of the negotiation, i.e., identifying what parties and interests will be affected, what issues are likely to be raised, and whether the parties believe it is in their best interests to negotiate. The role of convener should be distinguished from the role of facilitator, although one person or organization can fulfill both roles.

The facilitator serves as the chairman of the negotiating committee and has the responsibility of keeping the

discussion going and the committee moving toward consensus. This position requires the ability to get along with people, an awareness of group dynamics and the ability to move a group toward closure on negotiated issues. In addition, the facilitator must be independent and rigorously neutral in terms of the subject matter of the negotiation.

After evaluating several alternatives for the procurement of convenor/facilitator contracting services, the Staff is pursuing the use of the contractor available through the Council on Environmental Quality (CEQ). In April 1986, CEQ issued a Request for Proposals (RFP) for government-wide support in the area of negotiated rulemaking. The RFP requested bids in any or all of seven support areas (convening, facilitating, documenting, resource support, analytic support, training support, and direct support). The contractor selected by CEQ would be available to all Federal agencies for use in various negotiated rulemaking activities. A requesting agency would issue a task order, through CEQ, to the contractor. The contractor would then develop a work plan and cost estimate for agency review and approval. The agency would then transfer the requisite funds to CEQ. CEQ has received three proposals in response to the RFP. These proposals were evaluated by CEQ and several interested agencies, including the NRC. As a result of the contract review process, CEQ has awarded the negotiated rulemaking services contract to the Conservation Foundation. The Conservation Foundation has had extensive experience in multi-party dispute resolution, including negotiated rulemaking. The resources available to the Foundation include experts in all aspects of negotiated rulemaking. In addition, support services are provided through a subcontract with TechLaw, a firm with experience in designing information management systems for complex litigation, a relevant area for the Commission's negotiated rulemaking.

The Staff has prepared the documents that define the nature and extent of the services desired by the Commission from the Conservation Foundation, and is in the process of beginning negotiations on the contract. It is anticipated that the Foundation would primarily provide support to the Commission in the areas of convening, facilitating, training and information. The Conservation Foundation's first task would be to prepare a feasibility analysis of the

proposed negotiation. This would involve making inquiries among a broad range of parties to determine (1) whether representatives of essential interests would agree to participate in the negotiated rulemaking process, (2) the specific individuals who might represent those interests, (3) the preliminary scope of issues to be addressed, and (4) the timetable for the negotiating process. The Conservation Foundation's analysis of the feasibility of the negotiated rulemaking, as well as the comments received in response to the Federal Register Notice of Intent to negotiate, will be available to assist the Commission in making the final decision on whether to proceed with the negotiated rulemaking.

Potential Participants The Staff has had several preliminary discussions on the LSS and negotiated rulemaking with several of the major parties that would be potentially affected by the rulemaking. This has included DOE and those parties having special interests under the NWPA -- States and Tribal governments. Interest groups have also been approached about these concepts. As noted previously, the Conservation Foundation will be making further inquiries among the various interests as part of the Foundation's convening responsibilities.

In this particular rulemaking, the potential interests affected will be Indian Tribes, State governments, local governments, and interest groups affected by the siting of the repository or the transporation of HLW to the repository, rate payers, utilities, and Federal government agencies, including the Commission. The potential participants on the negotiating committee could include individual States, Tribes, and interest groups, or an organization that represents members of a particular class, for example the National Association of Regulatory Utility Commissioners or the Utility Nuclear Waste Management Group. Although the ACUS recommends fifteen (15) members as an optimum size for the negotiating committee, negotiated rulemakings have been sucessfully conducted with as many as twenty-five (25) members. However it is important to restrict the committee to a manageable size in order to facilitate the efficiency and sucess of the negotiation.

The Federal Register Notice announcing the Commission's intent to conduct a negotiated rulemaking includes a preliminary identification of potentially affected interests. In addition, the Notice invites requests for participation. Participants would then be selected by the Commission based on the extent of their direct and immediate stake in the rulemaking, whether they may be adequately represented by another party on the committee, and whether participation is essential to a successful negotiation.

Agency Representative It is important that senior officials within each party participating in the negotiation, including the NRC, be designated to represent that party. Although the individual representative will not be required to "bind" the interest 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 sufficent seniority and delegated responsibility to authoritatively represent the views of the party.

