



June 9, 1987

**RULEMAKING ISSUE**  
(Notation Vote)

SECY-87-140

For: The Commissioners

From: William C. Parler  
General Counsel

Subject: FORMATION OF 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 seek Commission approval of a Federal Register Notice establishing an advisory committee to negotiate a proposed rule on the use of an electronic information management system in the high-level waste (HLW) licensing proceeding.

Summary: Section 114(d) of the Nuclear Waste Policy Act (NWPA) provides three years, with a possible extension of 12 months, for the Nuclear Regulatory Commission to reach a decision on a construction authorization for a high-level waste repository. In order for the NRC to be able to make this decision within the allotted time, ready access to all pertinent records must be assured to all parties in the licensing proceeding. The Department of Energy has committed to develop an electronic information management system (the Licensing Support System or LSS) to provide this access to all parties to the HLW licensing proceeding. In SECY-86-308, the Commission approved the issuance of a Federal Register Notice announcing its 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 public comments on that Notice, provides an evaluation of the feasibility of proceeding with the negotiated rulemaking, and requests Commission approval of a Federal Register Notice establishing an advisory committee to pursue negotiated rulemaking. (Enclosure A).

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Discussion:

Need for the proposed rule. Section 114(d) of the Nuclear Waste Policy Act requires the Commission to issue a final decision on the issuance of a construction authorization for the repository within three years after DOE submits the license application (with a one year extension for cause). In order to meet this schedule, and to provide for the most effective review of the license application by the Commission and other parties, it will be necessary for the Commission to initiate specific 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 HLW licensing proceeding, to the extent practicable, in advance of the submission of the DOE license application and the start of the three year statutory time period;
- 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 has indicated its intent to develop this rule through the process of negotiated rulemaking. In negotiated rulemaking, the representatives of parties who may be affected by a rule, including the agency, 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 develops after traditional notice and comment procedures. The agency, 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 Staff 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 the HLW licensing 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 Fed. Reg. 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 Conservation Foundation, a nonprofit organization with expertise in the area of mediation and negotiated rulemaking, was retained to assist the Commission in conducting the negotiated rulemaking. 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. (Enclosure B).

Feasibility. The Conservation Foundation recommended that the Commission proceed with the negotiated rulemaking. In its feasibility report, 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 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 on both sides of the repository siting issue, expressed support for the LSS. In addition, the Conservation Foundation concluded that the substantive LSS implementation issues are feasible for negotiation.

Based on the Conservation Foundation feasibility report and the public comments, the Commission should proceed with the negotiated rulemaking.

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 the siting of a repository, utilities, ratepayers, and Federal agencies, such as 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. This would limit the number of committee members, and therefore facilitate reaching consensus, but at the same time would maximize broad and inclusive participation. In the first tier would be committee "members" i.e., those participants whose views will constitute any consensus or disagreement. This first tier would include not only individuals acting as representatives of a single party but also individuals acting as representatives of a coalition of parties. A coalition would collectively hold only 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.

Based on the public comments and the Conservation Foundation's feasibility report, the Commission should invite the following groups 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) 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 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. The Conservation Foundation believes that all of the parties recommended for first tier participants will agree to participate in the negotiations. After Commission review and approval of the draft Federal Register Notice, the Conservation Foundation will send letters of invitation to the first and second tier participants.

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 affected tribes or states not included as a named member of the coalitions in the first tier of committee membership, to participate as second tier members of the committee. The Federal Register Notice extends this invitation.

As with the meetings of any advisory committee chartered under the Federal Advisory Committee Act (FACA), the meetings of the negotiating committee 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. In addition, 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.

Convenor/Facilitators. The Conservation 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), technical support to the negotiating committee on the rulemaking issues, and administrative support.

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. The Conservation Foundation will submit bimonthly reports to the NRC on the progress of the negotiations.

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 Conservation Foundation advised that the Committee will not provide a representative sample of LSS users if such groups 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.

As the Commission stated in the Federal Register Notice announcing its intent to negotiate, 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. 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 the 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. In this context, the negotiating phase would constitute the beginning of a rulemaking "proceeding" for purposes of Section 502.

As the Conservation Foundation states, however, it is important for these interests to be represented on the negotiating committee. Accordingly, the Staff is working with the Conservation Foundation, and the specific interests in need of funds, to seek funding assistance from such organizations as the National Institute for Dispute Resolution (NIDR). The Staff is reasonably optimistic that some funds can be obtained.

#### 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. In the absence of consensus, the Staff will develop a proposed rule on an expedited basis.

In the Federal Register Notice announcing its intent to conduct a negotiated rulemaking, the Commission agreed 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. This position remains unchanged in the draft Federal Register Notice. (Attachment A).

Agency Representative. In the Federal Register Notice announcing its intent to conduct a negotiated rulemaking, the Commission delegated full authority to William J. Olmstead, Assistant General Counsel for Hearings, to represent the Commission at the negotiating sessions. Mr. Olmstead will periodically brief the Commission on the progress of the negotiations. He is supported by an intraagency negotiating team composed of representatives from the Office of the Secretary, the Rulemaking and Fuel Cycle Division of the Office of General Counsel, the Office of Nuclear Material Safety and Safeguards, the Office of Administration and Resource Management, the Atomic Safety and Licensing Board Panel, and the Atomic Safety and Licensing Appeal Panel. The negotiating team has been meeting biweekly since February 3, 1987 to prepare the initial Commission negotiating positions on the LSS rulemaking issues. The initial activity of the negotiating team was the preparation of a detailed list of rulemaking issues, and alternatives for addressing those issues. This list is part of the background paper that will be provided to participants on the negotiating committee (Attachment C). The negotiating team is proceeding to prepare the Commission's initial negotiating positions on these issues.

Staff support for the negotiating team will be provided

by the Rulemaking and Fuel Cycle Division, OGC, the Office of Administration and Resource Management, and the Division of Waste Management, NMSS. Donnie H. Grimsley, Director of the Rules and Records Division, Office of Administration and Resources Management will serve as the designated Federal Officer for the advisory committee under the Commission's regulations in 10 CFR 7.10.

Federal Advisory Committee Charter In accordance with the requirements of the Federal Advisory Committee Act, the Commission is required to charter the negotiating committee as an advisory committee. In SECY-86-308, the Commission approved a draft charter for this advisory committee. This charter (Attachment D) will be submitted to the General Services Administration for its review 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.

Schedule. The Staff anticipates that approximately nine two-day meetings will be required to complete the negotiating process for this rulemaking. 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.

Recommendation:

That the Commission approve:

1. the Federal Register Notice establishing an advisory committee to conduct a negotiated rulemaking (Attachment A).

  
William C. Parler  
General Counsel 6/9/87

Attachments:

- A. Federal Register Notice
- B. Conservation Foundation feasibility report
- C. Background paper on LSS rulemaking issues
- D. FACA Charter
- E. Negotiated Rulemaking Schedule

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, June 24, 1987.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, June 17, 1987, with an information copy to the Office of the Secretary. 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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ATTACHMENT A

**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; NOTICE OF 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 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., at the Conservation Foundation, 1250 24th Street, Washington D.C. 20037. The meeting will be open to the public.

FOR FURTHER INFORMATION CONTACT:

NRC Staff

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

Facilitators

Howard S. Bellman  
Timothy J. Mealey  
Matthew A. Low  
Conservation Foundation  
1250 24th Street  
Washington, D.C. 20037  
202-293-4800

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 a 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.

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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), technical support to the negotiating committee on the rulemaking issues, and administrative support. 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. In the first tier would be 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.. 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 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 NWP

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 state" 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. Olmstead, 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 NWPA 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 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 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            day of            , 1987.

For the Nuclear Regulatory Commission.

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Samuel J. Chilk,  
Secretary of the Commission.



**CONVENOR'S REPORT**

**FEASIBILITY ASSESSMENT OF THE  
PROPOSED NEGOTIATED RULEMAKING  
FOR A HIGH-LEVEL NUCLEAR WASTE REPOSITORY  
LICENSING SUPPORT SYSTEM**

**Prepared for the  
U.S. NUCLEAR REGULATORY COMMISSION**

**By  
The Conservation Foundation**

**May 26, 1987**

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## I. INTRODUCTION

The Nuclear Regulatory Commission (NRC) announced on December 18, 1986 (Federal Register; Vol. 51, No. 243 -- hereafter referred to as the Notice) that it is considering the formation of an advisory committee to negotiate "recommendations for revision of the Commission's discovery rules and other selected rules of practice in 10 CFR Part 2, related to the adjudicatory procedure for the issuance of a license for a geologic repository for the disposal of high-level waste." The particular objective of such a committee is "a consensus on proposed revisions related to the submission and management of records and documents for the high-level waste licensing procedure." Such revisions are intended to accommodate the use of an electronic information management system referred to as the Licensing Support System (LSS).

The same notice invited public comment about participation on such an advisory committee and the issues to be negotiated. It stated that comments should be submitted by February 17, 1987 and that later comments "will be considered only if it is practical to do so." It also stated "requests for representation (on the advisory committee) must be made in writing by the date appearing in the notice."

As also indicated in the notice, the Commission engaged The Conservation Foundation (CF), under the Foundation's contract with the Council on Environmental Quality for negotiated rulemaking services. CF, in turn and with Commission concurrence, specified a convenor team of experienced mediators and other experts.

This team has prepared this report and feasibility analysis concerning the proposed negotiations. It is based upon extensive interviews and other inquiries respecting, among other issues, those highlighted in NRC's notice, including: "(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 time table for the negotiating process."

The convenor team, in identifying its interview subjects, relied heavily upon suggestions from NRC staff, the comments filed in reply to the notice, and suggestions from interviewees. The following categories of potential committee participants were listed in NRC's notice:

- 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 public interest groups potentially affected by the siting of the repository
- National energy development public interest groups potentially affected by the siting of the repository
- Local environmental public interest groups potentially affected by the siting of the repository
- Local energy development public 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

The convenor team was able to interview representatives of most of the organizations which submitted comments in response to the NRC's notice.\* These included:

Atomic Industrial Forum  
Confederated Tribes of the Umatilla Indian Reservation  
Edison Electric Institute and the  
Utility Nuclear Waste Management Group  
Environmental Defense Fund  
Friends of the Earth  
National Conference of State Legislatures  
National Congress of American Indians  
National Association of Regulatory Utility Commissioners\*\*  
Nez Perce Tribe  
Sierra Club  
State of Minnesota\*\*  
State of Nevada  
State of Oregon  
State of Texas and the following local Texas entities:  
-- Deaf Smith County  
-- Oldham County  
-- Vega Independent School District

\* A list of most of the individuals who were interviewed is included in Attachment One.

\*\* Interviewed exclusively by telephone.

-- The Member organizations of the Nuclear Waste Task Force, Inc. including POWER and STAND  
-- Deaf Smith County Waste Deposit Impact Commission  
State of Utah\*\*  
State of Washington  
State of Wisconsin  
U.S. Department of Energy  
U.S. Nuclear Regulatory Commission  
Yakima Indian Nation

A few organizations and individuals who submitted timely comments were not interviewed. They indicated that they were not interested in advisory committee participation, or directed their comments to peripheral matters; or, in our view, were represented by another entity which was interviewed. These organizations and individuals included:

Ruth Weiner  
Marvin Lewis  
E. Nemethy  
State of Mississippi  
U.S. Department of Interior  
Westinghouse Electric Corporation  
Yankee Atomic Electric Company

Finally, the convenor team wrote letters on March 27, 1987 soliciting comments from second round states which had not previously submitted comments in response to NRC's notice. These included the states of Georgia, Maine, New Hampshire, North Carolina, and Virginia. Only the states of Georgia and Maine replied, and both to the effect that they did not wish to participate.

## II. GENERAL FINDINGS

The Commission's Federal Register notice states: "On the basis of preliminary analyses 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 ... the process, and their report, as well as comments submitted in response to this notice, will be considered before the Commission proceeds with the negotiated rulemaking."

Our evaluation of feasibility is grounded upon the following general findings.

A. The national controversy over the siting of a high-level waste repository is extraordinary, if not unique, in its magnitude and intensity. Thus, it is unlikely that a genuine negotiated consensus among a truly representative committee of affected interests will be reached on the subject of the rulemaking, the discovery process in the licensing procedure, unless it is viewed by the parties as distinct from the major siting controversy. The discovery process and its efficacy must be seen as a "neutral" matter. In other words, if effective and complete discovery is perceived as serving all sides in the licensing procedure, all will be willing to participate in its formulation.

In our judgment, this threshold issue of isolating the discovery process from siting conclusions has been plausibly answered in the affirmative by those we have questioned, at least as an abstract matter.

B. On more concrete terms, however, we cannot fail to observe that there is a pervasive judgment, developed over the years during which the siting controversy has been underway, that the single most important participant in the discovery process--the Department of Energy (DOE)--is not the subject of complete confidence respecting either competence or veracity. It is understood that DOE, as the license applicant, will be the major source of documentation in the discovery process; and it is presumed by many that DOE will be the operator of the LSS.

