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JAN 19 1989

MEMORANDUM FOR: David L. Meyer, Chief  
Rules and Procedures Branch  
Division of Rules and Records  
Office of Administration  
and Resources Management

FROM: Eric S. Beckjord, Director  
Office of Nuclear Regulatory Research

SUBJECT: IMPLEMENTATION OF COMMISSION ACTION: PUBLICATION  
OF NEW 10 CFR PART 62

By memorandum dated December 1, 1988, the Secretary of the Commission indicated that the Commission (with all Commissioners agreeing) has voted to approve the publication of the final rule on emergency access to low-level waste disposal facilities set out in SECY-88-298.

Please implement the Commission's action by arranging for publication of the enclosed final rule in the Federal Register.

Enclosed are three copies of the Federal Register notice and copies of the pages marked-up with the changes requested by your office for transmittal to the Office of the Secretary. Also enclosed is a Congressional letter package for transmittal to GPA/CA which includes seven copies of the public announcement for transmittal to GPA/PA. In addition, enclosed is a copy of the final regulatory analysis (which includes the environmental assessment and finding of no significant impact) for transmittal to the PDR.

ORIGINAL SIGNED BY

Eric S. Beckjord, Director  
Office of Nuclear Regulatory Research

Distribution  
Subj/Circ/Chron MKnapp, NMSS  
Beckjord  
Speis  
Arlotto  
Bosnak  
Silberberg  
Grill  
Lambert  
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Enclosures:  
1. FRN (and 3 copies)  
2. R+R Changes to FRN  
3. Congressional Letter Package  
4. Final Regulatory Analysis

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JLambert	RGrill	MSilberberg	RRosnak	GArlotto	TSpeis	EBeckjord
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Enclosure 1



NUCLEAR REGULATORY COMMISSION

10 CFR PART 62

Criteria and Procedures for Emergency Access to Non-Federal  
and Regional Low-Level Waste Disposal Facilities

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is issuing this rule to establish criteria and procedures for fulfilling its responsibilities associated with acting on requests by low-level radioactive waste generators, or State officials on behalf of those generators, for emergency access to operating, non-Federal or regional, low-level radioactive waste disposal facilities under Section 6 of the Low-Level Radioactive Waste Policy Amendments Act of 1985. Grants of emergency access may be necessary if a generator of low-level radioactive waste is denied access to operating low-level radioactive waste disposal facilities and the lack of this access results in a serious and immediate threat to the public health and safety or the common defense and security.

EFFECTIVE DATE:

ADDRESS: Copies of comments received on the proposed rule and the regulatory analysis may be examined at the NRC Public Document Room, 2120 L Street NW., Washington, DC 20555.

FOR FURTHER INFORMATION CONTACT: Janet Lambert, Division of Engineering,  
Office of Research, U.S. Nuclear Regulatory Commission, Washington, DC  
20555, telephone (301) 492-3857.

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I. Introduction and Background

On December 15, 1987, NRC published in the Federal Register  
(52 FR 47587) a proposed new Part 62 to 10 CFR in order to implement its  
emergency access responsibilities under Section 6 of the Low-Level

Radioactive Waste Policy Amendments Act of 1985 (PL 99-240, January 15, 1986), "the Act." The proposed Part 62 set forth the criteria and procedures that the Commission intended to use to determine if emergency access to non-Federal and regional low-level waste (LLW) disposal facilities should be granted. The public comment period for the proposed rule expired on February 12, 1988. The NRC received twenty-one (21) comment letters from ten concerned citizens and environmental groups, six State governments, two LLW compact Commissions, two industries and one nuclear information service.

The Act directs the States to develop their own low-level radioactive waste (LLW) disposal facilities or to form Compacts and cooperate in the development of regional LLW disposal facilities so that the new facilities will be available by January 1, 1993.

The Act establishes procedures and milestones for the selection and development of the LLW disposal facilities. The Act also establishes a system of incentives for meeting the milestones, and penalties for failing to meet them, which is intended to ensure steady progress toward new facility development.

The major incentive offered by the Act is that the States and regional Compacts that meet the milestones will be allowed to continue to use the existing disposal facilities until their own facilities are available, which is to be no later than January 1, 1993. If unsited States or Compact regions fail to meet key milestones in the Act, the States or Compact Commissions with operating non-Federal or regional LLW disposal facilities are authorized to demand additional fees for wastes accepted for disposal, and ultimately to deny the LLW generators in the delinquent State or Compact region further access to their facilities.



Section 6 of the Act provides that the Nuclear Regulatory Commission (NRC) can determine to grant a generator "emergency access" to non-Federal or regional low-level radioactive waste (LLW) disposal facilities if access to those facilities has been denied and access is necessary in order to eliminate an immediate and serious threat to the public health and safety or the common defense and security. The Act also requires that NRC determine whether the threat can be mitigated by any alternative consistent with the public health and safety, including ceasing the activities that generate the waste. NRC must be able, with the information provided by the requestor, to make both determinations prior to granting emergency access. The purpose of this regulation is to set forth the criteria and procedures that will be used by the Commission to determine if emergency access to a LLW facility should be granted.

## II. Legislative Requirements

In addition to directing the NRC to grant emergency access as discussed in the Background section, the Act further directs NRC to designate the operating LLW disposal facility or facilities where the waste will be sent for disposal if NRC determines that the circumstances warrant a grant of emergency access. NRC is required to notify the Governor (or chief executive officer) of the State in which the waste was generated that emergency access has been granted, and to notify the State and Compact which will be receiving the waste that emergency access to their LLW disposal facility is required. The Act limits NRC to 45 days from the time a request is received to determine whether emergency access will be granted and to designate the receiving facility.

The Act provides that NRC can grant emergency access for a period not to exceed 180 days per request. To ensure that emergency access is not abused, the Act allows that only one extension of emergency access, not to exceed 180 days, is to be granted per request. An extension can be approved only if the LLW generator who was originally granted emergency access and the State in which the LLW was generated have diligently, though unsuccessfully, acted during the period of the initial grant to eliminate the need for emergency access.

The Act also provides that requests for emergency access shall contain all information and certifications that NRC requires to make its determination.

"Temporary emergency access" to non-Federal or regional LLW disposal facilities may be granted at the Commission's discretion because of a serious and immediate threat to the public health and safety or the common defense and security, pending a Commission determination as to whether the threat could be mitigated by suitable alternatives. The grant of temporary emergency access expires 45 days after it is granted.

The Act does not require NRC to develop a rule to carry out its Section 6 responsibilities. However, NRC is issuing this rule to establish the criteria and procedures that will be used in making the required determinations for emergency access. Although Congress provided NRC the statutory responsibility for implementing Section 6 of the Act and gave the Commission authority to decide whether access will be provided, emergency access decisions are likely to be controversial. By setting out the criteria and procedures for making emergency access decisions in a rule that reflects public comment, NRC intends to add predictability

to the decisionmaking process and to help ensure that the NRC will be able to make its decisions on emergency access requests within the time allowed by the Act.

### III. Legislative History

The legislative history of the Act emphasizes the Congressional intent that emergency access be used only in very limited and rare circumstances and that it was not intended to be used to circumvent other provisions of the Act. Congress believed it was important for the successful implementation of the Act that emergency access not be viewed by the unsited States as an alternative to the pursuit of the development of new LLW disposal capacity. The legislative history indicates that Congress believed that with the various management options available to LLW generators, including, for example, storage or ceasing to generate the waste, that instances where there was no alternative to emergency access would be unlikely. Congress expected that responsible action from the generators and the States/Compacts should resolve most access problems thus precluding the necessity for involving the Federal sector in granting emergency access. Section 6 was included to provide a mechanism for Federal involvement as a vehicle of last resort.