The Staff recommends that the Commission approve the appointment of William J. Olmstead, Assistant General Counsel for Rulemaking and Fuel Cycle, as the Commission's representative on the negotiating committee. Not only do Mr. Olmstead's responsibilities include all rulemakings in the areas of high-level waste and the Commission's rules of practice, but Mr. Olmstead has considerable experience with the NRC adjudicatory process, and substantial knowledge of the legal and technical aspects of the use of computers in the legal process. The Staff recommends that the Commission delegate full authority to Mr. Olmstead to represent the Commission's position at the negotiating sessions. Mr. Olmstead will periodically brief the Commission on the progress of the negotiations. He will be supported by a negotiating team composed of representatives from NMSS, the staff of the Assistant General Counsel for Hearings in OGC, and the Atomic Safety and Licensing Board Panel. Staff support for the negotiating team will be provided by the Rulemaking and Fuel Cycle Division, OGC, and the Policy and Program Control Branch, Division of Waste Mangement, NMSS, with assistance, as appropriate, from the Office of State Programs.

In order to separate the implementation of negotiating committee activities as much as practicable from those NRC offices that have a substantive interest in the rulemaking, the Rules and Procedures Branch, Division of Rules and Records, ADM, will be responsible for coordinating the administrative details of negotiating committee activities, including interaction with the facilitator. In order to carry out this function, John Philips, Chief of the Rules and Records Branch, will serve as the designated Federal Officer for the advisory committee under the Commission's regulations in 10 CFR 7.10.

In addition to delegating sufficient authority to its representative on the negotiating committee, the Staff recommends that the Commission commit in advance to using, as much as is practicable, any consensus reached by the committee as a basis for a notice of proposed rulemaking. The absence of such an advance commitment might undermine the negotiating process because of the fear that the Commission could arbitrarily refuse to use the consensus develcped by the negotiating committee. The approach recommended by the Staff is for the Commission to agree to use the consensus unless the agency finds that it is inconsistent with statutory requirements or it is not appropriately justified.

Federal Advisory Committee Charter In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App.I, the Commission is required to charter the negotiating committee as an advisory committee. After Commission review and approval, The draft charter (Enclosure 2) will be submitted to the General Services Administration (GSA) for their review under 41 CFR Part 101-6.

In line with the GSA guideline that it is the responsibility of each agency to make a good faith effort to meet its advisory committeee membership requirements on a noncompensated basis, the Commission is not providing any direct funding to the individual members on the negotiating committee. 41 C.F.R. §101-6.1033. Another consideration that mitigates against compensating individual participants on the negotiating committee is the potential applicability of the provision contained in several NRC appropriations acts which prohibit the Commission from compensating

"...parties intervening in regulatory or adjudicatory proceedings". Energy and Water Development Appropriations Act, Pub. L. No. 97-88, §502, 95 Stat. 1135, 1146. In addition, most of the major participants on the negotiating committee will either be able to use funds provided by DOE under the NWPA or are financially capable of covering their own expenses. The Staff recommendation to not provide direct support to individual participants is consistent with the practice followed by the FAA, and the FTC, in their negotiated rulemakings. For those exceptional cases where a group would not be able to participate without some financial assistance, the Commission could choose to employ the technique used in the FTC negotiated rulemaking, where the convenor arranges funding for exceptional cases through a nonprofit organization.

The Commission is providing complete support for the operation of the committee including funding for a professional convenor/facilitator to assist the negotiating committee in reaching consensus, funding for the training of committee 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 all logistical and administrative support for committee operations, and provision of Commission legal and technical staff to assist the committee.

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 generally 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 recorded and available for public review and copying.

Schedule The Staff anticipates that approximately nine two-day meetings will be required to fully implement the negotiating process for this rulemaking. This series of meetings will take place over a period of nine months beginning in early 1987. Approximately one-half of the meetings will be held in Washington D.C. and the remaining meetings will be held at regional locations. Negotiations will begin in approximately April 1987.