We respect DOE's response that these judgments are often unfounded and its stated desire to institute changes designed to share information in a more timely and thorough fashion. Nevertheless, it must be recognized that these issues exist and will not advance efforts toward consensus. Rather, they will serve to inhibit agreement. Extra caution by many of the parties we have recommended for participation can be anticipated respecting acceptance of any terms or arrangements for which responsibility will lie with the DOE. This caution--or reluctance to agree to new terms for discovery--mitigates the abstract neutrality of discovery procedures, and presents serious barriers to consensus.

C. It must also be noted that the siting controversy with its multitude of technical issues, legal battles and political dynamics has served to create, particularly within state governments, but elsewhere as well, a cadre of experts and representatives who are dependent upon the continuing controversy rather than its resolution. This should be overcome by the "neutrality" of the discovery issue, but is not immaterial.

In our judgment, the style of interaction that by now prevails among the pertinent parties will not be easily left behind as they enter these negotiations. The levels of conflict and distrust that have been established will not be simply overwhelmed by the "merits" of reaching agreements on issues in these negotiations.

D. There continues to be a very high degree of uncertainty surrounding the statutory basis for siting procedures. This will inevitably affect the willingness of the participants to make difficult compromises about the discovery process for the licensing procedure. Dozens of lawsuits are pending which call into serious question the legality of procedures to date, and a great deal of very high level reconsideration is taking place among state and federal political leaders on whether current statutory provisions should be maintained and supported. These factors suggest--particularly to those who do not welcome an ultimate siting determination under the current statute--that the whole process will eventually begin entirely anew. This, in turn, creates the impression that the specifics of the discovery procedure are a very remote matter which do not currently require difficult decision making--or the consideration of compromises.

E. The Commission in its notice states that "it is sufficient if each major interest affected by the rule is adequately represented on the committee" and that "it is important that the ... committee be kept to a manageable size." The notice anticipates "the consolidation of groups/persons with like interests," and that some parties may participate by attending the committee's meetings and by submitting their positions by other means.

These views reflect the constant challenge in major consensus-based policy-making processes of balancing the values of broad and inclusive participation against the limitations of conflict management capacity. The difficulty of striking such a balance is quite vivid in this case. Many states, tribes and private organizations of various orientations can describe the peculiarities of their points of view, and plausibly express reluctance to entrust representation to others of a somewhat different perspective. All recognize that the discovery process, and any concessions and emphases during the negotiations over the discovery process will influence the licensing procedure outcomes.

The treatment afforded to non-first round Indian Tribes has certain special consequences. They not only share the concerns of all entities whose territory may be affected, but also have a sensitivity to equivalence of treatment born of historic experience. Their representation on a committee can be accomplished by a single representative, but only so long as non-first round states are represented in an equivalent manner.

F. Another extremely important issue respecting committee composition arises out of the disparate financial positions of the potential members. Some states and Indian tribes and nongovernmental organizations are, in general, sufficiently financed to participate fully. Some are funded by DOE under the Nuclear Waste Policy Act (NWPA). Other organizations, especially nonprofit environmental, citizen groups and local governmental units, are not so situated. Nevertheless, they are listed among the participant categories in NRC's notice, and in our assessment, their participation is necessary to a sufficient representation of major interests.

In anticipating the issue of participant funding, the notice states as follows:

"In line with the GSA guideline that it is the responsibility of each agency to make a good faith effort to meet its advisory committee 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."

### III. GENERAL RECOMMENDATIONS

A. It is our general recommendation that the formation of an advisory committee should proceed substantially on the grounds stated in NRC's notice. That advice is tempered by the foregoing general findings, of course. Particularly, it is our judgment that in this case, even more than might normally be observed, it would be less than astute to predict with confidence an ultimate consensus on all matters in issue. Although we are genuinely hopeful, we respectfully disagree with the NRC notice assertion that "the likelihood of developing a consensus in this area is high ..." Rather, our recommendation is grounded on the belief that, paraphrasing the Administrative Conference of the United States (ACUS) recommendation 82-4 (47 FR 11024; 3-15-82), 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.

B. Such a cautious view seems not only more realistic in this matter, but also impels certain judgments about limiting the number of participants. First, although it is true as the NRC notice reported that "negotiated rulemakings have also been successfully conducted with as many as 25 committee members," we are mindful that ACUS has suggested that such negotiations should ordinarily involve not more than 15 participants. Because we take a cautious view of the difficulties in reaching a consensus on these issues, we would not encumber these particular efforts with a challenging number of participants. Second, as a result, any agreements and other findings resulting from these negotiations should not be described as a complete national consensus.

C. To limit the number of committee members while still attempting to maximize broad and inclusive participation, we recommend that the meetings of the advisory committee provide for three levels of participation--or tiers around the bargaining table. In the first tier would be the Committee "members" i.e., those participants whose views will constitute any consensus or disagreement. This first tier would not only include individuals acting as representatives of a single party but also individuals acting as representatives of a coalition of parties. The second tier would consist of individuals representing entities which, for specified reasons, were not invited to the first tier but whose views are extremely important to the negotiations. The third tier would be for those who participate as members of the public.

During its first organizational meeting the committee will determine the protocols and procedures that will provide for such a structure.

#### IV. PARTICIPATION RECOMMENDATIONS

##### A. Factors Considered In Determining Participation

1. In developing our advice respecting committee membership we gave weight to NRC's statement in its notice that:

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.

2. We also noted the statements that "... to keep the negotiating committee at a manageable size, the Commission may need to consolidate the participation of 'second round' states and Indian tribes ..." and that, "the Commission will encourage the consolidation of groups/persons with like interests in order to reduce the number of participants in the negotiations."

3. On the other hand, we found persuasive the many contentions presented in comments and interviews which emphasized that apparently "like interests" and ostensible categories of participants would break down in the context of many concrete specific issues.

4. We also gave weight to NRC's comment submission "deadline" for committee participation noted in our introduction.

5. Finally, we are concerned that Federal Advisory Committee Act provisions require that the membership be "fairly balanced in terms of points of view represented." This has ramifications not only regarding the number of members who can be expected to support and oppose particular proposals, but the funding of certain participants as well.

##### B. Organizational Representation

Our recommendation is that the following parties should be invited to participate in the Commission's proposed negotiated rulemaking in the manner indicated. We believe that all of the parties we have recommended for participation as first tier members of the committee will agree to participate in the negotiations.

1. Each of the so-called first-round states and Indian tribes, including the states of Texas, Nevada, and Washington, and the Nez Perce, Umatilla and Yakima Tribes should be invited to participate as members of the committee in the first tier of

participation.

2. The principal Federal agencies--the Nuclear Regulatory Commission and the Department of Energy should also participate as first tier members of the negotiating committee.

3. The National Congress of American Indians (NCAI)--should be invited to participate as a first tier member of the negotiating committee representing the interests of all second-round tribes, transportation tribes, and tribes in any other affected category. We understand that NCAI is in every sense competent for this responsibility. We would also welcome and look forward to any tribes who comprise the NCAI "constituency" participating in the negotiated rulemaking effort from second tier seats at their own discretion.

4. The State of Minnesota should be invited to participate as a first tier member of the committee to "represent" all other second-round states, transportation states, and states in any other affected category. Again, we would look forward to states in any of these categories participating in the negotiations from the second tier.

Further, it is our hope and expectation that the Minnesota representative will gain the advice of other non-first round states in formulating positions. We believe that with some extraordinary effort Minnesota may informally gain the "proxies" of other states. By the combination of this effort and second tier participation, sufficient non-first round state representation should be achievable.

We would emphasize, because this is a potentially controversial recommendation, that it is our judgment that there is not an excessively broad spectrum of state positions on the substantive issues of LSS development and attendant rule revisions. The various points of view that we anticipate should be well aired in this structure.

We would also recommend that specific invitations to the second tier be made to the following states who have requested participation: Oregon, Utah, and Wisconsin. Personnel from these other states may be invited to actually join the team of the first tier participant. However, it should remain clear that this team holds a single seat in the first tier of committee membership.

We also recommend that an invitation to participate in the second tier should also be directed to the National Conference of State Legislatures. This will broaden state participation and provide for regular reporting on the committee's activities to state legislatures.

5. The following national environmental public interest groups requested participation on the committee: the Sierra Club, Environmental Defense Fund, Friends of the Earth. All of these groups expressed an inability to fund such participation, however.

It is our advice that the Committee will not provide a representative sample of potential LSS users if such groups do not participate. Their combined national and regional/local perspectives, their skill and experience as litigators, and their financial barriers concerning LSS design and accessibility provide an important and unique perspective that should be represented, especially in an apparent consensus.

Therefore, we recommend that these groups form a coalition and participate in the negotiations as a single member of the committee in the first tier of participation. As in the case of other coalitions formed pursuant to this advice, only one seat on the Committee would be allotted.

We further recommend that NRC, the convenors, and the affected organizations explore ways to develop funding for the participation of this coalition. Specifically, we would advise that funding be developed to support the travel costs (transportation, lodging, meals, etc.) for two representatives of this coalition.

6. During our investigation we were referred to and met with local government representatives in only one first round state, Texas. We recommend that these entities be represented on the advisory committee in a coalition with the State of Texas.

7. In Texas we were also referred to and met with several non-governmental organizations, listed in the introduction above. These organizations represent a unique perspective on pertinent issues which reflects local economic and community planning concerns. These organizations also expressed an inability to fund such participation.

It is our advice that these organizations be invited to form a coalition and participate as a single member of the committee in the first tier of participation. Our judgment as to funding this coalition is the same as expressed in item #5, (i.e., to develop funding for the travel costs of two persons).

8. Interviews and inquiries were made of representatives of various segments of the nuclear industry, including the Edison Electric Institute (EEI), of which the Utility Nuclear Waste Management Group (UNWGM) is an affiliate, and the Atomic Industrial Forum (AIF). Only EEI indicated a desire to be a member of the committee, and it is our recommendation that it be invited to participate in the first tier. This will provide representation for the utility segment of the nuclear industry, especially the stockholder owned companies and, by way of certain

EEl affiliations, other utilities as well.

The AIF, which represents nuclear industry "vendors," indicated that it lacks the organizational resources for full committee membership, and requested second tier participation. AIF should be invited to participate in the second tier to encourage their contribution to the deliberations, and to provide for reporting to its members.

9. As indicated above, NRC's notice suggested that the National Association of Regulatory Commissioners (NARUC) should participate on the advisory committee as a representative of utility ratepayers. However, NARUC has stated that it lacks the organizational resources for full committee membership. It would, however, accept second tier participation. We advise that this organization be invited to participate in the second tier to encourage their contribution to the deliberations, and to provide for reporting to its members.

We recognize that some of the groupings we have recommended; especially among non-first round states, among the State of Texas and certain local government entities, and among national environment groups; are not self-selected and may experience challenging internal negotiations. On that basis, we recommend that NRC strongly consider expanding the scope of the facilitator's responsibility to include assistance which may be needed in such internal interactions.

### C. Individual Representatives

In its announcement of the proposed regulatory negotiation NRC stated, "Participants on the negotiating committee must be willing to negotiate in good faith" and that, "senior individuals within each party ... be designated to represent that party. Of course, it is not truly possible to judge good faith in advance in such matters, and "senior" status is not always clear. However, in our judgment there is no basis to reject any recommended parties' assertion of its own good faith. Likewise, the individuals who have been indicated to-date as chief spokespersons appear to be appropriately placed in their own hierarchies. The indications that we have received from the potential members of the advisory committee identifying their spokespersons are listed in Attachment Two.

V. PROCEDURAL ISSUES

According to the notice, "the Committee will establish detailed procedures for conducting committee meetings." Examples offered of such matters include "the definition of consensus and the use of working groups and caucuses." We would add the following possible topics:

- The general mission statement, if any, of the committee, including any statutory limitations on the content of this rulemaking.
- Should the Committee seek to draft rule provisions or limit the objective of the negotiations to agreements on principles?
- The obligations that derive for the members where there are consensus agreements. The NRC notice indicated that the agency will "issue for comment 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." Should there be any reciprocal agreements covering other committee members?
- How many committee meetings should be held, and where? In its notice NRC stated that it "anticipates approximately nine two-day meetings will be required ... over nine months" and that "approximately one-half of the meetings will be held in Washington and the remaining meetings will be held at regional locations." The choice of sites and meeting lengths may be improved by committee agreement. It is not unimportant that many committee members are likely to be attending other meetings together which may provide for convenience and economies. Although it is not suggested that the nine month duration should be questioned now, progress may warrant revision of this proposal.
- Under what circumstances and by what authority should the negotiations be terminated previous to their predetermined end? According to the notice, "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." Should there be predetermined milestones of progress and similar facilitator or committee-based discretion?
- What should be the intervals between meetings for information gathering, position development, working group meetings, seeking instructions, constituent ratification, intra-coalition negotiations, etc? What role, if any, should the facilitators have in such

matters?

- How should caucusing during committee meetings be conducted?
- How should coalition members and non-coalition members of the first tier participate in the negotiations?
- How should second and third tier participants participate?
- What should be the responsibilities of the facilitators with respect to minutes, issue hierarchies and sequences, preparing texts from which to negotiate, distributing agendas and other documentation?
- Should there be subcommittees; and if so, what will be their scope, and procedures?
- What is the status and relationship, if any, to this committee of the NRC-DOE Interagency Coordinating Committee?
- What provisions should the Committee make to expand its own membership in the case of unanticipated developments, or any other basis?
- How should press contacts be handled?
- What provisions should be made for confidentiality?