In developing the emergency access rule, NRC tried to be consistent both with the actual text of Section 6 of the Act and with the intent expressed by Congress regarding decisions made pursuant to Section 6. The rule sets strict requirements for granting emergency access and should serve to encourage potential requesters to seek other means for resolving the problems created by denial of access to LLW disposal facilities. The rule places the burden on the party requesting emergency



access to demonstrate that the criteria in the rule have been met and emergency access is needed. Applicants for emergency access will have to provide clear and convincing evidence that they have exhausted all other options for managing their waste. By establishing strict requirements for approving requests for emergency access, NRC intends to reinforce the idea that problems with LLW disposal are to be worked out to the extent practical among the States, and that emergency access to existing LLW facilities will not automatically be available as an alternative to developing that capacity. NRC believes this interpretation is consistent with a plain reading of the Act and the supporting legislative history.

Section 6(g) of the Act requires the NRC to notify the Compact Commission for the region in which the disposal facility is located of any NRC grant of access "for such approval as may be required under the terms of its compact." The Compact Commission "shall act to approve emergency access not later than fifteen days after receiving notification" from the NRC. The purpose of this provision is to--

- ensure that the Compact Commission is aware of the NRC's grant of emergency access and the terms of the grant,
- allow the Compact Commission to implement any administrative procedures necessary to carry out the grant of access, and
- ensure that the limitations on emergency access set forth in Section 6(h) of the Act have not been exceeded.

However, it is clear from the legislative history of the Act that Section 6(g) should not be construed as providing the Compact Commission with a veto over the NRC's grant of emergency access. The basic purpose

of the Section 6 emergency access provision is to ensure that LLW disposal sites that have denied access to certain States under provisions of the Act will be made available to receive waste in situations posing a serious and immediate threat to the public health and safety. A Compact Commission veto would frustrate the purpose of the emergency access provision and would be generally contrary to the legislative framework established in the Act. As emphasized in the House Committee on Interior and Insular Affairs Report on the Act, ratification of a Compact should be conditioned on the Compact's acting in accord with the provisions of the Act. If the Compact refuses to provide, under its own authorities, emergency access under Section 6, Congressional ratification of that Compact would be null and void. H.R. REP. No. 314, 99th Cong., 1st Sess., pt. 1, at 2997 (1985).

#### IV. NRC Approach

In developing this rule, the NRC's approach was to:

1. ensure that all of the principal provisions of Section 6 of the Act are addressed in the regulation.
2. identify the information and certifications that will have to be submitted with any request for emergency access in order for NRC to make the necessary determinations.
3. ensure that the criteria and procedures that are established in 10 CFR Part 62 can be implemented within 45 days after NRC receives a request as specified in the Act.
4. establish criteria and procedures for designating a site to receive the waste that are fair and equitable and that are consistent

with the other provisions of the Act, including the limits on the amount of waste that can be disposed of at each operating facility.

5. establish requirements for granting emergency access that are stringent enough to discourage the unsited States and regions from viewing emergency access as an alternative to diligent pursuit of their own disposal capability, and yet flexible enough to allow NRC to respond appropriately in situations where emergency access is genuinely needed to protect the public health and safety or the common defense and security.

#### V. Assumptions

NRC made several assumptions in developing this rule.

NRC assumed that the wastes requiring disposal under the emergency access provision will be the result of unusual circumstances. The nature of routine LLW management is such that it is difficult to conceive of situations where denial of access to disposal would create a serious and immediate threat to the public health and safety or the national security. In most cases generators should be able to safely store routinely generated LLW or employ other options for managing the waste without requiring emergency access. Thus, if all the LLW generators in a State were denied access to LLW disposal facilities, NRC would not expect to receive a blanket request for emergency access for all of the LLW generated in that State, or for all of the LLW generated by a particular kind of generator since the need for emergency access would be different in each case.

NRC has also assumed that requests for emergency access will not be made for wastes that would otherwise qualify for disposal by the



Department of Energy (DOE) under the unusual volumes provision of the Act [Section 5(c)(5)]. This means that NRC does not intend to consider requests for emergency access for wastes generated by commercial nuclear power stations as a result of unusual or unexpected operating, maintenance, repair, or safety activities. Section 5(c)(5) of the Act specifically sets aside 800,000 cu ft of disposal capacity above the regular reactor allocations through 1992 to be used for those wastes. With this space reserved for wastes qualifying for the "unusual volumes allocation," NRC believes emergency access should be reserved for other LLW, until the 800,000 cu ft allocation is exceeded.

NRC considered basing its decisions for granting emergency access solely on quantitative criteria, but decided against that approach. While NRC has identified some of the wastes and the scenarios which would create a need for emergency access, it is unlikely that all possibilities can be predicted or anticipated. Largely, because of the uncertainty associated with identifying all of the circumstances under which emergency access may be required, NRC has avoided establishing criteria with absolute thresholds. Instead, the rule contains a combination of qualitative and quantitative criteria with generic applicability. NRC believes this combination provides maximum flexibility in considering requests for emergency access on a case-by-case basis.

## VI. The Final Rule

The final rule contains four Subparts, A, B, C, and D. These Subparts set out the requirements and procedures to be followed in requesting emergency access and in determining whether or not requests should be granted. Each Subpart is summarized and discussed here.

### Subpart A - General Provisions

Subpart A contains the purpose and scope of the rule, definitions, instructions for communications with the Commission, and provisions relating to interpretations of the rule. Subpart A states that the rule applies to all persons as defined by this regulation who have been denied access to existing commercial LLW disposal facilities and who submit a request to the Commission for an emergency access determination under Section 6 of the Low-Level Radioactive Waste Policy Amendments Act of 1985. Subpart A also emphasizes that the emergency access rule applies only to those subclasses of LLW for which the States have disposal responsibility under Section 3(1)(a) of the Act.

### Subpart B - Request for a Commission Determination

Subpart B specifies the information that must be submitted and the procedures that must be followed by a person seeking a Commission determination on emergency access.

Specifically, Subpart B requires the submission of information on the need for access to LLW disposal sites, the quantity and type of material requiring disposal, impacts on health and safety or common defense and security if emergency access were not granted, and consideration of available alternatives to emergency access. This information will enable the Commission to determine:

- (a) whether a serious and immediate threat to the public health and safety or the common defense and security might exist,
- (b) whether alternatives exist that could mitigate the threat, and
- (c) which non-Federal disposal facility or facilities should provide the required disposal.

In addition, Subpart B also sets forth procedures for the filing and distribution of a request for a Commission determination. It provides for publishing in the Federal Register a notice of receipt of a request for emergency access to inform the public that Commission action on the request is pending. Although comment is not required by the Act or the Administrative Procedure Act, Subpart B provides for a 10-day public comment period on the request for emergency access.

In the event that the case for requesting emergency access is to be based totally or in part on the threat posed to the common defense and security, Subpart B specifies that upon receiving such a request, NRC will consult with the Department of Energy (DOE) and or the Department of Defense (DOD) to ascertain the importance to the common defense and security of the activities producing the LLW for which emergency access is requested.

#### Subpart C - Issuance of a Commission Determination

For the NRC to grant emergency access, the Commission must first conclude that there is a serious and immediate threat to the public health and safety or the common defense and security, and second that there are no available mitigating alternatives. Subpart C sets out the procedures to be followed by the Commission in considering requests for emergency access, for granting extensions of emergency access, and for granting temporary emergency access; establishes the criteria and standards to be used by the Commission in making those determinations; and specifies the procedures to be followed in issuing them.