Licensing Support System NRC is participating with DOE on an Interagency Coordinating Committee (ICC) whose purpose is to provide a preliminary evaluation of the major issues related to the development and implementation of the LSS. The ICC has met several times, with the assistance and participation of the States, Indian Tribes, and the public. Much of the planning and background information developed by the ICC will be useful to the negotiating committee in developing the final recommendations on the use of the LSS in the Commission's HLW licensing process. In this regard, a major concern of the States and Tribes is that DOE, on its own initiative, or through the ICC, will have already made critical decisions on the development of the LSS, leaving nothing to negotiate in the negotiated rulemaking. As emphasized in the Federal Register Notice, the use of the LSS, and any related design issues, will ultimately be dictated by the Commission's rulemaking on this issue, whether the rule is developed through the negotiated rulemaking process or by the Commission on its own initiative. Although the ICC, with the participation of the States and Tribes, will allow DOE to begin planning the development of the system in the period during which the negotiating committee is being constituted, the ultimate decision on the nature of the system and its use will be made within the context of the Commission's rulemaking, with the negotiated rulemaking as the first step in that process.

Recommendations: That the Commission approve:

1. the Federal Register Notice on the Commission's intent to conduct a negotiated rulemaking (Enclosure 1).

2. the FACA Charter for the negotiating committee (Enclosure 2).

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General Counsel

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Executive Director for Operations

Enclosures:
1. Federal Register Notice
2. FACA Charter

Commissioners' comments or consent should be provided directly to SECY by c.o.b. November 5, 1986.

Commission staff office comments, if any, should be submitted to the Commissioners NLT October 29, 1986, with an information copy to SECY. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Enclosure 1

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;INTENT TO FORM AN ADVISORY COMMITTEE FOR NEGOTIATED RULEMAKING

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of intent to form an advisory committee to negotiate a proposed rule.

SUMMARY: The Nuclear Regulatory Commission is considering formation of an advisory committee under the Federal Advisory Committee Act, to develop recommendations for revision of the Commission's discovery rules, and selected other 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 would 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 would be composed of organizations representing the major interests affected by the rule. This notice provides a preliminary identification of interests that may be represented on the committee, and the issues that the committee may consider. The notice also invites public comment on potential participation on the committee and on the rulemaking issues identified for negotiation.

DATE: Submit comments by [60 days after publication]. Comments received after this date will be considered only if it is practical to do so.

ADDRESSES: Send comments to the Secretary, U.S. Nuclear Regulatory Commission, Washington D.C. 20555, Attn: Docketing and Service Branch.

FOR FURTHER INFORMATION CONTACT:

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Kenneth L. Kalman, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington D.C. 20555, Telephone: 301-427-4071.

SUPPLEMENTARY INFORMATION:

Background

Under Section 114(d)(2) of the NWPA, the NRC is required to issue a final decision approving or disapproving issuance of a construction authorization for the high-level waste repository no later than three years after the date of submittal of the DOE license application, with a possible extension of twelve months for good cause. If the NRC is to meet the statutory deadline for making its decision on construction authorization, specific measures must be taken to streamline the NRC review process. One such measure is the development of an electronic information management system to provide parties to the licensing proceeding with ready access to all relevant documents.

One of the most significant contributors to the length of licensing review has been the time associated with sending, receiving, and handling of information and data. This is true for docketed correspondence between receivers and applicants, for discovery by the production of documents and by interrogatories, and service of documents during adjudication. Current technology for electronic storage, retrieval, and mail could substantially reduce the time needed for information processing.

If the Commission is to reach its construction authorization decision within the allotted time, it will be necessary to facilitate the discovery process, as well as to reduce the delay normally associated with the physical service of documents. Hence, the information and data supporting a DOE application should be made available to all interested parties before the application is submitted and formal NRC review begins. This would entail DOE development of a licensing information system that would provide ready access to all pertinent documents. The system would not involve the generation of new data, but rather, would capture in electronic form, all the data that would normally be generated relevant to the licensing decision. As such, it would serve as a means for efficient management of the information to be used in the licensing decision.

To meet this intended purpose, all parties to the licensing proceeding would provide access to all relevant data within their control by making it available in a standard electronic format for easy incorporation into a centralized computer data base in the licensing information system. Appropriate safeguards would have to be provided and a "no access" file for privileged data would have to be created. All parties, as well as interested State, local, and tribal governments would then have open access to the licensing information system, with the exception of data in the privileged file. Commission requirements for system performance are that ready access to the system would be available at minimal cost to the user. The Commission proposes to implement this process through a rulemaking which would require all parties to the high-level waste licensing proceeding to place all of their relevant documents in the data base and to use the licensing information data base as the sole information base for discovery purposes.