Assuming that the NRC proceeds with the proposed regulatory negotiation, and the convenor team is retained as the facilitation team, we intend to bring proposed groundrules to the organizational meeting of the advisory committee. These proposed groundrules will serve as the basis for committee discussion and decision making.

## VI. SUBSTANTIVE ISSUES

### A. General Comments

This section describes substantive issues likely to arise during negotiations concerning the proposed LSS, the context in which they were raised, the willingness of the parties to address them, and in some cases, suggested ways of initiating the negotiations. This discussion is not intended to cover every issue raised in the NRC's notice or the verbal comments received from the potential parties to the negotiation. Rather, it highlights those issues that appeared to us to be foremost on the minds of the parties and incorporates many comments made during our meetings with the parties.

The NRC notice set forth issues relating to:

- 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?
- What organization will be responsible for administering LSS?
- What procedures should be established 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?

The parties commented on most of these issues to one degree or another. However, many of the parties commented on these issues in the context of discussing the premise for revising the discovery rules and overall purpose of the NRC rulemaking activities. The objectives of NRC in amending its rules to accommodate the LSS clearly represents an important issue to many parties.

One general observation about the attitudes of the parties in examining LSS issues is worthy of note. Many of the parties examined the benefits of the LSS in isolation. Thus, for example, if the LSS cannot guarantee retrieval of one hundred percent (100%) of all relevant documents, some parties questioned its usefulness. When asked about the LSS in comparison to the current discovery practices, these same parties occasionally acknowledged that the LSS may prove to have advantages.

In summary, we did not uncover any issues which appeared to be intractable. Not knowing what the LSS can do, combined with the perspective that NRC may wish to eliminate or significantly curtail traditional discovery mechanisms, creates concern in the minds of many parties. However, all parties expressed a willingness to discuss all issues. Some parties expressed more skepticism than others about the possibility of negotiating agreements on all issues. However, even the deepest skeptics acknowledged that even in the absence of consensus on all issues, the negotiations would result in a better rule, based on more informed insights from interested parties. On this basis, it is our judgment that the substantive issues are feasible for negotiations.

## B. Primary Issues

One of the primary tensions expressed by most potential participants relates to what they perceive to be the NRC's purpose in developing the LSS. A second major issue relates to the potential for the Department of Energy's (DOE) current efforts in designing an electronic information management system to drive the proposed regulatory negotiation in an inappropriate way. Thirdly, the relationship between the NRC Rules and the LSS is seen as an important issue which will significantly affect the scope of the negotiations.

### 1. Purpose of the LSS

NRC's notice emphasizes its expectation that the LSS could expedite discovery, perhaps eliminating requests for production of documents. Presentations by NRC officials before various groups and statements to the CF team during interviews have similarly revealed expedited discovery as a key objective of NRC.

Most parties react with some concern to this NRC objective. They are anxious to preserve all options for discovery, including making requests for production of documents. This position arises out of a number of subjective and objective concerns:

- a. At this point, most parties see DOE as the primary party implementing the LSS. They are not confident that DOE will place all relevant documents in the LSS or that DOE will place documents in the LSS in a way that will allow the parties to, in all cases, identify and retrieve them.
- b. Even if the LSS is "well-implemented" by DOE, or some other party, some participants still remain uncomfortable that their ability to conduct discovery might be conditioned on their own abilities to utilize computer search techniques. Some parties also see use of computers as an added expense, which may not be justified.
- c. Some parties believe that reliance on the LSS can only be justified if the LSS enhances the quality of discovery, as well as expediting exchange of documents. They are concerned that, while discovery and, accordingly, the hearing, may be expedited, presumably to the benefit of NRC, DOE and industry participants, the quality of discovery will be reduced, to the detriment of state, environmental and public interest groups. Moreover, compressing the time period for discovery is seen by some parties as a means of limiting the time available to perform adequate analysis of all of the complex issues likely to arise in a licensing hearing. These parties view maintaining the quality of the review of the application as a far more important objective than expediting the hearing.
- d. Some parties question the premise that an LSS will expedite discovery. These parties believe that this premise should be tested during the negotiations.

Because of the primacy of this issue, most potential participants acknowledged the need to initially address the purpose of the LSS. In this context, many of the parties agreed that it would be important for all parties to first become informed about the various aspects of LSS options. In this way, parties can form opinions on the reasonableness, practicality and costs of various uses of the LSS. Having defined a reasonable set of expectations, certain parties may be in a position to formulate conditions attendant to the uses desired by other parties.

For example, information about various LSS systems may reveal the ease (or difficulty) in using the LSS and lessen (or heighten) concerns about its use as a primary discovery tool.

But, if ease of use is a necessary condition for acceptance of the LSS as a discovery tool, the parties will have learned what types of mechanisms are required to facilitate use.

We are optimistic that all parties will be willing to address this issue in a constructive manner. Those expressing some concern about the LSS have recognized that there may be benefits in using the LSS. Proponents of the LSS have recognized the need to examine all aspects of the LSS to help identify and address any limitations or concerns.

## 2. DOE Implementation

Despite DOE's stated intention to abide by the outcome of the regulatory negotiations, some parties raised a concern that DOE is already engaged in early efforts to design and implement an LSS. Their concern is that DOE may move too quickly to be responsive to any agreements reached in the negotiations. More importantly, some participants are alarmed that the negotiations may wind up reacting to the efforts of DOE, as opposed to DOE responding to the deliberations of the advisory committee.

It may be appropriate to also address this issue early in the negotiations, by allowing the parties to learn about DOE's efforts and place those efforts in the context of the pending rulemaking proceeding. DOE informed the CF team about its efforts and indicated a willingness to share this information during negotiations. For this reason we believe that it is feasible to address this issue in a positive manner.

## 3. Relationship Between NRC Rules and LSS

Some parties see an issue in structuring the NRC hearing regulations to accommodate an LSS, particularly where the regulations are to be promulgated well before feasibility of the LSS is fully understood. It was noted that the hearing rules in question principally create procedures for discovery, setting forth the types of discovery allowed, time frames for completing discovery and methods for resolving discovery disputes. Parties expressed questions regarding the extent to which proposed modifications to the rules would address subject matter beyond procedures of the type currently embodied in the rules.

For example, the rules could simply eliminate requests for production of documents as an option for discovery, except by electronic transmission, and require all parties to certify that they will enter documents into an LSS and abide by procedures established for entry and retrieval of documents. However, few parties will agree to such a rule unless they know what those procedures will be. Thus, many parties see the need for the rules to set forth the specific LSS procedures for entry and retrieval. More importantly, some parties may be unwilling to agree to a requirement to use the LSS unless they know what will be entered into the LSS, or how entry of all documents will be

assured. Thus, the regulations may be required to contain provisions setting forth criteria for relevance and provisions relative to LSS administration, oversight and enforcement.

Finally, the parties may be reluctant to agree to use of an LSS without some assurances of its capability to retrieve relevant documents (recall) and avoid retrieval of irrelevant documents (precision). This may entail discussion of LSS hardware and software options available to achieve certain objectives or goals for recall and precision and, in some instances, incorporation of various design parameters into the regulations. In essence, a relatively uncomplicated procedural rule could turn into a complex rule defining the LSS system.

Three (3) principal issues arise out of this discussion. First, to what extent does NRC have authority to promulgate a rule which contains specific criteria and design parameters for an LSS? Second, if all parties see the need to set forth the details of an LSS before agreement can be reached on its use, is it feasible for this group to be able to work out such details? Third, given the complexity of design and implementation of an LSS, is it appropriate to set forth details relating to procedures, design parameters and equipment or software before there has been adequate time to thoroughly evaluate different options? This last issue is placed in context by the magnitude of the task, soon to be initiated by DOE, of engaging a contractor to begin evaluation of various design issues.

Resolution of these issues may become clear after all parties are better informed about the LSS system. Some parties may concur that agreements on the details of the LSS are not necessary, if its use is conditioned on meeting certain basic requirements. In any event, defining the balance between procedural rules (i.e., discovery rights and practices) and substantive rules (i.e., defining the specifics of the LSS) is an issue which the parties may wish to discuss early in the negotiations.

## B. Other Significant Issues

### 1. Timing of LSS Implementation

A number of parties expressed the view that the LSS will not be very useful if it becomes operative just prior to DOE's license application. Because of the number and complexity of documents relevant to key licensing issues, they deem it of great importance that the documents be identified and retrievable at the earliest point in time.

Some commenters noted that many licensing issues will need to be addressed during the quasi-administrative/legislative process (e.g., preliminary site selection, Presidential/Congressional veto considerations, etc.) prior to the hearing on the licensing application. Indeed, some of these commenters

believe that the hearing may be pro forma. On the other hand, some commenters note that while the site may have some momentum behind its selection by the time the application is submitted, the hearing is of vital importance in addressing the myriad operating conditions that will have to be placed in the license. Few of these conditions will be addressed prior to the hearing. However, these commenters also expressed the view that documents should be accessible at an early point in time.

The feasibility of placing the LSS into early operation will be addressed early in the negotiations. DOE's current schedule for implementation of an LSS may satisfy many of the concerns raised by respective parties. However, the schedule may need to be revisited in the context of an LSS deemed acceptable by all parties.

## 2. Documents in the LSS

### a. Relevance

A number of parties believe that determining what documents should be entered in the LSS will present significant issues. All of the issues to be addressed during a licensing hearing are not currently known. Thus, some parties believe that, if relevancy is to be determined now, it must be determined based on nexus to the general subject matter of high level waste repositories. A number of parties suggest that the basic test of relevance in adjudicatory hearings is whether requested information is likely to lead to documents which have a bearing on issues in dispute. Thus, they necessarily view relevance in expansive terms.

Many parties are concerned about relevance primarily in the context of which documents DOE will enter into the LSS. These parties expressed concern that "relevancy" might be dictated by what DOE chooses to rely on as a basis for the license application. We are not aware of DOE taking this position. However, as the breadth of the subject matter to be entered into the LSS grows, DOE will face greater challenges in setting up systems to capture all potentially relevant documents.

Another issue bearing on relevance concerns documents generated in prior years and how far back in time such documents will be considered relevant. This issue was raised in the context of older documents recently made available to the public concerning radioactive releases at the Hanford site. Some parties view these documents as highly relevant to site characterization and selection.

### b. Document/Information Types

A number of parties would like to see any type of document, including such documents as handwritten notes, drafts, preliminary data and phone logs entered in the LSS. Other

parties suggested entry of a more limited array of documents, such as final reports, memoranda and letters, and final data. This issue is deemed by some to be important in establishing the credibility of the LSS as a discovery device. Resolution of this issue will be influenced by considerations relating to LSS feasibility, practicality and costs.

How this issue is addressed will influence and be influenced by the hardware, software and process options available for document entry and retrieval. For example, marginalia on typed documents cannot be retrieved in full text searches or by using key word dictionaries in text searches. Thus, subject/thesauri headers may have to be relied upon for searches. The quality of recall may be poorer for such documents than for documents exclusively in word processed formats.

Another issue concerns entry of raw data into the system. Some parties expressed the observation that all data, prior to and subsequent to C/C, analysis revision, etc., should be available. Raw data readouts could presumably be loaded in the system and any subsequently revised readouts also could be entered.

#### c. Privileged Documents

All parties are concerned about how to handle privileged information. Security of any information placed in the LSS is an issue. It was our impression that if parties can be convinced that privileged documents will be secure, entry of such documents into the LSS will not present a significant concern. Some parties acknowledged benefits in gaining quick access to descriptions of adversary parties' privileged documents, an objective which could be served by the LSS if bibliographic header information is included in the available portion of the LSS.

#### d. Document Entry

The practical aspects of document entry were the subject of some comments. Non-governmental parties expressed uncertainty about what might be required of them to create documents in a suitable form for entry or take the necessary steps to achieve entry. This concern will come into sharper context when the parties understand more about the various options for a LSS. Other parties expressed concern about the feasibility of assuring that large volumes of documents, created in a significant number of DOE headquarters, regional, field, and contractor offices could be entered correctly. Problems associated with coordination of procedures and equipment were noted, in addition to the challenges posed by administration and oversight of the myriad of personnel involved in the effort. Quality control of entered documents is an area that many parties believe should be addressed.

e. Third Party Documents

It was noted that data will be generated by organizations (e.g., USGS) not likely to be parties to the licensing application proceedings. Gaining access to such data may be important. Some parties questioned whether any provisions would be made for entry of such data in the LSS. A corresponding issue concerns the responsibility of any party obtaining such data by traditional means to enter them into the LSS.

3. LSS Administration

a. Who Administers

As discussed above, many parties expressed concern about DOE administering the LSS. All parties, however, saw this as an issue that was open for discussion, despite the fact that DOE is in the process of early design of a system. Even if DOE administers the LSS, some parties observed that third party oversight or audit might allay some concerns about adherence to document entry requirements. Other parties offered the possibility of an entity other than DOE actually administering the program.