Subpart C provides that NRC, in determining whether there is a serious and immediate threat to the public health and safety, will consider: (1) the nature and extent of the radiation hazard that would result from the denial of access including consideration of the standards for radiation protection contained in 10 CFR Part 20, any standards governing the release of radioactive materials to the general environment that are applicable to the facility that generated the low-level waste, and any other Commission requirements specifically applicable to the facility or activity which is the subject of the emergency access request and, (2) the extent to which essential services such as medical, therapeutic, diagnostic, or research activities will be disrupted by the denial of emergency access.

In determining whether there is a serious and immediate threat to the common defense and security, Subpart C provides that the Commission will consider whether the activity generating the LLW is necessary to protect the common defense and security and whether the lack of access to a disposal site would result in a significant disruption in that activity that would seriously threaten the common defense and security. Subpart C also specifies that the Commission will seek and consider DOD and DOE viewpoints on the importance of the activities responsible for generating the LLW to the common defense and security.

Under Subpart C, if the Commission makes either of the above determinations in the affirmative, then the Commission will consider whether alternatives to emergency access are available to the requestor. The Commission will consider whether the person submitting the request has identified and evaluated the alternatives available which could potentially mitigate the need for emergency access. The Commission will

consider whether the person requesting emergency access has considered all factors in the evaluation of alternatives including state-of-the-art technology and the impacts of the alternatives on the public health and safety. For each alternative, the Commission will also consider whether the requestor has demonstrated that the implementation of the alternative is unreasonable because of adverse effects on the public health and safety or the common defense and security, because it is technically or economically beyond the capability of the requestor, or because the alternative could not be implemented in a timely manner.

Of particular concern to Congress was the possibility that ceasing the activity responsible for generating the waste could lead to the cessation or curtailment of essential medical services. Section 62.25 of the rule provides that the Commission will consider the impact on medical services from ceasing the activity in making its determination that there is a serious and immediate threat to the public health and safety. The Commission is also concerned as to whether the implementation of other alternatives may have a disruptive effect on essential medical services. Section 62.12 specifically requests information on these impacts as part of a request for emergency access so they can be considered by the Commission in its overall determination about reasonable alternatives.

According to the procedures set out in Subpart C, the Commission will only make an affirmative determination on granting emergency access if the available alternatives are found to be unreasonable. If an alternative is determined by NRC to be reasonable, then the request for emergency access will be denied.

If the Commission determines that there is a serious and immediate threat to the public health and safety or the common defense and security which cannot be mitigated by any alternative, then the Commission will decide which operating non-Federal LLW disposal facility should receive the LLW approved for emergency access disposal.

Subpart C sets out that in designating a disposal facility or facilities to provide emergency access disposal, the Commission will first consider whether a facility should be excluded from consideration because: (1) the LLW does not meet the license criteria for the site; (2) the disposal facility meets or exceeds its capacity limitations as set out in the Act; (3) granting emergency access would delay the planned closing of the facility; or (4) the volume of the waste requiring disposal exceeds 20 percent of the total volume of the LLW accepted for disposal at the site in the previous calendar year. If the designation cannot be made on these factors alone, then the Commission will consider the type of waste, previous disposal practices, transportation requirements, radiological effects, site capability for handling the waste, volume of emergency access waste previously accepted at each site, and any other information the Commission deems necessary.

In making a determination regarding a request for an extension of emergency access, Subpart C provides that the Commission will consider whether the circumstances still warrant emergency access and whether the person making the request has diligently acted during the period of the initial grant to eliminate the need for emergency access.

In making a determination that temporary emergency access is necessary, the Commission will have to consider whether the emergency access situation falls within the criteria and examples in the Commission's



policy statement on abnormal occurrences, but will not have to reach a determination regarding mitigating alternatives.

#### Subpart D - Termination of Emergency Access

Subpart D establishes that the NRC may terminate a grant of emergency access if the requestor or the type of waste do not meet the conditions established by NRC pursuant to this Part. It also establishes that the Commission may terminate emergency access when it determines that emergency access is no longer necessary to protect the public health and safety or the common defense and security from a serious and immediate threat.

#### VII. Rationale for Criteria

This rule establishes the criteria for making the emergency access determinations required by the Act. The rationale for these decisions is discussed below:

(a) Determination that a Serious and Immediate Threat Exists.

Establishing the criteria to be used in determining that a serious and immediate threat exists to the public health and safety or the common defense and security is key to NRC's decisions to grant emergency access. Neither the Act nor its legislative history provide elaboration regarding Congressional intent for what would constitute "a serious and immediate threat."

(1) To the Public health and safety--

The criteria in this rule for determining whether a serious and immediate threat to the public health and safety exists, address three situations. Section 62.25(b)(i) addresses the situation where the lack of access would result in a radiation hazard at the facility that is generating the LLW. Section 62.25(b)(ii) addresses the situation where the threat to public health and safety would result from disruption of the activity that generates the waste, for example, an essential medical service. Section 62.25(c) addresses the criteria for granting temporary emergency access.

The criteria used in this rule for determining whether a serious and immediate threat to the public health and safety exists is qualitative in nature in order to provide the Commission with the flexibility necessary to consider a wide range of potential factual situations. However, in making this qualitative determination, the criteria require the Commission to consider several existing quantitative standards. These consist of the Commission's standards for radiation protection in 10 CFR Part 20, any standards on the release of radioactive materials to the general environment that are applicable to the facility that generated the LLW, and any other Commission requirements specifically applicable to the facility or activity which is the subject of the emergency access request. This latter category would include license provisions, orders, and similar requirements.

The Congressional concern in enacting Section 6 of the Act was to ensure that a serious and immediate threat to the public health and safety did not result from a denial of access. In addressing this concern, the Commission will evaluate the request for emergency access in

its entirety, i.e., the threat to public health and safety and the alternatives to emergency access that may be available to mitigate that threat. In other words, in determining what constitutes a serious and immediate threat to public health and safety, the Commission must consider what threat would be unacceptable assuming that no alternatives are available. In the Commission's judgment, any situation that would result in exceeding the occupational dose limits or basic limits of public exposure upon which certain requirements in 10 CFR Part 20 are founded would be an unacceptable threat to the public health and safety, and should be considered for emergency access.

The legislative history of Section 6 of the Act does not provide any illustrations of a situation where a serious and immediate threat to the public health and safety would be created at the facility at which the waste is stored, although it is clear that Congress was concerned over the potential radiation hazard that might result at a particular facility that was denied access to LLW disposal. The Commission does not anticipate any situation where the lack of access would create a serious and immediate threat to the public health and safety. However, in order to be able to respond to the unlikely, but still possible, situation where a serious threat to the public health and safety might result, this rule establishes criteria to address this possibility. Under its normal regulatory responsibilities and authority, the Commission would act immediately to prevent or mitigate any threat to the public health and safety, including shutting down the facility. However, there may be circumstances where a potential safety problem would still exist, after the facility was shut down or the activity stopped, if the low level waste could not be disposed of because of denial of access. In this



situation, emergency access may be needed. The Commission would emphasize first, that it is extremely unlikely that a serious and immediate threat to the public health and safety will ever result at the generator's facility from the lack of access to a disposal facility, and second, if such a situation does exist, the Commission will move immediately to eliminate the threat.

If the Commission does receive a request for emergency access based on the above circumstances, the Commission will evaluate the nature and extent of the radiation hazard. If there is no violation of the Commission's generic or facility-specific radiation protection standards, no serious and immediate threat would exist from the waste itself. This is separate from a finding that a serious and immediate threat to the public health and safety would exist if the activity were forced to shut down.