Because all relevant licensing information would already be available through access to the information management system, this type of process would eliminate the traditional filing of first round discovery requests and accompanying search times by the party from whom the records were requested. It would also eliminate the mailing time associated with the request and the response, and would eliminate or reduce requests for extensions of time because documents were not provided or because adequate search time was not available. Furthermore, it will ensure, to the extent practicable, the availability of data at the earliest possible time, thereby facilitating the early resolution of licensing issues.

To ensure that the information and data are readily available to all participants, NRC staff believes that the DOE license application and all records relevant to the application should be submitted in a standardized electronic format. The standardized electronic format will ensure compatibility of information and data submitted by parties to the licensing hearing. It would also eliminate the need to re-key information and data into an NRC-accessible system. The compatible information and data would then be accessible to all interested parties (States, Tribes, and others).

In agreement with DOE, NRC will carry out a pilot project to demonstrate document storage and retrieval capabilities and to develop processes that could lead to an interim system for use within the NRC (and possibly by others) until the DOE's full information management system, formally known as the Licensing Support System (LSS) is implemented. The experience gained from the pilot project will be made available to DOE for use in expediting the definition of requirements for the LSS.

In addition, NRC is participating with DOE on an Interagency Coordinating Committee (ICC) whose purpose is to provide a preliminary evaluation of the major issues related to the development and implementation of the LSS. The ICC has met several times, with the assistance and participation of States, Indian Tribes, and the public. Much of the planning and background information developed by the ICC will be useful to the negotiating committee in developing the final recommendations on the use of the LSS in the Commission's HLW licensing process. However, the Commission emphasizes that the use of the LSS in the Commission's licensing proceeding, and any related design issues, will ultimately be dictated by the Commission's rulemaking on this issue, whether the rule is developed through the negotiated rulemaking process or by the Commission on its own initiative. Although the ICC, with the participation of the States and Tribes, will allow DOE to begin planning the development of the system in the period during which the negotiating committee is being constituted, the ultimate decision on the nature of the system and its use will be made within the context of the Commission's rulemaking, with the negotiated rulemaking as the first step in that process.

The Negotiated Rulemaking Process

The Commission intends to use the process of "negotiated rulemaking" to develop the proposed rule that would revise the Commission's discovery procedures and motion practice in 10 CFR Part 2 for the high-level waste licensing proceeding. In negotiated rulemaking, the representatives of parties who may be affected by a rulemaking, including the agency, convene as a group over a period of time to try to achieve consensus on the rulemaking issues. The agency represents one essential party in the negotiation, with the same rights and responsibilites as any other party. If the negotiating committee does reach a consensus, the committee prepares a report to the agency containing the proposed rule. The agency would then use the consensus report as a basis for a notice of proposed rulemaking. The consensus is the basis for the proposed rule published for public comment, not the final rule. The agency retains the responsibility to develop the final rule on the basis of notice and comment procedures. If the negotiating committee cannot reach consensus, the Commission will proceed to develop the rule on its own.

Negotiated rulemaking offers an opportunity for comprehensive treatment of the issues and creative solutions because all those with ideas on how to solve the problem are present at the discussions and can react directly to each others concerns and positions. It will be particularly important in this rulemaking for all affected parties to communicate directly on a set of uniform and compatible system requirements because of the diverse information systems now in use by these parties. In addition, because the intervenors in the HLW licensing proceeding may possess substantial research data, it is important that they participate fully in the licensing information management system. The Commission believes that negotiated rulemaking will encourage this participation.

Participation by affected interests in the development of the proposed rule will be important in terms of the credibility of the information management system, i.e., the belief that all relevant documents have been entered and that the system is secure from tampering. In this respect, negotiated rulemaking should increase the acceptability and enforceability of the rule. Affected interests will be less likely to resist its enforcement, lobby against its implementation, or challenge it in court.

Negotiated rulemaking has been used successfully by other agencies, and the Commission believes that it is appropriate to use this technique to develop the rulemaking on the HLW licensing information system. This particular rulemaking involves the resolution of many issues, such as what data should be entered into the system, how to ensure that all relevant documents are entered, what types of data will be privileged, security and access issues, sanctions for withholding data, and appropriate modification of the discovery rules. These issues must be resolved to the satisfaction of all affected interests to ensure that the benefits of the rulemaking are achieved. The likelihood of developing a consensus in this area is high because of the mutual benefits that could be realized by all parties.