"Administration" is a term that may require sharper focus, since parties do not appreciate fully which of the various aspects of administration are in question. Administration may mean establishing procedures for entry and QA/QC, conducting oversight, retaining security codes allowing various types of access, managing distribution of computer scanning and/or word processing equipment, coordination of training, enforcing sanctions, distributing funds, managing contractors, managing entry of documents into the LSS or any or all of a number of other activities. Thus, it will be useful for all parties to understand the various tasks necessary to implement and administer the LSS.

b. Sanctions

Many parties see the need to provide incentives to adhere to LSS document entry procedures and disincentives to militate against non-compliance. How such disincentives, or sanctions, might be structured and implemented is an issue for many parties. It was noted that there currently are no sanctions written into the NRC hearing regulations, causing some parties to question the need for sanctions in addressing the LSS. Nevertheless, all parties expressed a willingness to discuss this issue.

c. Equipment Availability/Training/Funding

A number of parties expressed concern about the manner in which they would be able to access the LSS. They were concerned about the availability of computer terminals and equipment (e.g.,

in their offices versus in a "conveniently" accessible location). They also were concerned about availability of training to assist them and relevant staff and attorneys in using the system. Finally, some parties were concerned that use of an LSS may require funding over and above that normally required for participation in a hearing and questioned whether such funding will be available.

d. Access to the LSS

One issue relating to the LSS (and, incidentally, who participates in the negotiations) concerns who might be given access to the LSS. For example, adjacent and transportation states might wish to fully participate in reviewing and generating information relevant to characterization and selection. If these parties are given access to the LSS, a corresponding issue concerns the extent to which such parties will be subject to LSS requirements for document entry.

4. LSS Design

a. User Friendliness

A number of parties believed that it will be necessary to develop an LSS which is very easy to use. This concern is based on the premise that discovery time and discovery options might be limited if a LSS is instituted. Most users of the LSS are not likely to be computer literate and may not have computer support readily at hand in all cases. Thus, they are interested in examining the types of options that will enhance system use.

b. Data/Document Transmission

The accuracy of information entered into and retrieved from the LSS was raised as an issue. This concern arises out of the prior experience of some parties with poor data transmission over long distance telephone lines. The problems are normally exacerbated when different types of computer systems and software are in use by the host data bank and system users. Many users not familiar with computers might not even recognize that document transmission was inaccurate.

Some parties suggested that this concern will be reduced if all parties use identical equipment or if optical discs are used. However, since such equipment is likely to be sophisticated, this raised the issue of the extent to which equipment will be provided to all potential users.

c. Recall/Precision/System Reliability Standards

As noted above, many parties are concerned about their ability to retrieve all documents and information which may be relevant to a specific area of inquiry. To this end, parties are interested in establishing standards for recall, precision and

reliability, as a means of assuring optimum effectiveness of discovery. On the other hand, some parties commented that it may be impossible to establish such standards, given the inter-relationship between the LSS and the ability of the user to formulate the proper queries. Also, some commenters believed that it would be highly inappropriate for this negotiating group to develop any technical requirements or characteristics which would limit the choice of equipment or software.

VII. CONCLUSION

We have concluded, with certain cautious reservations, that it is feasible for NRC to form an advisory committee to negotiate revisions to its discovery rules to support the development of a Licensing Support System. 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 generally 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.

ATTACHMENT ONE

LIST OF PERSONS INTERVIEWED AND THEIR AFFILIATIONS

State of Washington

Terry Husseman  
Director  
Office of Nuclear Waste Management

Charles B. Roe, Jr.  
Senior Assistant Attorney General

State of Texas

Renea Hicks  
Assistant Attorney General

State of Nevada

Robert R. Loux  
Director  
Nuclear Waste Project Office

Carl Johnson  
Administrator of Technical Programs  
Nuclear Waste Project Office

Malachy R. Murphy  
Special Deputy Attorney General  
Duryea, Murphy, Davenport and Van Winkle

James H. Davenport  
Special Deputy Attorney General  
Duryea, Murphy, Davenport and Van Winkle

State of Minnesota

Jocelyn F. Olson  
Special Assistant Attorney General

State of Oregon

Walter Perry  
Assistant Attorney General

Michael W. Grainey  
Deputy Director  
Department of Energy

David Stewart-Smith  
Radioactive Materials Program Manager

Linda Rodgers  
Assistant Attorney General

State of Utah

Bim Oliver  
High Level Nuclear Waste Office

Yakima Indian Nation

Dean Tousley  
Attorney  
Harmon & Weiss

Nez Perce Tribe

Ronald T. Halfmoon  
Program Manager  
Nuclear Waste Program

Confederated Tribes of the Umatilla Indian Reservation

William H. Burke  
Director  
Nuclear Waste Study Program

Dan Hester  
Attorney  
Federicks & Pelcyger

Thomas Glenn  
Council on Energy Resources Tribes

National Congress of American Indians

Gail Chehak  
Natural Resources Coordinator

Robert Holten  
Natural Resources Coordinator

Environmental Defense Fund

Melinda Kassen  
Staff Attorney

Sierra Club

Brooks Yeager  
Washington Representative

Friends of the Earth

David Ortman  
Director  
Northwest Field Office

Estella Odum  
Professor  
University of Washington

Texas Local Governments

Thomas Simons  
County Judge  
Deaf Smith County

John P. Gilter  
County Judge  
Oldham County

Philip A. Niedzielski-Eichner  
Deaf Smith County Waste Deposit  
Impact Committee

Texas Non-governmental Local Groups

Alice Hector  
Attorney  
Hector and Associates

George W. Drain  
Serious Texans Against Nuclear Dumping (STAND) and  
the Nuclear Waste Task Force, Inc.

Wayne Richardson  
People Opposed to Wasted Energy Repositories (POWER) and  
the Vega Independent School District

Tonya Kleuskens  
Nuclear Waste Task Force, Inc.

Edison Electric Institute and the Utility Nuclear Waste  
Management Group (UNWGM)

Steven P. Kraft  
Director  
UNWGM

Nancy Montgomery  
Program Manager  
UNWGM

Loring E. Mills  
Vice President  
Nuclear Activities

Jay Silberg  
Attorney

National Association of Regulatory Utility Commissioners

Ronald Callen  
Public Service Commission  
State of Michigan

Atomic Industrial Forum

Dixon Hoyle  
Nuclear Fuel Cycle Project Manager

Department of Energy

Jerome Saltzman  
Director of Policy and Outreach Division  
Office of Civilian Nuclear Radioactive Waste Management

Charles R. Head  
LSS Project Manager  
Office of Civilian Nuclear Radioactive Waste Management

James P. Knight  
Director of Siting, Licensing and Quality Assurance Division  
Office of Civilian Nuclear Radioactive Waste Management

Ralph Stein  
Director of Engineering and Geotechnical Division  
Office of Civilian Nuclear Radioactive Waste Management

E. Regnier  
Office of Civilian Nuclear Radioactive Waste Management

Barbara Searney  
Office of Scientific and Technical Information

Nuclear Regulatory Commission

William Olmstead  
Office of the General Council

Francis X. Cameron  
Office of the General Council

Stuart Trevey  
Office of the General Council

Kenneth Kalman  
Office of Nuclear Material Safety and Safeguards

Philip Altomare  
Office of Nuclear Material Safety and Safeguards

Alvi Bender  
Office of Nuclear Material Safety and Safeguards

Rob MacDougall  
Office of Nuclear Materials and Safeguards

Nita Beeson  
Office of Administration and Resource Management

ATTACHMENT TWO

LIST OF LIKELY SPOKESPERSONS FOR RECOMMENDED PARTICIPANTS

State of Washington

Terry Husseman  
Director  
Office of Nuclear Waste Management

State of Texas

Renea Hicks  
Assistant Attorney General

State of Nevada

Robert R. Loux  
Director  
Nuclear Waste Project Office

State of Minnesota

Jocelyn F. Olson  
Special Assistant Attorney General

Yakima Indian Nation

Dean Tousley  
Attorney  
Harmon & Weiss

Nez Perce Tribe

Ronald T. Halfmoon  
Program Manager  
Nuclear Waste Program

Confederated Tribes of the Umatilla Indian Reservation

Dan Hester  
Attorney  
Federicks & Pelcyger

National Congress of American Indians

Gail Chehak or Robert Holten  
Natural Resources Coordinator

Proposed Environmental Coalition (Spokesperson to be determined)

Environmental Defense Fund

Sierra Club

Friends of the Earth

Texas Non-governmental Local Groups

Alice Hector  
Attorney  
Hector and Associates

Edison Electric Institute and the Utility Nuclear Waste  
Management Group (UNWGM)

Steven P. Kraft  
Director  
UNWGM

Department of Energy

Jerome Saltzman  
Director of Policy and Outreach Division  
Office of Civilian Nuclear Radioactive Waste Management

Nuclear Regulatory Commission

William Olmstead  
Office of the General Council

been held not to be agency records, even though they contain substantive information. American Federation of Government Employees v. Department of Commerce, 632 F. Supp. 607, 616 (D.D.C. 1986). However, if a "personal record" is shown or transmitted, in the course of business to any other individual, other than for FOIA review, it becomes an "agency record" subject to the requirements of the Act. Furthermore, if "personal records" are maintained in the same file as, or commingled with, agency records, there is a presumption that they are also agency records. As discussed in the section on discovery, "personal records" and "drafts" may still be subject to disclosure under the Commission's discovery procedures, even though not subject to disclosure under FOIA.

10 CFR 9.5 establishes categories of records that are exempt from public disclosure under FOIA. These categories parallel the exemptions from the Commission's routine disclosure policy set forth in 10 CFR 2.790(a). The following discussion focuses on those exemptions that may be most relevant to the HLW licensing proceeding, beginning with a discussion of Exemption 5.

Exemption 5. Of particular relevance in the HLW licensing context is FOIA exemption 5, which applies to all "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Exemption 5 was intended to incorporate the discovery privileges that the government can traditionally claim to protect documents from disclosure in litigation. Two of these privileges - the attorney-client privilege and the attorney work product

privilege - can also be claimed by any party involved in litigation. As such, the following analysis of this FOIA exemption is directly relevant to the discovery privileges applicable to the HLW licensing proceeding. The NRC adjudicatory decisions on these privileges embody many of the basic principles found in the decisions of the Federal courts on Exemption 5. A brief discussion of these NRC decisions will be provided in Section C on disclosure pursuant to the NRC discovery process, infra.

Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The Supreme Court has indicated that privileges that are well-established may be included within the scope of this exemption far more readily than privileges that are "novel" or have "far less than universal acceptance." United States v. Weber Aircraft Corp., 465 U.S. 792, 801 (1984). Of the discovery privileges held by the Supreme Court to be incorporated in Exemption 5, the most relevant to the LSS are (1) the "executive" or "deliberative process" privilege, (2) the attorney work-product privilege, and (3) the attorney-client privilege.

The most commonly invoked discovery privilege incorporated within Exemption 5 is the "executive" or "deliberative process" privilege (hereinafter "deliberative process" privilege). There are two aspects to this privilege - the common law "deliberative process" privilege, and the constitutionally based "executive" privilege. The common law aspect applies to agency

ATTACHMENT C

**RULEMAKING 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**

**BACKGROUND PAPER**

The Commission has decided to use negotiated rulemaking to develop rules governing the submission and management of records and documents in the Commission's proceeding for the licensing of a geologic repository for the disposal of high-level radioactive waste (HLW). Specifically, the proposed rulemaking would revise the Commission's rules of practice in 10 CFR Part 2, including the rules governing discovery, to provide for the use of an electronic information management system known as the Licensing Support System (LSS).

Section 114(d) of the Nuclear Waste Policy Act requires the Commission to issue a final decision on the issuance of a construction authorization for the repository within three years after the Department of Energy (DOE) files the license application (with a one year extension for cause). In order to meet this 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. Parties to the proceeding would then have access to this system. Because all relevant information would be readily available through access to the system, the initial request for the production of documents traditionally submitted by parties to a licensing proceeding, and the physical production of those documents, would be eliminated. However, derivative discovery through interrogatories and depositions may still take place.

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

- to facilitate discovery by providing comprehensive and easy access to potentially relevant licensing information
- to facilitate review of the relevant licensing information by parties through the provision of full text search capability

- . 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 will 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. To assist the negotiating committee in its deliberations, the NRC staff has prepared this background paper discussing some of the issues likely to be involved in this rulemaking.

In the Commission's Notice of Intent to form an advisory committee to negotiate the proposed rule, 51 Fed.Reg. 45338, December 18, 1986, the Commission identified the following preliminary issues as appropriate for consideration by the negotiating committee:

- . 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?

As noted by the Commission in the Federal Register Notice, these issues were not intended to be a rigid agenda for the committee's deliberations. The Commission fully anticipates that additional issues will arise and be considered by the negotiating committee.

Part I of this background paper summarizes the existing framework for the disclosure of documents relevant to a Commission licensing proceeding. This Part identifies the type of documents that have traditionally been disclosed in Commission licensing proceedings, the criteria and procedures for disclosure, potential legal constraints that might affect the design of the LSS, and the flexibility that the Commission has to fashion new rules for the disclosure of documents. It is not intended to be an exhaustive survey of the Commission's discovery process, but rather to provide a broad overview of those aspects that are most relevant to the design and implementation of the LSS. The background paper is only intended to provide a useful survey of the applicable law in this area. It does not reflect, and should not be

considered as, an official agency interpretation of the Commission's rules of practice.

Part II provides a more detailed break-down of the preliminary issues identified in the Federal Register Notice (see above).