Section 6(d) of the Act allows the Commission to grant temporary emergency access for a period not to exceed 45 days solely upon a finding of a serious and immediate threat to the public health and safety. In order to grant temporary emergency access, the Commission is not required to evaluate the availability of alternatives to emergency access that would mitigate the threat. The Commission believes that grants of temporary emergency access should be reserved for the most serious threat to public health and safety, and has accordingly established criteria for granting temporary emergency access that require the consideration of more serious events. For purposes of granting temporary emergency access under Section 62.23, the Commission will consider the criteria and examples contained in the Commission's Policy Statement (45 FR 10950, February 24, 1977) for determining whether an event at a facility or

activity licensed or otherwise regulated by the Commission is an abnormal occurrence within the purview of Section 208 of the Energy Reorganization Act of 1974. This provision requires the Commission to keep Congress and the public informed of unscheduled incidents or events which it considers significant from the standpoint of public health and safety. Under the criteria established in the Commission's policy statement, an event will be considered an abnormal occurrence if it involves a major reduction in the degree of protection provided to public health and safety. Such an event could include--

- a. Moderate exposure to, or release of, radioactive material;
- b. Major degradation of safety related equipment; or
- c. Major deficiencies in design, construction, use of, or management controls for licensed facilities or activities.

In deciding whether to grant temporary emergency access, the Commission will evaluate whether the emergency access situation falls within the criteria in the Commission's policy statement on abnormal occurrences.

(2) To the common defense and security--

Although NRC is required by the Act to determine that there is either a serious and immediate threat "to the public health and safety," or to "the common defense and security," realistically NRC cannot make the latter judgement without some information from DOD and DOE which will assist NRC in identifying those situations involving the denial of access to LLW disposal which constitute a serious and immediate threat to the national defense and security, or the importance of a particular LLW generator's activities in maintaining those objectives. While NRC

has the Congressional mandate for this determination, the staff believe it necessary to consider DOD and DOE information as part of the decision-making process.

NRC considered several approaches for involving DOD and DOE in the process of determining whether requests for emergency access should be granted on the basis of a serious and immediate threat to the common defense and security. In the proposed rule NRC decided that the best way to provide such interaction would be to require that requests filed with NRC for emergency access on the basis of a serious and immediate threat to the common defense and security, would have to include appropriate certification from DOE and or DOD substantiating the requestor's claim that such a threat would result if emergency access is not granted. NRC proposed that the necessary certification in the form of a statement of support should be acquired by the requestor prior to applying to NRC for emergency access so the statement of support could be a part of the actual petition.

Discussions with DOD and DOE regarding the proposed arrangement have led NRC to include a modified procedure in the final rule. A generator whose request for emergency access is based in whole or in part on a serious and immediate threat to the common defense and security is no longer required to include a DOD and or DOE statement of support for that claim in the request package submitted to NRC. Rather, NRC will consult with DOD and or DOE directly to ascertain the importance of the activities responsible for generating the LLW to the common defense and security. In reaching a determination as to whether emergency access should be granted in order to protect the common defense and security, the NRC will consider whether DOE and or DOD



support the generator's claim regarding the strategic importance of the activity.

Negotiations with DOD and DOE regarding this procedure were underway in parallel with the development of the final rule. Letters of intent between the NRC and DOD and DOE that establish the process for obtaining the DOD and DOE recommendations on the importance of the requestor's activities to the common defense and security are expected by the time the rule is published. DOD and DOE staffs are aware of the 45 day response time imposed on NRC to make the emergency access determinations and the agreement will provide for expeditious action by DOD and DOE.

Congress deliberately gave the NRC the responsibility for making the common defense and security determination rather than leaving the determination with DOD or DOE. So while the Commission intends to give the DOD and DOE statements of support and recommendations full consideration in evaluating requests for emergency access, the Commission will not treat them as conclusive.

(b) Determination on Mitigating Alternatives.

As directed by Section 6 of the Act, even if a situation exists which poses a serious and immediate threat to the public health and safety or the common defense and security, emergency access is not to be granted if alternatives are available to mitigate the threat in a manner consistent with the public health and safety. Requestors for emergency access are required to demonstrate that they have explored the alternatives available and that the only course of action remaining is emergency access. Only after this has been demonstrated to NRC will the Agency proceed with a grant of emergency access.

Alternatives which, at a minimum, a requestor will have to evaluate are set out in Section 6(c)(1)(B) of the Act. They include (1) storage of LLW at the site of generation or in a storage facility, (2) obtaining access to a disposal facility by voluntary agreement, (3) purchasing disposal capacity available for assignment pursuant to Section 5(c) of the Act, and (4) ceasing the activities that generate the LLW.

While 6(c)(1)(B) of the Act sets these out as possible alternatives which a generator must consider before requesting emergency access, NRC has identified other possible alternatives to emergency access which should be considered, as appropriate, in any requests for emergency access. These additional alternatives are discussed below.

Section 5(c)(5) of the Act, "Unusual Volumes," provides owners and operators of commercial nuclear reactors with special access to disposal in the event that unusual or unexpected operating, maintenance, repair or safety activities produce quantities of waste which cannot be otherwise managed or disposed of under the Act. NRC does not consider that Congress intended that disposal under the emergency access provision was to apply to the Section 5(c)(5) wastes unless the capacity required for disposals under the unusual volume provision would exceed the 800,000 cubic feet allocated for those purposes. Thus, NRC has taken the position in this rule that as long as unusual volumes disposal capacity is available for LLW which qualifies for such disposal, emergency access should not be requested. Applications for emergency access for wastes which NRC determines would otherwise be eligible for disposal under the unusual volumes provision, will be denied.

Another alternative applies only to Federal or defense related generators of LLW. NRC will expect that generators of LLW falling into

either of these categories will attempt to arrange for disposal at a Federal LLW disposal facility prior to requesting access to non-Federal facilities under the emergency access provision.

The Commission fully intends that the States and Compacts whose generators have been denied access to LLW disposal will share in the responsibility for identifying and providing alternatives to emergency access. NRC's expectation is that the States and appropriate Compacts, as well as the generator, will each exhaust their options before emergency access will be requested. A request for emergency access is to include a discussion of the consideration given to any alternatives available to the requestor. To NRC, this includes State/Compact options as well as those available to the individual generator. NRC expects that any request would address the alternatives explored by each of these, and the actions taken.

For all the alternatives that are considered, NRC is requiring detailed information from the requestor regarding the decision process leading to a request for emergency access. The requestor will be expected to: (1) demonstrate that all pertinent alternatives have been considered; (2) provide a detailed analysis comparing all of the alternatives considered; (3) demonstrate that consideration has been given to combining alternatives in some way or in some sequence either to avoid the need for emergency access, or to resolve the threat, even on a temporary basis, until other arrangements can be made; (4) evaluate the costs, economic feasibility, and benefits to the public health and safety of the potential alternatives, and (5) incorporate the results into the request.

(c) Designation of Site.



In deciding which of the operating, non-Federal or regional LLW disposal facilities will receive the LLW requiring emergency access, NRC will determine which of the disposal facilities would qualify under the limitations set out in Section 6(h) of the Act. According to those limitations, a site would be excluded from receiving emergency access waste if (1) the LLW does not meet the license criteria for the site; (2) the disposal facility meets or exceeds its capacity limitations as set out in the Act; (3) granting emergency access would delay the planned closing of the facility; or (4) the volume of the waste requiring disposal exceeds 20 percent of the total volume of the LLW accepted for disposal at the site in the previous calendar year.

If NRC cannot designate a site using the limitations in the Act alone, the Commission will consider other factors including the type of waste, previous disposal practices, transportation requirements, radiological effects of the waste, the capability for handling the waste at each site, the volume of emergency access waste previously accepted by each site, and any other information that would be necessary in order to come to a site designation decision.