This would be the Commission's first experience with negotiated rulemaking. Its use, in appropriate situations, has been encouraged by the Administrative Conference of the United States (ACUS). See ACUS Recommendation 82-4 and 85-5. The Environmental Protection Agency (EPA), and the Federal Aviation Administration (FAA) have completed sucessful negotiated rulemakings. The ACUS has reviewed these attempts and concluded that its endorsement of negotiated rulemaking was sound.

1. Feasibility

The NRC staff has had preliminary discussions on the development and use of an electronic information management system in the HLW licensing proceeding, and on the possibility of using negotiated rulemaking to institute this system, with many of the parties that would be potentially affected by the rulemaking. This has included DOE and those having special interests under the NWPA -- the States and Tribes. Interest groups have also been approached. The professional mediators that the Commisssion has engaged to conduct the negotiated rulemaking will make further inquiries among a broad range of parties to determine (1) whether representatives of essential parties would agree to participate in the negotiated rulemaking process, (2) the specific individuals who might represent those parties, (3) the preliminary scope of the issues to be addressed, and (4) the timetable for the negotiating process.

On the basis of preliminary analysis and inquiries, the Commission believes negotiated rulemaking is a feasible mechanism for developing the proposed rule. However, the professional mediators will be further evaluating the feasibility of using the negotiated rulemaking process, and their report, as well as any comments submitted in response to this Notice, will be considered before the Commission proceeds with the negotiated rulemaking.

2. Convenor/Facilitators

Under the umbrella of the Council on Environmental Quality contract for negotiated rulemaking services, the Commission has employed the Conservation Foundation of Washington, D.C., to oversee the negotiated rulemaking process. Gail Bingham, Senior Associate of the Foundation will act as Project Manager for the negotiation. The Conservation Foundation negotiating team has had extensive experience in multi-party dispute resolution, including experience in negotiated rulemaking. The Conservation Foundation negotiating team has not had any prior involvement with the substantive content of this particular rulemaking.

As noted above, the Conservation Foundation, in the exercise of its responsibilities as convenor, will be contacting potential participants on the negotiating committee, and will prepare a feasibility analysis of the negotiation for the Commission's consideration. The facilitator from the Conservation Foundation will chair the negotiating sessions, assist individual

parties in forming and presenting their positions, and offer suggestions and alternatives that would help the negotiating committee reach consensus.

3. Participants

The Commission has identified several interests that may be affected by this particular rulemaking. These interests include--

- the NRC as the sponsoring agency
- the Department of Energy
- States potentially affected by the siting of the repository
- Indian Tribes potentially affected by the siting of the repository
- local governments potentially affected by the siting of the repository
- national environmental interest groups potentially affected by the siting of the repository
- national energy development interest groups potentially affected by the siting of the repository or
- local environmental interest groups potentially affected by the siting of the repository
- local energy development interest groups potentially affected by the siting of the repository
- States, Tribal governments, and local governments potentially affected by the transportation of HLW
- ratepayers, represented by the National Association of Regulatory Utility Commissioners, or a similar association
- utilties, represented by the Utility Nuclear Waste Management Group, or a similar association

Although not all of these parties may actually participate in the Commission's HLW licensing proceeding, they all have an interest in the efficiency and adequacy of the process that the Commission uses to ultimately arrive at a final decision on the DOE license application. These interests could be represented by several parties acting in their individual capacities, or by a single party representing several groups in a particular class. The Commission will make a final determination on the identity of the parties that will participate in the negotiated rulemaking based on the convenor's report and the comments received in response to this notice.

The Commission will consider parties for membership on the basis of (1) their 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 does not believe that every individual or group actually or potentially affected by this rulemaking must have its own member on the committee. Rather it is sufficient if each major interest affected by the rule is adequately represented on the committee. The Commission also anticipates that particular groups or individuals may choose not to participate because they believe that the effects of the rulemaking on their interests are limited or speculative, or because they are already adequately represented on the negotiating committee. For example, with the DOE deferral of the site-specific aspects of the second repository program, many "second round" States and Indian Tribes may feel that their interests on the negotiating committee are adequately represented by participation of the "first round" States and Indian Tribes. In addition, to keep the negotiating committee at a manageable size, the Commission may need to consolidate the participation of "second round" States and Indian Tribes in light of the DOE deferral of a site-specific second repository program. However, the Commission welcomes expressions of interest from all potentially affected groups, including those whose stake in the rulemaking may only be speculative at this point. Requests for representation must be made in writing by the date appearing in the notice.