#### I. DISCLOSURE OF RECORDS AND DOCUMENTS RELEVANT TO LICENSING

A number of statutory and regulatory mechanisms exist to provide the public, and participants in agency proceedings, with information about agency actions. The procedures applicable to the disclosure of records and documents relevant to an NRC licensing decision differ depending on who has custody of the records. For example, the disclosure of records under the Freedom of Information Act (FOIA) would only apply to the disclosure of documents by federal government agencies, such as NRC and DOE, and not to the private parties involved in the licensing proceeding. In addition, the procedures applicable to the disclosure of NRC records and documents through discovery in the licensing proceeding are somewhat different from the discovery procedures applicable to the license applicant and the intervenors in the licensing proceeding. The disclosure of records and documents will be discussed in the context of NRC records and documents. Any significant differences in those procedures as applied to other parties to the licensing proceeding will be noted.

The disclosure of NRC records and documents is governed by three primary mechanisms:

- A. Routine disclosure under 10 CFR 2.790 of the Commission's regulations;
- B. Disclosure under the Freedom of Information Act, 5 U.S.C. 552 (FOIA), and the Commission's regulations to implement FOIA, 10 CFR Part 9;
- C. Disclosure pursuant to the Commission's discovery rules in 10 CFR Part 2.

A. Routine Disclosure under 10 CFR 2.790

10 CFR 2.790(a) establishes the policy of making all final NRC records and documents publicly available for inspection and copying in the NRC Public Document Room (PDR), unless there is a compelling reason for nondisclosure. This disclosure policy includes correspondence to and from the NRC on the issuance, denial, or amendment of a license, or regarding a rulemaking proceeding. All final, nonpredecisional staff documents relevant to a licensing proceeding must be made publicly available as a matter of course. Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Electric Station, 1 & 2), ALAB-613, 12 NRC 317 (1980).

This disclosure policy does not apply to handwritten notes and drafts of documents because these are not "final NRC records and documents." 10 CFR 2.790(a), n.8. In addition, 10 CFR 2.790(a) sets forth nine categories of records that are specifically exempt from the Commission's mandatory public disclosure policy. These exemption categories conform to the nine categories specified by FOIA as exempt from disclosure under that Act. These include:

- . matters specifically authorized under the criteria established in an Executive Order to be kept secret in the interest of national defense (FOIA Exemption 1);
- . records related solely to the internal personnel rules and practices of the Commission (FOIA Exemption 2);
- . records and documents specifically exempted from disclosure by statute (FOIA Exemption 3);
- . trade secrets and commercial or financial information obtained from a person, and privileged and confidential (FOIA Exemption 4);
- . inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the Commission (FOIA Exemption 5);
- . personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (FOIA Exemption 6);
- . investigatory records compiled for law enforcement purposes (FOIA Exemption 7);
- . records related to the regulation or supervision of financial institutions (FOIA Exemption 8);
- . geological and geophysical information and data concerning wells (FOIA Exemption 9).

NRC Manual Chapter Update 3203-15 identifies those NRC records that should be publicly available under 10 CFR 2.790. This Manual Chapter also identifies those NRC records that are not to be routinely disclosed for policy reasons. For example, pre-decisional inter-agency or intra-agency memoranda

or letters (including drafts) that would be exempt from public disclosure under FOIA fall into this category of nondisclosure.

B. Disclosure Under the Freedom of Information Act (FOIA)

Although 10 CFR 2.790 establishes the NRC policy for routinely placing records or documents in the PDR, 10 CFR Part 9 of the Commission's regulations establishes the procedures used to address specific requests from the public, pursuant to FOIA, for NRC records and documents that may not have been voluntarily disclosed by being placed in the PDR. Note that FOIA is also applicable to the disclosure of records by DOE, under its applicable regulations. See 10 CFR Part 1004.

10 CFR 9.3 of the Commission's regulations defines "record" as any "... book, paper, map, photograph, brochure, punch card, magnetic tape, paper tape, sound recording, pamphlet, slide, motion picture, or other documentary material regardless of form or characteristics, made by, in the possession of, or under the control of the NRC...." This definition would include computer media, and material submitted to the NRC. Although FOIA does not define "agency record," the Supreme Court has held that a document qualifies as an "agency record" if it was either "created" or "obtained" by an agency. Forsham v. Harris, 445 U.S. 169 (1980). Furthermore, at the minimum, an agency cannot have "obtained" documents until it has possession or control over them. Possession of the documents, sufficient for FOIA purposes, requires more than the mere physical location of the documents. The agency

must actually have custody of the documents, i.e., there must be some connection between the agency and the documents other than the mere incidence of location. Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983). The agency use of an internal report generated outside the agency, but submitted in connection with a Commission licensing proceeding, has resulted in finding the report to be an "agency record." The record compiled in a nuclear licensing proceeding is an "agency record." Consequently, any document that is a part of that record is also an "agency record." General Electric Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984).

"Personal records," i.e., uncirculated personal notes, papers, and records, are generally not considered agency records for purposes of FOIA. Factors such as the circumstances of the documents' creation (i.e., by an agency employee on agency time, with agency materials, at agency expense), content (i.e., substantive information, official or personal information), purpose, distribution, use, maintenance, disposition, and control, are considered in making the "personal/official" determination. Bureau of National Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984). For example, handwritten notes within personal files have been held not to be agency records. Porter County Chapter of the Izaak Walton League of America v. U.S. Atomic Energy Comm'n, 380 F. Supp. 630, 633 (N.D. Ind. 1974); British Airports Authority vs. CAB, 531 F. Supp. 408 (D.D.C. 1982).. Similarly, appointment calendars and telephone message slips of agency officials have been held not to be agency records (Bureau of National Affairs, supra), and employee logs created voluntarily to facilitate work have

deliberations generally, while the constitutional aspect applies to communications between the agency and the President. Wolfe v. HHS, No. 86-5017 at 12 (D.C. Cir. April 7, 1987). The following discussion will focus on the common law deliberative process aspect of the privilege which protects advice, recommendations, and opinions that are part of the deliberative, decision-making process of government, the general purpose of which is to "prevent injury to the quality of agency decisions." NLRB, 421 U.S. at 151. Its purposes are: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons that were not in fact ultimately the grounds for an agency's action. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C.Cir. 1980).

Exemption 5 is co-extensive with the government's common law discovery privilege; i.e., Exemption 5 shields from a member of the public seeking disclosure under FOIA that which would be shielded from a private litigant seeking discovery from an agency. As characterized by one court,

The privilege is intended to foster a policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public interest more vitally

involved than in the fidelity of the sovereign's decision- and policy-making resources.

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-325 (D.D.C. 1966).

However, there is an additional consideration in the discovery context that is not considered in the FOIA context. When a party seeks discovery against the Government and the Government interposes a claim of privilege, it is appropriate for the court to consider the litigant's need for the material. When a member of the public seeks access to material under FOIA and the Government claims that the material comes within the purview of Exemption 5, the extent of the requester's need is not considered in granting the FOIA request.

The initial consideration under Exemption 5 is whether is an "inter-agency or intra-agency memorandum" is involved. Although this would seem to contemplate only those documents generated by an agency, the courts have construed the scope of Exemption 5 more expansively, and have included documents generated outside an agency. In terms of documents generated outside an agency but produced at the agency's request, whether purchased or provided voluntarily, "Congress apparently did not intend 'inter-agency' and 'intra-agency' to be rigidly exclusive terms, but rather to include any inter-agency document that is part of the deliberative process." Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980). Under this

The one limitation on the scope of the deliberative process privilege is that it is generally inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda. Not only would factual material "generally be available for discovery," EPA v. Mink, 410 U.S. 73, 87-88 (1973), but its release usually will not threaten agency consultative functions. Montrose Chemical Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974). Thus, even if a document is pre-decisional, the privilege applies only to the "opinion" or "recommendatory" portion of a document, not to factual information that is contained in the document. However, there are some exceptions to the disclosure of factual material. If the facts are "inextricably intertwined" with deliberative material, they are not subject to disclosure. Ryan, 617 F.2d at 790-91. Another exception is for situations where the facts themselves reflect the agency's deliberative process. In Montrose Chemical, the summary of a large volume of public testimony designed to assist the EPA Administrator's decision on a particular matter was held to be part of the agency's internal deliberative process. The act of separating significant from insignificant facts constituted an exercise of judgment by agency personnel. 421 F.2d at 71. In addition, a contractor report of a scientific or technical nature may be protected under Exemption 5 if the data are intimately involved in an ongoing agency policy making process. This policy is intended to prevent the chilling effect that might occur from an attack on a hypothesis or the data related to its formation before the author has formed a final conclusion. "[S]cientists should be able to withhold nascent thoughts where disclosure would discourage the the intellectual risk taking so essential to agency progress." Chemical Manufacturers, 600 F.Supp. at 118.

However, this exception to the general rule, that factual portions of a deliberative document must be disclosed, is premised on the ultimate availability of the factual material after the decision-making process has been completed.

A second traditional discovery privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects memoranda prepared by an attorney in anticipation of litigation or on the basis of some identifiable claim likely to lead to litigation. Coastal States, 617 F.2d at 865. The privilege is not limited to civil proceedings, but also extends to administrative proceedings, Exxon Corp., 585 F.Supp. at 700.

This privilege covers all records prepared in anticipation of litigation, not merely those reflecting legal opinions or strategy. United States v. Weber Aircraft Corp., 465 U.S. at 803. There is no need for the case actually to be in litigation, but only for the existence of an articulable claim that would probably lead to litigation. Furthermore, the litigation need never actually happen. The document does not actually have to be prepared by an attorney, but can also be prepared at the direction of an attorney, e.g., a document prepared by an economist at the direction of an attorney in preparation for litigation. This also applies to documents prepared by an attorney not employed as a litigator. Documents falling under this privilege remain privileged even after the litigation has been completed, and are not subject to the "segregation of facts" requirement that is applicable to

predecisional discussion by government officials free from the fear of ridicule or misunderstanding by the public. The basic consideration is whether release of the information would restrain the candor of government deliberations or lead to confusion on the part of the public as to the reasons for government action. Applying this approach, the D.C. Circuit in Wolfe, held that regulatory log information, revealing only whether and when a recommendation has been made, and not what the substance of the recommendation was, cannot accurately be characterized as "opinion" or "recommendation" because its disclosure would endanger none of the goals legitimately protected by the deliberative process privilege. Id at 7-8.

A particular category of documents likely to be exempt from disclosure under the deliberative process privilege is "drafts." "Draft documents, by their very nature, are typically pre-decisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.'" Exxon Corp. v. DOE, 585 F. Supp. 690, 698 (D.D.C. 1983); Dudman Communications Corp. v. Air Force, No. 86-5154 (D.C. Cir. April 14, 1987). Even draft documents, to be protected, must be predecisional and related to a particular deliberative process. Coastal States at 866; Burke Energy Corp. v. DOE 583 F. Supp. 507, 51 (D. Kan. 1984). Therefore, an agency cannot argue that any document identified as a "draft" is per se exempt. It must also be ascertained whether the document is deliberative in nature. Arthur Anderson & Co. v. IRS, 679 F.2d 254, 256 (D.C. Cir. 1982). However, if it is established

that the draft is qualified for protection under Exemption 5, the draft remains protected even after the final document is issued. Agencies often establish a policy of discretionary release of drafts a certain number of years after the document has been finalized. For example, the Department of Justice has a 15-year disclosure policy for draft documents.

In summary, factors to consider in determining whether a document falls within the deliberative process privilege include whether the document (1) is "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency"; (2) "is recommendatory in nature or is a draft"; (3) "weigh[s] the pros and cons of agency adoption of one viewpoint or another"; and (4) even if it was pre-decisional at the time it was prepared, is "adopted, formally or informally, as the agency position on an issue, or is used by the agency in its dealings with the public." Coastal States, 617 F.2d at 866. See also ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1235-37 (D.C. Cir. 1983). In determining whether the deliberative process privilege applies, courts should show "considerable deference" to an agency's judgment as to what constitutes part of its deliberative process. Chemical Mfrs. Ass'n. v. Consumer Product Safety Commission, 600 F. Supp. 114, 118 (D.D.C. 1984). After it is established that a document is protected by the deliberative process exemption, it remains protected even after the decision has been made.

approach, documents generated by consultants outside an agency are typically considered for Exemption 5 protection because agencies, in the exercise of their functions, commonly have "a special need for the opinions and recommendations of temporary consultants." Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir., 1967). Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972); Lead Industries Ass'n. v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979).

After this initial consideration has been resolved, two requirements must be met in order for the deliberative process privilege to be successfully invoked. First, the communication must be pre-decisional, i.e., generated before the adoption of an agency policy. Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978). Second, the document must be deliberative in that it reflects the give and take of the agency consultative process, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

The "pre-decisional" requirement goes to the timing of the document in relation to the final decision. In construing the deliberative process privilege, the Supreme Court has recognized a distinction between pre-decisional documents, which are protected, and post-decisional documents, which are not protected by Exemption 5. Pre-decisional documents are thought generally to reflect the agency give-and-take leading up to a decision, whereas post-decisional documents generally embody statements of

policy and final opinions that have the force of law, implement an established policy of the agency, or explain actions that an agency has already taken. Exemption 5 does not apply to these post-decisional documents because "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." NLRB, 421 U.S. at 152. For example, according to the D.C. Circuit, "as a general principle . . . action taken by a responsible decisionmaker in an agency's decisionmaking process which has the practical effect of disposing of a matter before the agency, is 'final' for purposes of FOIA." Eristol-Myers v. FTC, 598 F.2d 18, 25 (D.C. Cir. 1978). To determine whether a final decision is involved, the following factors have been considered:

Is the document signed by the authoritative decision maker in the particular subject area ?