Within the requirements of the above criteria, the NRC will, to the extent practical, attempt to distribute the waste as equitably as possible among the available operating, non-Federal or regional LLW disposal facilities. To the extent practicable, NRC intends to rotate the designation of the receiving site, and, for the three currently operating facilities, to allocate emergency access disposal in proportion to the volume limitations established in the Act. In most cases, NRC would expect that the designation of a single site will minimize handling of and exposure to the waste and best serve the interest of protecting the public health

and safety. However, if the volume of waste requiring emergency access disposal is large, or if there are other unusual or extenuating circumstances, NRC will evaluate the advantages and disadvantages of designating more than one site to receive waste from the same requester.

In addition to the above, NRC will also consider how much waste has been designated for emergency access disposal to each site to date (both for the year and overall), and whether the serious and immediate threat posed could best be mitigated by designating one site or more to receive the waste.

In order for NRC to make the most equitable site designation decisions, the Agency will have to be well informed regarding the status of disposal capacity for each of the commercially operating waste disposal facilities. NRC is currently in the process of developing a system to provide this information.

It should be noted that in setting out the site designation provision for Section 5, Congress assumed there would always be a site deemed appropriate to receive the emergency access waste. However, this may not be the case if all sites are eliminated by application of the limitations provision set forth in the Act. It is not clear what options Congress intended NRC to consider if all sites are deemed inappropriate to receive the LLW. This may have to be addressed by Congress at some time in the future.

(d) Volume Reduction Determination.

Section 6(i) of the Act requires that any LLW delivered for disposal as a result of NRC's decision to grant emergency access "should be reduced in volume to the maximum extent practicable." NRC will evaluate the extent to which volume reduction methods or techniques will be or

have been applied to the wastes granted emergency access in order to arrive at a finding in regards to this provision.

NRC may receive a request for emergency access where the application of volume reduction techniques may be sufficient to mitigate the threat posed to the public health and safety. As a result, NRC plans to evaluate the extent to which waste has been reduced in volume as a part of its mandated evaluation of the alternatives considered by the generator. From that evaluation, the NRC could reach a finding on whether the waste has been reduced in a manner consistent with Section 6(i).

As is so for the other determinations NRC will have to make pursuant to Section 6, volume reduction determinations will be made on a case-by-case basis. The optimal level of volume reduction will vary with the waste, the conditions under which it is being processed or stored, the administrative options available, and whether volume reduction processing creates new wastes requiring treatment or disposal. In evaluating whether the wastes proposed for emergency access have been reduced in volume to the maximum extent practicable, NRC will consider the characteristics of the wastes (including: physical properties, chemical properties, radioactivity, pathogenicity, infectiousness, and toxicity, pyrophoricity, and explosive potential); condition of current container; potential for contaminating the disposal site; the technologies or combination of technologies available for treatment of the waste (including incinerators; evaporators-crystallizers; fluidized bed dryers; thin-film evaporators; extruders evaporators; and Compactors); the suitability of volume reduction equipment to the circumstances (specific activity considerations, actual volume reduction factors, generation of secondary wastes, equipment contamination, effluent releases, worker exposure, and



equipment availability); and the administrative controls which could be applied.

#### VIII. Terms and Conditions for Emergency Access Disposal

LLW granted emergency access disposal pursuant to this rule is subject to the general requirements for LLW disposal as established in the Act, as well as those requirements which specifically address emergency access. This means that LLW granted emergency access shall be processed, treated and disposed of in a manner consistent with any other LLW which is eligible for disposal at operating non-federal or regional LLW disposal facilities under the Act. The disposal of waste by grant of emergency access should not preclude the implementation of any specific conditions, regulations, requirements, fees, surcharges or taxes prescribed by the disposal facility that may be in effect at the time of the Commission's determination to grant emergency access. However, while generators whose LLW is granted emergency access are subject to the special fees and surcharges specified in the Act for emergency access disposal, they should not otherwise be subject to fees or requirements that are not customarily charged or imposed for routine LLW disposal.

#### IX. Analysis of Public Comments

The Commission received twenty-one (21) comment letters for the proposed rule. Ten (10) of the comment letters came from concerned citizens, six (6) from the governments of potentially affected States, two (2) from low-level waste compacts, two (2) from the industry and one (1) from a nuclear information service. A detailed analysis of each

of the comments was prepared and used to revise the proposed rule. The major comments are discussed here. Copies of the comment letters and the detailed analysis of comments are available for public inspection and copying for a fee at the NRC Public Document Room, 2120 L Street NW., Washington, DC 20555.

In general, commentors expressed support for NRC's issuance of a rule for its emergency access decisions and indicated changes that would improve it from their perspective. Only one commentor, representing a lobbying group, expressed opposition to the issuance of the rule. That commentor indicated that the rule should be withdrawn because granting emergency access would infringe on the States' right to manage their LLW. The Act established the statutory framework for the management of LLW including the allocation of management responsibility between the Federal government and the States. The emergency access rule merely implements part of the existing statutory framework, so the rule itself does not infringe on the rights of the States.

#### Clarification of LLW Eligible for Emergency Access

By far the most common concern expressed by commentors was that emergency access would be used to force operating non-Federal or regional LLW disposal facilities to accept LLW they are either clearly not responsible for under the Act, or have specifically chosen to exclude from their facility. Fourteen of the commentors in almost half of the comments expressed concern that emergency access would be granted to wastes that were not typically to be considered eligible for disposal at non-Federal or regional LLW disposal facilities. Specifically, the commentors stated that Federal wastes, particularly those generated by

DOE and DOD, or wastes that are classified as greater-than-Class-C, should not be granted emergency access. Many of the commentors indicated that States and Compacts are not designing their facilities to provide safe disposal for these types of LLWs. Most of the commentors who expressed concern about which wastes would be granted emergency access were concerned that LLWs determined to be ineligible for routine disposal under the Act, could gain access to disposal at State or regional facilities under the emergency access provision.

Throughout the development of Part 62, the NRC assumed that its mandate was to grant emergency access only to LLW that would otherwise be eligible for routine disposal at State or regional LLW disposal facilities according to the terms and conditions set out in the Act. More specifically, the NRC believes that only those LLWs designated by Section 3(a)(1) of the Act to be the disposal responsibility of the States could be eligible for a grant of emergency access disposal.

Under Subsection 3(a)(1)(A), the States are mandated to provide disposal for commercially generated LLW classified as A, B and C. They are not required to provide disposal for greater-than-Class-C wastes. Thus, the NRC would expect to deny any request for emergency access received for greater-than-Class-C waste. The same is true for the Federally generated LLW which is excluded from State disposal responsibility under Section 3(a)(1)(B). Under that subsection, the States are assigned the responsibility for disposing of "LLW generated by the Federal government except that which is owned or generated by DOE, by the Navy as a result of decommissioning of vessels, or as a result of any research, development, testing, or production of any atomic weapons."



NRC does not expect to grant emergency access to any wastes that are exempted from State responsibility by Section 3(a)(1)(B).

The NRC has no intentions of granting emergency access to LLW which are ineligible for LLW disposal under Section 3(a)(1) of the Act. However, the Commission did not state its intentions in the proposed rule. The Commission assumed that it would be clear that the limitations established in the Act for routine LLW disposal would also apply for disposal resulting from a grant of emergency access. Apparently, that was not the case. To clarify the NRC's understanding and intent regarding the scope of wastes which the NRC considers to be potentially eligible for emergency access, the NRC added a new provision, (c) to Section 62.1, "Purpose and Scope" of the final rule. The new provision states that "The regulations in this Part apply only to the LLW's which the States have disposal responsibility for pursuant to Section 3(a)(1) of the Act." The NRC believes the addition of this clarification to the final rule should resolve any questions regarding a particular LLW's eligibility for emergency access consideration as well as the Commission's intended application of the final rule.