It is important that the negotiating committee be kept to a manageable size in order to maximize the efficient operation of the committee and the chances for success. The ACUS has recommended 15 members as an optimum size, but negotiated rulemakings have also been sucessfully conducted with as many as 25 committee members. The Commission anticipates proceeding with the negotiation if a substantial number of essential interests are willing to participate. Any individual or group not sitting as a member of the committee, and the public generally, will be provided with an opportunity to comment on any proposed rule developed as a result of the negotiating process. In addition, non-parties will also have an opportunity to attend the meetings of the negotiating committee, and to submit information to the negotiating committee, under the Federal Advisory Committee Act.

4. Qualifications of Representatives

Participants on the negotiating committee must be willing to negotiate in good faith. In this regard, it is important that senior individuals within each party participating in the negotiation, including the NRC, be designated to represent that party. The Commission has designated William J. Olmstead, Assistant General Counsel for Rulemaking and Fuel Cycle, as its representative. Although the individual 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 authoritatively represent the views of the party.

5. Federal Advisory Committee Act

In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App.I, 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 submitted to the General Services Administration (GSA) for its review under 41 CFR Part 101-6.

In line with the GSA guideline that it is the responsibility of each agency to make a good faith effort to meet its advisory committeee membership requirements on a noncompensated basis, 41 CFR §101-6.1033, the Commission is not providing any direct funding to the individual members on the negotiating committee. The Commission anticipates that the parties to the negotiation will either be able to cover expenses through funds provided by DOE under the NWPA or will be financially capable of covering their own expenses. In exceptional cases, where an essential group will be unable to participate due to the lack of funds, the Commission will have the convenor for the negotiation attempt to arrange funding through a nonprofit organization.

The Commission is providing complete support for the operation of the committee, including funding for a professional convenor/facilitator to assist the negotiating committee in reaching consensus, funding for the training of particpants on the principles of negotiation, provision of background information to the negotiating committee on the technical and legal aspects of the rulemaking, provision of all logistical and administrative support for committee operations, and provision of Commission legal and technical staff to assist the committee.

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 generally 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 recorded and available for public review and copying.

6. Committee Procedures and Meetings

Under the general guidance of the convenor/facilitator, the committee will establish detailed procedures for conducting committee meetings. To assist the committee, the convenor/facilitator is preparing draft procedures for committee review. These draft procedures 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 fully implement the negotiating process for this rulemaking. This series of meetings will take place over a period of nine months beginning in early 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. Negotiating sessions would begin approximately one month after the initial organizational meeting and continue monthly thereafter. The Commission is prepared to provide detailed information to the negotiating committee on the legal and technical aspects of the rulemaking during the inital sessions.

7. 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 sucessful, the committee will prepare a report describing the factual basis on which the committee developed its proposals. The Commission will provide drafting assistance to the committee in this regard. 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 any proposed rule prepared by 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.

8. Failure to Reach Consensus

The Commission plans to dissolve the negotiating committee if the participants do not reach consensus within eight months after the first committee meeting. 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. If the negotiating committee is unable to reach consensus on any of the issues raised for discussion, the committee will prepare a report identifying the reasons for failure to achieve consensus. In the absence of consensus, the Commission has directed the NRC Staff to develop a proposed rule on an expedited basis.