At what point in the decision-making chain is the document ?

Does it have the practical effect of disposing of the issue ?

The second requirement is that the communication must be "deliberative," i.e. an "opinion" or a "recommendation" rather than "fact." As noted by the D.C. Circuit, the proper approach to classifying information as "fact" or "opinion" is to do so in light of the policies and goals that underlie the deliberative process privilege. Wolfe v. HHS, No. 86-5017 at 12 (D.C. Cir. April 7, 1987). These underlying policies are to encourage frank and full

deliberative process material, i.e., the "factual-deliberative" distinction is not applicable here.

A third traditional discovery privilege incorporated into Exemption 5 is the attorney-client privilege, which protects all confidential communications, including facts, between client and attorney, not merely those made in anticipation of litigation relating to a legal matter for which the client has sought professional advice. Mead Data Central Inc. v. Department of the Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977). These confidential communications are shielded from disclosure in order to encourage full and frank discussions between a client and his or her legal advisor. The courts have uniformly held that federal agencies may enter into privileged attorney-client relationships with their lawyers. Coastal States, 617 F.2d at 863.

Unlike the attorney work-product privilege, the availability of the attorney-client privilege is not limited to the context of litigation. Moreover, while it usually applies to facts divulged by a client to his or her attorney, it also encompasses opinions given by an attorney to the client based upon those facts. In the FOIA context, this privilege protects an agency's communications with its attorneys, provided that the communications are necessary to obtaining informed legal advice and their disclosure is limited to those who are authorized to speak or act for the agency. This privilege is found to be waived when the communication is released outside of the traditional attorney-client relationship, even when the release is entirely

within the agency. However, free disclosure has always been permitted to those individuals holding decision-making authority; i.e., "[t]he privilege should not be defeated by some limited circulation beyond the attorney and the person within the group who requested the advice." Mead Data , 566 F.2d at 253. The Supreme Court, in Upjohn Co. v. United States, expanded the range of personnel who may provide or share privileged information, by holding that the privilege encompasses confidential communications made to attorneys not only by decision makers, but also by those lower echelon employees who possess information needed by counsel to advise their clients. 449 U.S. 383, 391-92 (1981).

In regard to waiver generally, once a claim of Exemption 5 privilege has been established, a determination must be made of whether, through prior disclosure, the privilege has been waived. Although courts are generally sympathetic to the necessities of effective agency functioning when confronted with an issue of waiver, courts do look harshly on prior releases that result in unfairness or are caused by carelessness. In State of North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978), for example, it was held that voluntary "selective disclosure" of an agency document to one party in litigation was "repugnant" to FOIA and operated to waive the agency's subsequent assertion of Exemption 5 against the other party to that litigation. An agency's failure to follow its own regulations regarding circulation of internal agency documents was determinative and led to a finding of waiver in Shermco Industries, Inc. v. Department of the Air Force, 613 F.2d 1314, 1320 (5th Cir. 1980).. Similarly, an agency's carelessness in permitting access to

certain information has resulted in waiver. Cooper v. Department of the Navy, 594 F.2d 484, 488 (5th Cir. 1978).

If the agency is able to establish that it acted responsibly and in furtherance of a legitimate agency purpose, in disclosing the document, its later claim of exemption will likely prevail. If it is necessary to show the document to someone for a governmental purpose, no waiver will result. For example, the release of information between two federal agencies does not impair the ability of either agency to withhold the document later. Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982). Agencies may disclose pre-decisional documents to advisory committees without waiving their ability to protect records under Exemption 5, at least where such disclosure furthers the "free and candid exchange of ideas during the process of decision-making." Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-108 (D.C. Cir. 1976). The one circumstance in which an agency's failure to treat information in a responsible and appropriate manner should not result in waiver is when an agency employee has made an unauthorized "leak" of information. Recognizing that a finding of waiver in such circumstances would only lead to "an exacerbation of the harm created by the leak," Murphy v. FBI, 490 F. Supp. 1138, 1142 (D.D.C. 1980), the courts have consistently refused to penalize agencies by holding that a waiver has occurred. Medina-Hincapie v. Department of State, 700 F.2d 737, 741 (D.C. Cir. 1983).

Exemption 4. Exemption 4 of FOIA is intended to protect both the interests of commercial organizations that submit confidential business information ("proprietary information") to the government and the interests of the government in receiving continued access to such data. The exemption covers two broad categories of information in federal agency records--

- . trade secrets; and
- . information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

In Public Citizen Health Research Group v. FDA, the term "trade secret" was defined as "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a direct relationship between the trade secret and the productive process.

The second category of exempt documents under Exemption 4 involves information that is (a) commercial or financial information; (b) obtained from a person; and (c) privileged or confidential. If the information relates to business or trade, most courts have little difficulty in considering it "commercial or financial". The D.C. Circuit has held that these terms should be given their "ordinary meanings" and has specifically rejected the argument

that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them. Id. at 1290.

The second criterion, that the information be "obtained from a person," is easily met in virtually all circumstances. The term "person" refers to a wide range of organizations, including corporations, state governments and foreign governments.

The third criterion is met if information is "privileged or confidential." Most of the litigation on this issue has focused on the meaning of the word "confidential." In National Parks & Conservation Ass'n v. Morton, the D.C. Circuit held that neither a commercial entity's claim of confidentiality nor an agency's promise that certain information would never be released, is determinative under Exemption 4, although both factors can be considered. It declared that the term "confidential" should be read to protect government interests as well as private ones according to the following test:

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F.2d 765, 770 (D.C. Cir. 1974).

These two tests are often referred to as "Prong 1" or "Prong 2." In order to withhold information under Prong 1, an agency must be able to demonstrate that the information was provided voluntarily and that the business entity would not provide it if it were subject to disclosure. In terms of Prong 2, evidence of actual competition and of the "likelihood of substantial competitive injury is all that need be shown." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979). In order for the agency to make the most informed decision possible as to the probable competitive harm that would result from disclosure, it is essential for the agency to be fully informed of the views of the business data submitter as to the data's sensitivity. In this regard, 10 CFR 2.790(b)(1) of the Commission's regulations establishes procedures for the identification and nondisclosure of documents that contain trade secrets or privileged or confidential commercial or financial information. The application of these procedures for the protection of such information from discovery will be discussed in Section C, infra.

The term "privileged" in Exemption 4 has recently begun to be used as an alternative for protecting nonconfidential commercial or financial information. The D.C. Circuit has indicated that this term should not be treated as simply synonymous with "confidential," particularly in light of the legislative history's explicit reference to certain privileges, i.e., attorney-client, doctor-patient, and borrower-lender. Washington Post Co. v. HHS, 690 F.

2d 252, 267 (D.C. Cir. 1982). In one District Court case, the court upheld the Department of Interior's withholding of detailed statements by law firms of work that they had done for the Hopi Indians on the ground that they were privileged because of their work-product nature within the meaning of Exemption 4. Indian Law Resource Center v. Department of Interior, 477 F. Supp. 144 (D.D.C. 1979). In a second case, a legal memorandum prepared for a utility company by its attorney qualified as legal advice protectible under Exemption 4 as subject to the attorney-client privilege. Miller, Anderson, Nash, Yerke, and Wiener v. Department of Energy, 499 F. Supp 767 (D. Or. 1980).

Exemption 9. One final FOIA exemption that may be relevant to the repository licensing process is Exemption 9. This provides for the nondisclosure of geological and geophysical information and data, including maps, concerning wells. Most of this material would already be adequately protected under Exemption 4. The double protection available for this narrow category of data has been interpreted as emphasizing the need for particular attention of the courts in reviewing releases concerning wells. "[W]here releasing the information serves no legitimate function, this court will prohibit disclosure." Pennzoil Co. v. Federal Power Commission, 534 F.2d 627, 630 (5th Cir. 1976)

Although Exemption 9 has been the least litigated of the FOIA exemptions, one district court rejected a claim for withholding the number, locations and depths of an oil company's proposed exploratory drill holes based on its view

that Congress intended the exemption to be limited in scope "only to well information of a technical or scientific nature." Black Hills Alliance v. U.S. Forest Service, 603 F. Supp. 117, 122 (W.D.S.D. 1984).

Most of the FOIA exemptions are permissive, not mandatory. Even if the information falls within a FOIA exemption, it may nonetheless be disclosed at the agency's discretion. Under the standards contained in 10 CFR 9.5(c), if the NRC determines that the disclosure of an exempt record is not contrary to the public interest and will not adversely affect the rights of any person, public disclosure of the record will be authorized. 10 CFR 2.790(b)(6) provides that any withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect a withheld document. However, the Commission may require that such inspection be under a protective agreement to allow inspection by contractor personnel or government officials, or under a protective order to allow inspection by parties to an NRC proceeding. Therefore, although public disclosure may not be warranted, a party to a licensing proceeding who needs access to information may, upon a proper showing of relevancy, inspect such information under a protective order.

In FOIA litigation, the agency has the burden of justifying its action in withholding records. An agency will usually be required to file a Vaughn index (derived from the first case in which a court ordered the government to produce such an index, Vaughn, 523 F.2d 1136, which contains a detailed

identification of the withheld records, with the statutory bases for the withholding. This permits the person requesting the documents to argue intelligently for the non-exempt status of a document. This concept is also used in discovery, counsel usually asking for a list of all responsive documents that a party withheld on the basis of privilege. The list typically identifies each document by author, recipient, date, and subject matter, and states the basis for the claim of privilege. This concept could be incorporated into the LSS, with the list of privileged documents entered into the system, or in addition, the document itself could be entered into a special file ready for disclosure if ordered by the Licensing Board.

A FOIA request can be made by "any person," as defined in 5 U.S.C. 551(2), which includes individuals, partnerships, corporations, associations, and foreign, state, or local governments. FOIA requests can be made for any reason, and unlike discovery, no showing of relevancy or purpose is required. Although persons seeking information under FOIA do not have to provide a reason, a requester's rights to access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public. NLRB, 421 U.S. at 143 n.10. However, FOIA generally receives its heaviest use prior to the beginning of the licensing proceeding when discovery is not yet available.

A private party who has submitted information to the government can use a "reverse" FOIA action to seek to enjoin the agency from releasing information in response to a request from a third party. In Chrysler Corp. Brown, 441

U.S. 281 (1979), the Supreme Court held that jurisdiction for a "reverse" FOIA action cannot be based on FOIA, but that such actions can be brought under the Administrative Procedure Act (APA), 5 U.S.C. 701-706. The submitter may challenge the agency's exercise of discretion to release the document under the APA on the grounds that it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. "Reverse" FOIA actions can only apply to information that falls within a FOIA exemption but nonetheless may be disclosed at the agency's discretion. If the information is not exempt, the mandatory disclosure provisions of FOIA apply and it must be disclosed.

FOIA specifies only two requirements for access requests:

- . that they "reasonably describe" the records sought, 5 U.S.C. 552(a)(3)(A), and
- . that they be made in accordance with the agency's published procedural regulations, 5 U.S.C. 552(a)(3)(B).

A description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort." H.R. Rep. No. 93-876, 93 Cong., 2d Sess. 6 (1974).

In suits under FOIA, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the manner in which it has endeavored to locate responsive documents. The agency is under a duty to

conduct a "reasonable" search which will vary from case to case. However, it is the duty of requesters to frame their requests with sufficient specificity so that they are not unreasonably burdensome. To prevail in a FOIA suit, the defendant agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973). In the recent case of Meeropol v. Meese, the D.C. Circuit ruled that a search under FOIA "is not unreasonable simply because it fails to produce all relevant material," and that "a search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." 790 F. 2d 942 (1986).

10 CFR 9.8 specifies the procedures for requesting documents from the NRC under FOIA. The NRC has 10 days after receipt to respond to a FOIA request. This response can take the form of providing access to the requesting documents, denying the request, or requesting additional information to facilitate identification of the records requested. 10 CFR 9.9(c) allows the NRC to extend the 10 working day response time for an additional 10 days for "unusual circumstances," e.g., a large amount of records. 10 CFR 9.11 allows an appeal to the Executive Director for Operations (EDO) from an initial denial. The EDO has 20 days after receipt of the appeal request to respond. If specific documents are already in the PDR, the NRC can meet its FOIA obligation by directing the requester to the PDR.

C. Disclosure Pursuant to Discovery

"Discovery" consists of procedures to assist parties to an adjudication in learning the nature of their opponent's case prior to hearing. These procedures are designed to provide full disclosure of facts and issues, to eliminate surprise, to obtain evidence for use at trial, to ensure adequate trial preparation, and generally to promote an efficient trial process. An agency has considerable discretion in fashioning discovery rules for its proceedings. As stated in McClellan v. Andrus--

The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency: both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable and the Administrative Procedure Act fails to provide expressly for discovery; further, courts have consistently held that agencies need not observe all of the rules and formalities applicable to courtroom proceedings.