#### Reciprocal Access

Several of the commentors pointed out that the proposed rule omitted any reference to, or discussion of, Section 6(f) of the Act, which addresses reciprocal access. Section 6(f) provides that the Regional Compact or State receiving the emergency access waste is entitled to reciprocal access at any subsequent facility that serves the Compact region or State in which the emergency access waste was generated. It further provides that the Regional Compact or State that receives the

emergency access waste shall designate, for reciprocal access, "an equal volume of Low-level radioactive waste having similar characteristics to that provided emergency access."

Most of the States and Regional Compact Commissions who submitted comments on the proposed Part 62 indicated that reciprocal access should be addressed in the final rule. Most of the commentors who raised reciprocal access concerns believed the NRC should broker reciprocal access arrangements to ensure that reciprocal access will be available to a State or Compact whose LLW disposal facility is designated to receive emergency access waste. Several of them emphasized that the reciprocal access provision of the Act is a significant one that cannot be ignored in the NRC process of granting emergency access and designating a disposal facility. They stated that reciprocal access is of particular concern because a receiving Regional Compact or State has virtually no leverage or role to play in the emergency access process and a guarantee of reciprocal access would make the situation more acceptable. They indicated reciprocity is an integral part of Section 6 and should be part of the rule.

One commentor indicated that even if the NRC did not wish to be involved in brokering the arrangements, it "must ensure that the right to reciprocal access is recognized and its implications are considered." The commentor indicated that a formal reciprocal access acknowledgement should be extracted from the Compact Region or State in which the emergency access waste was generated before any determination for granting emergency access is made. They indicated that such an acknowledgement should be required by the NRC as part of the contents of a request for emergency access (Section 62.12) and should include some indication of

when the reciprocal access would be provided. The acknowledgement could then be included as part of the Section 62.22 notification provided to the receiving state and, if appropriate, the Compact Commission."

The NRC recognizes that the commitment to reciprocal access is an integral part of the emergency access process, particularly for the States with the operating LLW disposal facilities which will be designated by NRC to receive emergency access waste. Staff considered reciprocal access during the development of the proposed rule. At that time, the NRC made a decision not to address reciprocal access as part of the rule on emergency access. As NRC staff read Section 6(f), arranging for reciprocal access is an obligation between States/Compacts unrelated to the Commission's responsibility to protect public health and safety and the common defense and security and thus is outside the scope of NRC's responsibility to implement Section 6. Thus, Staff believed it would be inappropriate for the NRC to assume the role of enforcing reciprocal access arrangements.

The NRC reconsidered its position on reciprocal access in light of the comments received on the proposed rule, but made no changes to the final rule. The NRC's mandate under Section 6 is to grant requests for emergency access in order to protect the public health and safety and the common defense and security from a serious and immediate threat. If the NRC were to require a formal promise of reciprocal access as a necessary condition for considering a request for emergency access, under certain circumstances, actions necessary to protect the public health and safety could be delayed or compromised. Thus, the NRC continues to believe that an enforcement role regarding reciprocal access is inappropriate for the NRC. The Commission also believes that any role regarding reciprocal



access, even of a brokering nature, could be in conflict with the Commission's basic mandate to make emergency access decisions. The NRC maintains that arranging for reciprocal access in response to grants of emergency access is the responsibility of the States and Compacts involved. The NRC believes that the promise of reciprocal access desired by the commentors could be initiated during the 15 day period required by the Act under Section 6(g) for the receiving Compact Commission's approval of the NRC's LLW disposal facility designation.

As noted above, Section 6(f) entitles any Compact or State that provides emergency access to a disposal facility within its borders to reciprocal access to any subsequently operating disposal facility that serves the State or compact region in which the LLW granted emergency access was generated. The Commission anticipates that any Compact or State that provides emergency access would take action to enforce this statutory right if the State or Compact in which the emergency access waste was generated does not accept an equal volume of low-level radioactive waste having similar characteristics at some future date.

#### Compact Approval of Grants of Emergency Access

Three of the commentors representing States or Compact Commissions indicated that the NRC had been remiss in not including a provision in the proposed rule which would require the NRC to seek approval for its decision to grant emergency access from the Compact Commission of the region in which the designated site is located. The commentors also wanted the rule to state that "no grant of emergency access under this Part shall be effective prior to 15 days from receipt of a request for approval from the Commission," in order to establish that Compact

Commission approval would be necessary before the NRC's decision would be considered final. The resolution of the issue raised by these comments is fundamental to the successful implementation of Congressional intent for the emergency access provision of the Act.

The basis for these comments is the language in Section 6(g) of the Act. It states that "any grant of access under this Section shall be submitted to the Compact Commission for the region in which the designated disposal facility is located for such approval as may be required under the terms of its Compact." The commentors interpretation of this provision is that Congress intended for the Compact Commission of the designated site to have the final say regarding the acceptance of emergency access wastes. They believe Congress intended that a receiving Compact Commission could reject the NRC's emergency access determination - essentially that Congress intended the compacts to have the power to veto the NRC's decision. The commentors wanted the NRC to acknowledge this interpretation of Section 6(g) by incorporating a veto/approval provision in the final rule.

While the commentors were correct in noting that the proposed rule did not include a specific mechanism for implementing the Section 6(g) provision of the Amendments Act, the NRC's position on this issue was addressed in Section III, Legislative History of the Supplementary Information portion of the proposed rule and is reiterated in the same section of the final.

Section 6(g) of the Act requires the NRC to notify the Compact Commission for the region in which the disposal facility is located of any NRC grant of access "for such approval as may be required under the terms of the Compact." However, Section 6(g) also requires that the

Compact Commission "shall act to approve emergency access not later than 15 days after receiving notification from the NRC." NRC believes the purpose of this provision is to (1) ensure that the Compact Commission is aware of the NRC's grant of emergency access and the terms of the grant; (2) allow the Compact Commission to implement any administrative procedures necessary to carry out the grant of access, and (3) ensure that the limitations on emergency access set forth in Section 6(h) of the Act have not been exceeded.

Contrary to what several of the commentators believe, the NRC believes that disapproval is not really an option for the Regional Compact Commission in which the designated emergency access disposal facility would be located. This position is derived from the legislative history for both Section 6 of the Act and the Omnibus Low-Level Radioactive Waste Interstate Compact Act which was passed by Congress as part of the Act. It is clear from the legislative history that the basic purpose of the Section 6 emergency access provision is to ensure that LLW disposal sites which have denied disposal access to certain States under provisions of the Act will be made available to receive LLW in situations posing a serious and immediate threat to the public health and safety. A Compact Commission veto of the NRC's decision would frustrate the purpose of the emergency access provision and would be generally contrary to the legislative framework established in the Act. As emphasized in the House Committee on Interior and Insular Affairs Report on the Act, ratification of a Compact should be conditioned on the Compact's acting in accord with the provisions of the Act. If the Compact refuses to provide, under its



own authorities, emergency access under Section 6, Congressional ratification of that Compact would be null and void. [H.R. REP. No. 314, 99th Cong., 1st Sess., pt. 1, at 2997 (1985).]