9. Issues for Negotiation

The Commission has identified a number of issues appropriate for consideration by the committee. The convenor/facilitators will also be soliciting the views of potential parties on additional issues that may be appropriate for discussion. In addition, the Commission invites any interested person to suggest issues relevant to this rulemaking. The Commission anticipates that additional issues will be considered by the committee as they arise.
The following is a preliminary list of issues and is not intended to be a rigid agenda for the committee's deliberations--

- What categories of information will be relevant to the HLW licensing decision, and therefore should be placed in the LSS ?
- What timeframe should be used for the identification of relevant documents ?
- How should drafts, handwritten notes, and handwritten annotations be handled?
- What rules should apply to privileged information, i.e. what documents are privileged and at what point in time should they be placed in the LSS?
- At what time will parties, or potential parties, to the licensing proceeding be required to enter documents into the LSS ? How can the early entry of data be encouraged?
- What organization will be responsible for administering the LSS?
- What procedures should be established to ensure that all relevant documents are entered into the LSS ?
- What procedures will apply to any documents that are incorrectly excluded from the LSS ?
- What measures, including sanctions, will be used to ensure that all relevant documents are entered into the LSS ?
- How will the authentication of documents be handled?
- What security measures are necessary to protect the information in the LSS ?
- What format should be used for the entry of documents into the LSS ?
- Should all documents be entered in full text?
- Where will system access terminals be located and what types of assistance will be available on using the system ?
- How will the electronic submission of documents be handled?

FINAL NOTICE

After evaluating the comments on this announcement, including requests for representation on the committee, the Commission will make a determination on

whether to establish a negotiating committee under the Federal Advisory Committee Act. If the Commission decides that a committee should be formed, the Commission will announce its decision in the Federal Register.

Dated at Washington, D.C. this
day of , 1986.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission.

Enclosure 2

U.S. NUCLEAR REGULATORY COMMISSION

CHARTER

NEGOTIATED RULEMAKING ADVISORY COMMITTEE

FOR

THE U.S. NUCLEAR REGULATORY COMMISSION'S RULEMAKING ON THE SUBMISSION AND MANAGEMENT OF RECORDS AND DOCUMENTS RELATED TO THE LICENSING OF A GEOLOGIC REPOSITORY FOR THE DISPOSAL OF HIGH-LEVEL WASTE

PURPOSE. This Charter establishes the Negotiated Rulemaking Advisory Committee for the Nuclear Regulatory Commission's (NRC) rulemaking on the submission and management of records and documents related to the licensing of a geologic repository for the disposal of high-level waste and sets forth guidelines for its operation.

SCOPE AND OBJECTIVES. The Committee shall advise the NRC on a rulemaking to be conducted by the NRC to revise the Commission's discovery rules, and other rules of practice, relating to the adjudicatory proceeding for the issuance of a license for a geologic repository for the disposal of high-level radioactive waste. The Committee shall develop, using a negotiation process, a report, including a recommended rulemaking proposal, to improve those regulatory requirements. The report will form the basis for an NRC Notice of Proposed Rulemaking (NPRM), which will be published for public comment. The report will also be placed in the public docket for the rulemaking proceeding. The Committee shall act solely in an advisory capacity to the NRC and shall not exercise program management responsibility nor make decisions directly affecting the matters on which it provides advice.

DUTIES. The Committee shall be responsive to specific assignments made by the Sponsor.

DURATION. Until completion of the proposed subject rulemaking or until the expiration of this charter, whichever occurs first.

SPONSOR AND OFFICE OF SUPPORT. Mr. John Philips, Chief, Rules and Procedures Branch, Office of Administration, NRC, shall be the Sponsor. The NRC offices of General Counsel, Nuclear Material Safety and Safeguards, and Administration, shall furnish support services.

ESTIMATED ANNUAL COST. $80,000 and 3.6 work-years.

MEMBERSHIP. The Committee shall consist of approximately 15, but no more than 25, members appointed by the Commission. The Committee shall be comprised of persons who represent the interests affected by the Commission's high-level waste licensing proceeding, including persons representing States, Indian Tribes, public interest groups, ratepayers, and utilities.

OFFICERS. The facilitator from the Conservation Foundation, the Commission's contractor for the negotiated rulemaking, shall serve as Chairperson of the Committee. Mr. John Philips, Chief, Rules and Procedures Branch, Office of Administration, NRC, shall serve as Executive Secretary of the Committee. The Sponsor may designate other officers as needed.

MEETINGS. The Committee shall meet at the call of the Executive Secretary, who also may terminate a meeting.

COMPENSATION FOR MEMBERS. The members shall receive neither salary compensation or expense reimbursement for service on the Committee.

SUBCOMMITTEES. The Sponsor is authorized to establish subcommittees from among the membership.

FILING DATE. [Insert date submitted to GSA]. This is the effective date of this Charter, which will expire two years form this date unless sooner terminated or extended.