Some agencies have of their own accord adopted regulations providing for some form of discovery in their proceedings. In addition, to being bound by those rules, the agency is bound to ensure that its procedures meet due process requirements. Therefore, discovery must be granted if in the particular situation a refusal to do so would prejudice a party as to deny him due process.

606 F.2d 1278, 1285-86 (D.C. Cir. 1979).

The discovery provisions for Commission licensing proceedings are set forth in the Commission's Rules of Practice (10 CFR Part 2). As noted earlier, Commission rules provide for different discovery procedures for the NRC staff than those that are applicable to other parties to the proceeding such as the license applicant and intervenors. The following material will discuss discovery in the context of the NRC staff. Any significant differences between discovery against the staff, and discovery against other parties will be noted.

Discovery can be obtained regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. 10 CFR 2.740(b). The discovery request must be related to those matters in controversy identified by the Licensing Board following a pre-hearing conference, and an individual may begin discovery only after being admitted as a party to the proceeding. 10 CFR 2.740(b)(1); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977) In general, the discovery rules for all parties (with the exception of the special rules applicable to the NRC Staff) are modeled after the Federal Rules of Civil Procedure. Therefore, the legal authorities and court decisions pertaining to Fed. R. Civ. P. 26 provide appropriate guidelines for interpreting NRC discovery rules. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983)

(citing Toledo Edison Co. (Davis-Besse Nuclear Power Station, ALAB-300, 2 NRC 752, 760 (1975))).

Although one party may seek discovery from another party without the necessity of Licensing Board intervention (see 10 CFR 2.740a, 2.741), the Licensing Board, as provided by 10 CFR 2.740(c) and (d), may and should, when not inconsistent with fairness to all parties, limit the extent or control the sequence of discovery to prevent undue delay or the imposition of an undue burden on any party. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979). The question of Board management of discovery was addressed by the Commission in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-56 (1981). The Commission stated that in virtually all cases, individual Boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted. A Licensing Board may establish reasonable deadlines for the completion of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-79, 18 NRC 1400, 1401 (1983) (citing Statement of Policy, 13 NRC at 456). Although a Board may extend a discovery deadline upon a showing of good cause, a substantial delay between a discovery deadline and the start of a hearing is not sufficient, without more, to reopen discovery. The Commission has expressly advised the Licensing Boards to see that the licensing process moves along at an expeditious pace, consistent with the demands of fairness, and the fact that a party has personal or other obligations or fewer resources than others does

not relieve the party of its hearing obligations. Nor does it entitle the party to an extension of time for discovery absent a showing of good cause. Texas Utilities Generating Co., (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

Although a time limit of 30 days is specified in 10 CFR 2.741 for the response to discovery requests for the production of documents among parties other than the NRC staff, 10 CFR 2.744 does not specify any set time limit for the staff to respond to a request for the production of documents. However, generally the Licensing Board will establish time limits within which discovery must take place. Cleveland Electric Illuminating Co., 18 NRC at 1401-1402. As in the case of FOIA requests, the requester can be directed to the PDR for any documents that are already publicly available. It is an adequate response to any discovery request to state that the information requested is available in the public compilations and to provide sufficient information to locate the material requested. Metropolitan Edison Co. 10 NRC at 147-48. It is considered full compliance to produce documents for inspection and copying: there is no requirement to give or mail copies. Pennsylvania Power & Light Co., (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 331. The requester need only describe the documents requested with "reasonable particularity." It is not necessary to designate each particular document that is desired. However, requests phrased in terms of "all documents..." are not favored, i.e., a blanket request for the production of all books, documents, papers, and records that are relevant and relate to the subject matter. Illinois Power Co. (Clinton Power Station, Units No. 1

and 2), ALAB-340, 4 NRC 27, 34 (1976). In responding to discovery requests, a party is not required to engage in extensive independent research. It need only reveal information in its possession or control (although it may be required to perform some investigation to determine what information it actually possesses). Assuming the truthfulness of the statement, lack of knowledge is always an adequate response.

Discovery against the NRC Staff is not governed by the general rules but, instead, is governed by special provisions of the regulations. See, e.g., 10 CFR 2.740(f)(3),(j), and 2.741(e). Special provisions for discovery against the Staff are contained in 10 CFR 2.720(h)(2)(i) (depositions);

2.720(h)(2)(ii) (interrogatories); 2.744, 2.790 (production of records and documents). Discovery against the Staff is on a different footing than discovery in general. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 97-98 (1981); Pennsylvania Power & Light Co., 12 NRC at 323. For example, depositions of named NRC Staff members may be required only upon a showing of exceptional circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-4, 13 NRC 216 (1981); 10 CFR 2.720(h)(2). In addition, under 10 CFR 2.720, interrogatories against the Staff may be enforced only upon a showing that the answers to be produced are necessary to a proper decision in the proceeding. Consumers Power Co. (Palsades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119 (1980).

As noted earlier, 10 CFR 2.790(a) requires that all staff documents relevant to a licensing proceeding be publicly available as a matter of course, unless there is a compelling reason for nondisclosure. Because of this policy, discovery against the staff is normally limited to items not reasonably obtainable from other sources. Pennsylvania Power & Light Co., supra. 10 CFR 2.744 establishes the procedures for obtaining those NRC records and documents not routinely provided by the staff. Under 10 CFR 2.744(a), a party may request that the EDO make available specified records. Such a request must describe the documents requested and state why the record or document is relevant to the proceeding. The EDO may object to producing the record or document on the grounds that it is (1) not relevant or (2) exempt from disclosure under 10 CFR 2.790 and the disclosure is not necessary to a proper decision in the proceeding, or the document or information therein is reasonably obtainable from another source. The requesting party may then file a motion with the Licensing Board to compel production of the record. Upon a determination by the Board that the record or document is relevant and not exempt from disclosure under 10 CFR 2.790, or that, if exempt, its disclosure is necessary to a proper decision in the proceeding and the document or information therein is not reasonably obtainable from another source, the EDO must produce the record or document. 10 CFR 2.744(d).

In terms of general policy, "in modern administrative and legal practice, pre-trial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, to refine the issues, and prepare adequately for a

more expeditious hearing or trial." Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978). Relevant evidence has been defined as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Discovery requests are generally found to be relevant where there is any possibility that the information sought may be relevant to the subject matter of the action. While the general relevancy test is fairly liberal, it does not permit the discovery of material far beyond the scope of issues to be considered in a proceeding. Thus, parties may obtain discovery only of information that is relevant to the controverted subject matter of the proceeding, as identified in the pre-hearing order, or that is likely to lead to the discovery of admissible evidence. Allied-General Nuclear Services , supra.

As under the Federal Rules of Civil Procedure, privileged or confidential material may be protected from discovery under Commission regulations. A party objecting to the production of documents on grounds of privilege has an obligation to specify in its response to a document request those same matters that it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order, i.e., there must be a specific designation and description of (1) the documents claimed to be privileged, (2) the privilege being asserted, and (3) the precise reasons why the party believes the privilege applies to such documents. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153

(1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

10 CFR 2.744 incorporates the FOIA exemptions into the Commission's rules of discovery. Consumers Power Co. 12 NRC at 121. "The Commission, in adopting the standards of Exemption 5 and 'necessary to a proper decision' as its document privilege standard under 10 CFR 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure." Id. at 123. The fact that a record or document would not be disclosed in response to a FOIA request does not necessarily mean that it will not be available in discovery. A document exempt from disclosure under FOIA could still be discoverable if its disclosure is necessary to a proper decision in the proceeding. In that circumstance, however, the proponent for disclosure should demonstrate convincingly that information already furnished or otherwise available is not adequate in the circumstances. Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390 (1970); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333 (1984).

The following material briefly summarizes the Commission adjudicatory decisions applicable to the discovery of privileged or confidential material.

#### Deliberative Process

The deliberative process privilege may be invoked in NRC proceedings. Long Island Lighting Co., 19 NRC at 1341 (citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974)); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971). However, this privilege is available only to the government. Although Exemption 5 of FOIA is applicable only to the Federal government, the common law discovery privilege for the deliberative process can be invoked by all governmental units, not just the federal government. However, it is appropriate to look to cases decided under Exemption 5 of FOIA for guidance in resolving claims of deliberative process privilege in NRC proceedings related to discovery, so long as it is done using a common-sense approach that recognizes any differing equities presented in such FOIA cases. Long Island Lighting Co., 16 NRC at 1163-1164.

The deliberative process privilege protects from discovery governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. Long Island Lighting Co., 19 NRC at 1341 (citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 384 F.2d 979 (D.C. Cir. 1967)). The deliberative process privilege protects both intra-agency and inter-agency documents and may even extend to outside consultants to an agency. Id. at 1346 (citing Lead Industries Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979)).

The deliberative process privilege is a qualified privilege, and does not attach to purely factual communications or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. Long Island Lighting Co., 16 NRC at 1164 (citing EPA v. Mink, 410 U.S. 73, 87-88 (1973)). However, the deliberative process privilege does apply where purely factual material is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decisionmaking process. Long Island Lighting Co., 19 NRC at 1342 (citing Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982)).

Documents shielded by the deliberative process privilege remain privileged even after the decision to which they pertain has been issued, since disclosure at any time could inhibit the free flow of advice including analysis, reports, and expression of opinion within the agency. Long Island Lighting Co., 16 NRC at 1164 (citing Federal Open Market Committee of the Federal Reserve System v. Merrill, 443 U.S. 340, 360 (1979)).

Communications that fall within the protection of the privilege may be disclosed upon an appropriate showing of need. In determining the need of a litigant seeking the production of documents covered by the deliberative process privilege, an objective balancing test is employed, weighing the importance of documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the Government interest in secrecy. Id., (citing United States v. Leggett and

Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976)); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island Lighting Co., 19 NRC at 1341. A claim of deliberative process privilege is not waived by participation as a litigant in the proceeding. Long Island Lighting Co., 16 NRC at 1164; Consumers Power Co., 12 NRC at 127. Therefore, DOE or other governmental units participating in the HLW licensing proceeding, would be able to claim the privilege.

#### Attorney-Client

The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Long Island Lighting Co., 16 NRC at 1157. However, statements from an attorney to the client are privileged only if the statements reveal, either directly or indirectly, the substance of a confidential communication by the client. Id. at 1158 (citing In re Fischel, 557 F.2d 209 (9th Cir. 1977)); Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980). An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction. Id. Furthermore, the attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney. Id. Virtually all consultations between attorneys and their clients involve the discussions of facts

discoverable from other sources: what has been done, not done, etc., the underpinnings of most legal conflicts. It is not the facts that are privileged, it is the communication - the give-and-take exchange of facts, ideas, and advice, the facilitation of which lies at the core of the purpose of the attorney-client privilege. Consumers Power Co. (Midland Plants, Units 1 and 2), LBP-83-70, 18 NRC 1094, 1102 (1983).

### Attorney Work-Product

To be privileged from discovery by the work-product doctrine, as codified in 10 CFR 2.740(b)(2), a document must be both prepared by an attorney (or by a person working at the direction of an attorney) and prepared in anticipation of litigation. Ordinary work-product, which does not include the mental impressions, conclusions, legal theories or opinions of the attorney (or other agent), may be obtained by an adverse party upon a showing of "substantial need of materials in preparation of the case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Opinion work-product is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation, and not assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation. Long Island Lighting Co., 16 NRC at 1162; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983). The input of counsel to documents that are required under the regulatory process (for example, quality assurance program descriptions) and are otherwise discoverable,

cannot immunize these documents from discovery. However, special reports prepared to aid the license applicant's counsel in preparing for the licensing hearing would fall within the protection of the attorney work-product privilege. Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177 (1986).

Privileged or Confidential Financial or Commercial Information

It is within the discretion of the Commission to withhold proprietary information from public disclosure. Under Commission regulations, the Commission determines whether information required to be withheld from public disclosure is a trade secret or confidential or privileged commercial or financial information, and if so, whether it should be withheld from public disclosure. 10 CFR 2.790(b)(3). As noted earlier, a person who submits such information must file an accompanying statement of the reasons the submitter wishes the information to be withheld from the public. The Commission decision on whether the information is a trade secret or confidential or privileged commercial or financial information is based on consideration of such factors as whether the information has been held in confidence by its owner and whether public disclosure is likely to cause substantial harm to the competitive position of the owner of the information. 10 CFR 2.790(b)(4). Once the requisite nature of the information is established, the Commission must decide whether the right of the public to be apprised fully of the bases and effects of the information outweighs the concern for protection of a competitive position. 10 CFR 2.790(b)(5).

Wisconsin Electric Power Co. (Point Beach Nuclear Plant Units 1 and 2), LBP-82-42, 15 NRC 1307 (1982). The Commission may require that information withheld from public inspection, or under consideration for withholding, be open to inspection by parties to a Commission proceeding under protective order. 10 CFR 2.790(b)(6); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-807, 21 NRC 1195, 1214 (1985).

#### SUMMARY

1. Disclosure of documents is governed by Commission regulations on the voluntary disclosure of documents in 10 CFR 2.790; FOIA and corresponding Commission regulations in 10 CFR Part 9; and the Commission's rules on discovery in 10 CFR Part 2.
2. The Commission's general policy under 10 CFR 2.790 is to make all final NRC records and documents available for inspection and copying in the Public Document Room.
3. 10 CFR 2.790 also establishes certain categories of documents which are exempt from voluntary disclosure. These categories correspond to the exemptions from disclosure authorized by FOIA.
4. The FOIA exemptions allow the Commission to exempt certain categories of documents from disclosure.