While disapproval may not be an option under the Act, clearly the Act intended the receiving Compact Commission to be fully informed regarding the emergency access decision made by the NRC. The Commission believes the Notification procedures under § 62.22 of the proposed rule provided the Compact Commission of the designated disposal facility with information consistent with the specifications in the Act. Section 62.22 of the proposed rule provided that the NRC will notify the Compact Commission of the State in which the designated disposal facility is located that emergency access is required. It further provides that "the notifications must set forth the reasons that emergency access was granted and specifically describe the low-level radioactive waste as to source, physical and radiological characteristics, and the minimum volume and duration (not to exceed 180 days) necessary to alleviate the immediate and serious threat to the public health and safety or the common defense and security.

In response to this comment, the NRC has made a change to the final rule. New language has been added to § 62.22 which states that the Commission will make notification of the final determination in writing to the appropriate Compact Commission "for such approval as is specified as necessary in Section 6(g) of the Act."

#### Applicable Terms and Conditions for Emergency Access

A number of the commentors expressed concern that LLW granted emergency access to disposal by the NRC should be required to meet any

conditions of the site designated, as well as any fees, or taxes prescribed by that facility. Other commentors stated that LLWs granted emergency access disposal should not have to pay any special fees, beyond those specifically mandated by the Act. In both cases the commentors wanted assurances incorporated into the rule that in making emergency access site designation determinations, the NRC would protect both the health and safety interests and the financial interests of either the disposal facility designated to receive the LLW, or the person requesting emergency access. In addition, they wanted assurances included in the rule that the NRC would consider the fees, taxes, etc. in designating a site to receive any waste granted emergency access.

The NRC's response to these concerns is simple, and is much like the earlier discussion about the response to comments concerning which wastes are eligible for emergency access. As previously stated, the Commission believes that Congress intended emergency access only to be granted for waste which would routinely qualify for LLW disposal under the terms of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the Act). To the Commission, it is quite clear from Section 6(h) of the Act that Congress intended that the LLW granted emergency access would meet all of the general requirements and regulations of the disposal facility designated to receive the wastes by the NRC. Section 6(h) states that "No State shall be required to provide emergency access or reciprocal access to any regional disposal facility within its borders for low-level radioactive waste not meeting criteria established by the license or license agreement of such facility, ...."

To ensure that the designated site is suitably matched to the LLW granted emergency access, the NRC included a provision in the proposed

rule which stated that a LLW disposal site will be excluded from consideration to receive emergency access waste if the waste does not meet the criteria established by the license or licensee agreement for the facility [62.26(b)(1)]. The license or licensee agreements incorporate the regulations and requirements that affect each particular facility. Taken with the other information in Section 62.26, which the NRC will consider before designating a site, the Commission believes Section 62.26 as it appeared in the proposed rule adequately addresses the NRC's responsibility to designate a site which does not preclude "the implementation of any specific regulations, and requirements at the designated disposal facilities."

Regarding fees, taxes and other conditions that several commentors believed the NRC should consider in designating a site, the NRC believes that Congress intended for generators who are granted emergency access to pay all the normal LLW disposal fees as well as the additional fees or surcharges specifically applicable to emergency access waste and established under Section 5 of the Act. However, the Commission does not agree that such information can or should be used by the NRC in making its site designation decision.

The Commission recognizes the importance of conditions to ensure the implementation of emergency access decisions once they are made by the Commission. In response to the comments, the NRC added a new Section "VIII" to the Supplementary Information portion of the final rule titled, "Terms and Conditions for Emergency Access Disposal." It sets out the responsibilities regarding the disposition of emergency access for both the generator of the LLW granted emergency access and the operating disposal site or sites which have been designated to receive the waste. The



new section reaffirms the NRC's understanding of Congressional intent that whatever conditions or terms normally apply to LLW disposal apply for emergency access, except where specifically stated otherwise in the Act.

#### Conditions of Termination

Four of the commentors suggested the addition of a new section or subsection to the rule to address the conditions under which emergency access could be terminated. The Commission agrees that terms and conditions should be established in the final rule for termination of grants of emergency access. The NRC has added a new Subpart D to the final rule which incorporates some of the suggested conditions for termination as recommended by the commentors. The Subpart is entitled, "Termination of Emergency Access." This new Subpart D is discussed under Section VI.(D) of the Supplementary Information for this rule. It establishes that the Commission may terminate a grant of emergency access if an applicant has failed to comply with the conditions established by the NRC pursuant to this Part. It also establishes that the Commission may terminate a grant of emergency access if it determines that emergency access is no longer needed.

#### Response to Specific Request for Comments

In the proposed rule, the NRC specifically requested comments on certain parts or assumptions made by the NRC. Under Section VIII of the proposed rule, the NRC expressed an interest in receiving comments on--

- (1) What scenarios are envisioned where emergency access would be required?

(2) What are the potential problems with the NRC's approach to determining an immediate and serious threat to the public health and safety?

(3) What are the potential problems with the arrangement proposed for making the determination of serious and immediate threat to the common defense and security?

(4) What are the potential difficulties with the proposed approach for designating the receiving site? and

(5) What should the NRC do if no site is found to be suitable for waste requiring emergency access?

Two of the commentors specifically addressed this request for comments, offering partial responses to some of the questions. One of the commentors offered possible scenarios for emergency access and both of the commentors suggested that a Federal facility should be developed to accommodate emergency access wastes. The comments did not reveal any new perspectives for the NRC to consider so the final rule was not affected by the comments received.

In the proposed rule, the NRC specifically requested comments on the initial regulatory flexibility analysis from small businesses, small organizations, and small jurisdictions in order to determine if the final regulations should be modified such that less stringent requirements could be imposed on small entities while still adequately protecting the public health and safety. None of the comments received on the proposed rule addressed the impact of the regulation on small entities or the adequacy of the NRC's regulatory flexibility analysis. As a result, it was not necessary to change the final rule to accommodate the special needs of small business.

## X. Finding of No Significant Environmental

### Impact: Availability

This rule establishes criteria and procedures for a Commission determination under Section 6 of the Act that emergency access to an operating non-Federal LLW disposal facility is necessary to avert a serious and immediate threat to the public health and safety or the common defense and security. For the most part, the final rule is an administrative action which serves to codify the criteria and procedures in the Act. The adoption of such implementing criteria and procedures by promulgation of a final rule does not have an environmental effect.

Therefore, the Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required.

The environmental assessment forming the basis for this determination is contained in the regulatory analysis prepared for this regulation. The availability of the regulatory analysis is noted in Section XIII of this rule.

## XI. Paperwork Reduction Act Statement

The final rule adds information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget Approval Number 3150-0143.

Public reporting burden for this collection of information is estimated to average 680 hours per response, including the time for



reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Records and Reports Management Branch, Division of Information Support Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

## XII. Regulatory Analysis

The Commission has prepared a regulatory analysis on this final regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The analysis is available for inspection, copying for a fee, at the NRC Public Document Room, 2120 L Street NW., Washington, DC 20555. Single copies of the analysis may be obtained from Janet Lambert, Nuclear Regulatory Commission, NLS-260, Washington, DC 20555, telephone (301) 492-3857.

## XIII. Regulatory Flexibility Certification

NRC is using this final rule to implement the statutory requirements for granting emergency access to non-Federal or regional LLW disposal facilities under Section 6 of the Act. Based upon the information available and in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities.

The rule has the potential to affect any generator of LLW as well as any existing LLW disposal facility. None of the LLW disposal facilities would be considered to be a small entity. The generators of LLW are nuclear power plants, medical and academic facilities, industrial licensees, research and development facilities, radiopharmaceutical manufacturers, fuel fabrication facilities, and government licensees. Of these categories, all but the power plants, fuel fabrication facilities, and government licensees could potentially include small entities.