5. Although FOIA allows the Commission to protect certain categories of documents from disclosure, the Commission's authority is discretionary, i.e. documents exempt from disclosure may be released at the Commission's discretion.
6. The Commission has considerable flexibility to fashion the rules governing the disclosure of documents pursuant to discovery.
7. Discovery can be obtained by any party to the NRC licensing proceeding for any documents of any other party that are relevant to the subject matter of the proceeding.
8. Discovery requests are generally found to be relevant where there is any possibility that the information sought may be relevant to the subject matter of the action.
9. The discovery request must be related to the matters in controversy that have been admitted to the licensing proceeding.
10. Commission practice provides for certain categories of documents to be privileged from disclosure during discovery.
11. Most of these privileges from discovery are available to all parties in the licensing proceeding.

12. A claim of privilege can be overridden on a showing that the document is necessary to a proper decision in the proceeding.
  
13. In those cases where proprietary or safeguards information, or privileged documents are made available, the Licensing Board can require that they be examined under a protective order.

**PART II -NEGOTIATED RULEMAKING ISSUES  
JUNE 1, 1987**

1. What categories of information should be considered for entry into the LSS (for the primary site and the two alternatives)?

**EXAMPLE OPTIONS**

- basic licensing documents such as the license application, safety analysis report, environmental report, safety evaluation report, environmental impact statement
- All that is potentially relevant to the HLW licensing decision, excluding commonly available material such as textbooks (includes basic licensing documents cited above)
  - technical reports and analyses
  - QA/QC records
  - contractor reports
  - report references
  - external correspondence
  - internal memoranda, including legal opinions
  - personal notes, desk calendars, telephone logs
  - meeting minutes, including DOE/NRC meetings, Commission meetings
  - interagency agreements
  - drafts (e.g. those submitted for review beyond the first level of management or some other criterion)
  - annotated (marginal notes) documents
  - personnel records
  - travel records
  - Contract records
  - staff speeches and publications
  - "regulatory" documents related to HLW site selection and licensing
    - draft and final environmental assessments
    - site characterization plans
    - rulemakings
    - NRC technical positions
    - public and agency comments on these documents
    - agency reponse to public comments
  - computer codes and programs
  - congressional "Qs and As"
  - NRC on-site representative reports
- Supporting technical data
  - Field notes
  - Raw data

- Maps, photographs, tape recordings, movies, etc.
  - core samples
  - computer codes and runs
- Records generated as a part of the hearing process (motions, evidence, etc.)
2. What criteria should be used for the entry of information into the LSS either in full text or by author, title, and subject, etc.?

EXAMPLE OPTIONS

- All records relevant to HLW repository licensing regardless of when they were produced will be entered in full text
  - the date of the production of documents, for example, beginning with the signing of the Nuclear Waste Policy Act (NWPA) or some other significant reference point, would determine what is entered in full text
  - basic licensing documents, all material referenced in the license application, and material generated as part of the proceeding (motions, evidence) would be entered in full text
  - if a party intends to rely on a document in presenting its case, the document must be entered in full text
  - Only bibliographic information and abstracts entered in full text
  - exclude certain categories of documents from initial entry in full text, for example, annotated documents, handwritten notes, computer codes and computer runs, travel and personnel records, textbooks, newspapers
  - any relevant documents outside the criteria for full text entry must be identified in the system by author, title, etc.
3. Under what circumstances may information be excluded from the LSS or identified for special treatment based on privileges from discovery or on a similar basis?

EXAMPLE OPTIONS

- no privileged or proprietary material
- all traditional discovery privileges and procedures for protection of proprietary information and safeguards information

- all appropriate exclusions cited in 10 CFR 2.790(a)(1) for federal agency parties, i.e. national security data, internal personnel rules or practices, privileged or confidential commercial or financial information, deliberative process material, personnel or medical files, law enforcement investigatory files, geological or geophysical information concerning wells
  - attorney-client, attorney work product, privileged or confidential commercial or financial information only (i.e. elimination of the deliberative process privilege) for all parties
  - deliberative process privilege for all government entities including Indian tribes
4. In what manner should privileged and similar material be administered?

EXAMPLE OPTIONS

- Privileged documents should be entered in the LSS when produced but access protected
  - Privileged documents should be retained by the participants in electronic format for immediate entry when no longer protected
  - Privileged documents should be identified by author, recipient, date, subject matter, and basis for claim of privilege
  - a pre-license application board or judicial officer should rule on requests for withholding
  - a Protective Order segment of the LSS should be established for certain documents with access restricted to the counsel or expert witnesses, as appropriate, of the parties to the proceeding
  - if the material in any one category of withholding, for any single party, is above a certain volume, it must be entered into an access-restricted Privileged segment of the LSS in searchable full text when the claim of withholding is asserted
5. What provisions should be made for information existing solely or primarily in electronic form, or information usable only in electronic form?

EXAMPLE OPTIONS

- transfer such data directly into the LSS
- dump the entire computer bank onto print outs, then into the LSS

- require a written description of the electronic data base; the reasons for its creation; indexes; the computer codes used to create it; the software needed to manage the data

6. What format should be used for the entry of documents into the LSS?

EXAMPLE OPTIONS

- Standardized electronic format for text and document images with bibliographic header
- Standardized type font or electronic format with camera ready copy for non-text material
- Standardized format or as is for special cases
- all of the above

7. How will the electronic submission of documents be handled?

EXAMPLE OPTIONS

- Prepared at participants or contractors facility and transmitted by telecommunications, floppy or hard disk, or other electronic media to a central processing facility
- Each participant maintains their own document data base; accessible by others or copy provided to a central facility
- Hard copy or available electronic copy is transmitted to a central facility, processed, and a complete data base for all participants is returned to each user on optical disk
- During the license proceeding all records transmission will be conducted through telecommunications

8. What will be the role of hard copy?

EXAMPLE OPTIONS

- allow submission of information in hard copy or electronic format
- require submission to LSS in standardized electronic format (authenticated), except when special circumstances criteria are met (hardship, etc.)
- require submission in electronic format, and require submitter to retain hard copy of all information submitted

- If information is generated originally in electronic format, it is not required to be converted into hard copy
- hard copy provided on request for a fee from the System
- hard copy available at no cost from the System
- no restriction on parties using hard copy for their own purposes

9. What is the scope of derivative discovery and what procedures will apply?

EXAMPLE OPTIONS

- documents identified through the deposition process, and not already in the LSS, including handwritten materials and annotated documents, will be entered into the system
- eliminate interrogatories on the production of documents

10. How should large volumes of documents or "indiscriminate dumping" of documents be approached?

EXAMPLE OPTIONS

- require submitter to prepare an index of all material submitted
- only require final documents of contractor reports
- establish a committee of potential parties or a Licensing Board to screen documents for relevance
- require submitter to identify irrelevant portions of documents
- eliminate all duplicative material in the LSS

11. What procedures should be applied to new information that is offered for admission into the proceeding?

EXAMPLE OPTIONS

- apply the same procedures that were applied to the original information entered into the LSS

12. How will additions to the LSS be administered?

EXAMPLE OPTIONS

- users are provided a hard copy new additions listing
- LSS provides a highlight of new additions in electronic format

13. What procedures should apply to amending records already in the LSS?

EXAMPLE OPTIONS

- allow record correction, addition of record notes, or record removal
- allow correction only to eliminate duplication

14. What measures should be established to ensure that all relevant documents have been entered into the LSS?

EXAMPLE OPTIONS

- required procedures for the identification and entry of documents
- audits
- independent system administrator for each party
- Certification by participants that all relevant documents have been entered (affidavits affirming that all relevant documents have been entered)
- sanctions
  - monetary compensation to a party aggrieved by the failure to disclose information
  - dismissal as a party
  - denial of license application
  - evidentiary inference that information improperly withheld from discovery is unfavorable to the withholding party
  - for all parties, withholding party may not offer related information into evidence; may not offer a witness whose theory would have been damaged by the withheld evidence
  - if withheld by license applicant, delay in the licensing proceeding

15. What procedures will apply to any documents that are incorrectly excluded from the LSS?

EXAMPLE OPTIONS

- Procedures for notice to all participants and immediate entry of document

- application of sanctions

16. How will the authentication of documents be handled?

EXAMPLE OPTIONS

- Electronic verification of system user and access code
- Electronic transmission, recording on write-once-only laser disk, retransmission and certification by user
- Check against and maintain an original hardcopy
- the originals of legal documents (e.g. pleadings, affidavits, certificates of service) traditionally must bear an authorized signature and/or notary seal. A similar "electronic" signature will be required for electronic submission of these documents to the LSS.

17. What security measures are necessary to protect the information in the LSS, including protecting the confidentiality of research by users?

EXAMPLE OPTIONS

- Controlled access to the system
- Use of write-once-read-many-times laser disk systems (documents can be added but not removed or changed)
- System Administrator provides for security access by entering documents to data base
- Periodic electronic comparison against a master protected document data base
- System Administrator maintains confidentiality of user research

18. At what time will parties, or potential parties, to the licensing proceeding be required to enter documents to the LSS? (i.e. How can the early entry of data be encouraged?)

EXAMPLE OPTIONS

- rule establishes a schedule for entry
- Documents are required to be entered within some time period after completion

- Documents must be entered prior to initiation of the licensing proceeding -
- provide for parties to be designated before the license application is filed

19. What organization will be responsible for administering the LSS?

EXAMPLE OPTIONS

- The DOE would have responsibility for implementing, maintaining and administering the LSS
- The NRC would have system administration control with NWPAs funding
- A third independent party would have administrative control with an oversight board
- Each party to the proceeding would administer their own document data base in accordance with standard procedures

20. Where will system access terminals be located and what types of assistance will be available on using the system?

EXAMPLE OPTIONS

- Terminals located at each participants primary location(s) and Public Document Rooms
- Dial-in access to text information through individually owned personal computers and modems
- Access through central and/or specially distributed facilities
- Self-help training programs at terminals
- Professional assistance at public facilities
- training programs conducted at users facilities
- hotline for users with questions during on-line searches
- schedule hours of access to LSS to ensure fairness with regard to access by all users
- prepare a manual for LSS users

21. How should the costs of system use and access be administered

EXAMPLE OPTIONS

- Nuclear Waste Fund pays full cost of design, development, entry, administration, and access
  - Nuclear Waste Fund pays for design, development, and administration
  - submitter pays cost of entry
  - establish a system charge for access and use
22. What, if any, exemptions should be allowed to LSS requirements (e.g. a requirement to submit in electronic format)?

EXAMPLE OPTIONS

- no exemptions
  - exemptions for hardship
  - exemption for single entry, small volume, filings
  - exemption for limited appearance submissions under 10 CFR 2.715(a)
23. What standards should be set for recall and precision, system reliability, document retrieval time, and other performance criteria
24. What requirements should be established for collection of documents in electronic format in the interim until the LSS is fully operational?

EXAMPLE OPTIONS

- NRC establishes a policy for all documents that it creates or that are submitted to the NRC; recommend that other potential parties follow suit
  - potential parties establish their own policies
25. How can the LSS be most efficiently integrated into the licensing process?

EXAMPLE OPTIONS

- provide for early Licensing Board involvement
26. How will the LSS be used during the licensing proceeding?

EXAMPLE OPTIONS

- hard copy is available to counsel and witnesses
- electronic format must be used during the proceeding;  
establish a file entitled "hearing record"
- the transcript of the hearing should be entered into the LSS on a daily basis
- provide for electronic submission of motions, etc.
- online access to the LSS will be provided to the parties and the Licensing Board during the hearing

27. How will conflicts over the entry of documents or other issues be addressed?

EXAMPLE OPTIONS

- allow the LSS Administrator to resolve disputes
- establish a committee of potential parties to resolve disputes
- establish a pre-license application Licensing Board to resolve disputes



**U.S. NUCLEAR REGULATORY COMMISSION**

**CHARTER**

**HLW LICENSING SUPPORT SYSTEM ADVISORY COMMITTEE**

**FOR**

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

**PURPOSE.** This Charter establishes the HLW Licensing Support System Advisory Committee for the Nuclear Regulatory Commission's (NRC) negotiated 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 negotiating sessions, but in any event not later than December 31, 1988.

**SPONSOR AND OFFICE OF SUPPORT.** The U.S. Nuclear Regulatory Commission shall be the Sponsor. The NRC offices of General Counsel, Nuclear Material Safety and Safeguards, and Administration and Resources Management shall furnish support services.

**ESTIMATED ANNUAL COST.** \$120,000 and 3.6 work-years.

**MEMBERSHIP.** The Committee shall consist of approximately 15, but no more than 25, voting 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 Chairman of the Committee. Mr. Donnie H. Grimsley, Rules and Records Division, Office of Administration and Resources Management, 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 nor expense reimbursement for service on the Committee.

**SUBCOMMITTEES.** The Committee 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 from this date unless sooner terminated or extended.



**ENCLOSURE E**

**ENCLOSURE E IS TOO LARGE TO REPRODUCE,  
ORIGINAL IS FILED IN SECY.**