Although these categories may contain a "substantial number of small entities," the Commission does not believe that there will be a significant economic impact to these generators because the Commission does not anticipate that many generators will be affected by the rule. In order for the requirements of the rule to be imposed on a generator, the generator must initiate the action by requesting a grant of emergency access from NRC. This would occur only because the generator has been denied access to LLW disposal. The impact of the recordkeeping requirements on any affected licensees should be minimal since the information that must be provided if a generator requests emergency access would most likely be collected and assembled as part of any process to decide a course of action if necessary access to LLW disposal was not going to be available.

The Commission is required by statute to make emergency access determinations. Since a grant of emergency access is intended to correct the problems LLW generators may encounter because of lack of access to LLW disposal, the provision of emergency access will benefit any generator of LLW, including small entities.

Establishing criteria and procedures for requesting and granting emergency access through a rule will also benefit small and large generators. This Part provides guidance to the generator on what information will be required for making requests for emergency access and provides an orderly framework for making those requests. Also, the rule will enable generators to better plan to avoid LLW disposal access problems, thus providing the certainty required for economic growth and development.

#### XIV. Backfit Statement

The provisions of 10 CFR Part 50.109 on Backfitting do not apply to this rulemaking because this regulation is not applicable to production and utilization facilities licensed under 10 CFR Part 50.

#### XV. List of Subjects

Administrative practice and procedure, Denial of access, Emergency access to low-level waste disposal, Low-level radioactive waste, Low-level radioactive waste policy amendments act of 1985, Low-level radioactive waste treatment and disposal, Nuclear materials, Reporting and record-keeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, and the Low-Level Radioactive Waste Policy Amendments Act of 1985, the NRC is adopting a new 10 CFR Part 62.



Part 62 - Criteria and Procedures for Emergency Access to  
Non-Federal and Regional Low-Level  
Waste Disposal Facilities

1. A new Part 62 is added to 10 CFR to read as follows:

Subpart A - General Provisions

Section:

- 62.1 Purpose and Scope.
- 62.2 Definitions.
- 62.3 Communications.
- 62.4 Interpretations.
- 62.5 Specific Exemptions.
- 62.8 Information Collection Requirements: OMB Approval

Subpart B - Request for a Commission Determination

- 62.11 Filing and distribution of a determination request.
- 62.12 Contents of a request for emergency access: General information.
- 62.13 Contents of a request for emergency access: Alternatives.
- 62.14 Contents of a request for an extension of emergency access.
- 62.15 Additional information.
- 62.16 Withdrawal of a determination request.
- 62.17 Elimination of repetition.
- 62.18 Denial of request.

Subpart C - Issuance of a Commission Determination

- 62.21 Determination for granting emergency access.
- 62.22 Notice of issuance of a determination.
- 62.23 Determination for granting temporary emergency access.
- 62.24 Extension of emergency access.
- 62.25 Criteria for a Commission determination.
- 62.26 Criteria for designating a disposal facility.

Subpart D - Termination of Emergency Access

- 62.31 Termination of Emergency Access.

AUTHORITY: Secs. 81, 161, as amended, 68 Stat. 935, 948, 949, 950, 951, as amended. (42 U.S.C. 2111, 2201); secs. 201, 209, as amended, 88 Stat. 1242, 1248, as amended (42 U.S.C. 5841, 5849); secs. 3, 4, 5, 6, 99 Stat. 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857. (42 U.S.C. 2021c, 2021d, 2021e, 2021f).

Subpart A--General Provisions

§ 62.1 Purpose and scope.

(a) The regulations in this part establish for specific low-level radioactive waste (1) criteria and procedures for granting emergency access under Section 6 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C. 2021) to any non-Federal or regional low-level radioactive waste (LLW) disposal facility or to any non-Federal disposal facility within a State that is not a member of a Compact, and (2) the terms and conditions upon which the Commission will grant this emergency access.

(b) The regulations in this part apply to all persons as defined by this regulation, who have been denied access to existing regional or non-Federal low-level radioactive waste disposal facilities and who submit a request to the Commission for a determination pursuant to this part.

(c) The regulations in this part apply only to the LLW that the States have the responsibility to dispose of pursuant to Section 3(1)(a) of the Act.

#### § 62.2 Definitions.

As used in this part:

"Act" means the Low-Level Radioactive Waste Policy Amendments Act of 1985 (P.L. 99-240).

"Agreement State" means a State that - (1) has entered into an agreement with the Nuclear Regulatory Commission under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021); and (2) has authority to regulate the disposal of low-level radioactive waste under such agreement.

"Commission" means the Nuclear Regulatory Commission or its duly authorized representatives.

"Compact" means a Compact entered into by two or more States pursuant to the Low-Level Radioactive Waste Policy Amendments Act of 1985.

"Compact Commission" means the regional commission, committee, or board established in a Compact to administer such Compact.

"Disposal" means the permanent isolation of low-level radioactive waste pursuant to the requirements established by the Nuclear Regulatory Commission under applicable laws, or by an Agreement State if such isolation occurs in this Agreement State.



"Emergency access" means access to an operating non-Federal or regional low-level radioactive waste disposal facility or facilities for a period not to exceed 180 days, which is granted by NRC to a generator of low-level radioactive waste who has been denied the use of those facilities.

"Extension of emergency access" means an extension of the access that had been previously granted by NRC to an operating non-Federal or regional low-level radioactive waste disposal facility or facilities for a period not to exceed 180 days.

"Low-level radioactive waste" (LLW) means radioactive material that (1) is not high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in Section IIe(2) of the Atomic Energy Act of 1954 [U.S.C. 2014(e)(2)]; and (2) the NRC, consistent with existing law and in accordance with paragraph (a), classifies as low-level radioactive waste.

"Non-Federal disposal facility" means a low-level radioactive waste disposal facility that is commercially operated or is operated by a State.

"Person" means any individual, corporation, partnership, firm, association, trust, State, public or private institution, group or agency who is an NRC or NRC Agreement State licensed generator of low-level radioactive waste within the scope of Section 62.1(c) of this part; any Governor (or for any "State" without a Governor, the chief executive officer of the "State") on behalf of any NRC or NRC Agreement State licensed generator or generators of low-level radioactive waste within the scope of Section 62.1(c) of this part located in his or her "State"; or their duly authorized representative, legal successor, or agent.

"Regional disposal facility" means a non-Federal low-level radioactive waste disposal facility in operation on January 1, 1985, or subsequently established and operated under a compact.

"State" means any State of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

"Temporary emergency access" means access that is granted at NRC's discretion under Section 62.23 of this part upon determining that access is necessary to eliminate an immediate and serious threat to the public health and safety or the common defense and security. Such access expires 45 days after the granting and cannot be extended.

#### § 62.3 Communications.

Except where otherwise specified, each communication and report concerning the regulations in this part should be addressed to the Director, Office of Nuclear Materials Safety and Safeguards, J.S. Nuclear Regulatory Commission, Washington, DC 20555, or may be delivered in person to the Commission's offices at 2120 L Street NW., Washington, DC, or 11555 Rockville Pike, Rockville, Maryland.

#### § 62.4 Interpretations.

Except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be considered binding on the Commission.

#### § 62.5 Specific exemptions.

The Commission may, upon application of any interested person or upon its own initiative, grant an exemption from the requirements of the regulations in this part that it determines is authorized by law and will

not endanger life or property or the common defense and security and is otherwise in the public interest.

§ 62.8 Information collection requirements: OMB Approval.

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). OMB has approved the information collection requirements contained in this part under control number 3150-0143.

(b) The approved information collection requirements contained in this part appear in §§ 62.11, 62.12, 62.13, 62.14, and 62.15.

Subpart B--Request for a Commission Determination

§ 62.11 Filing and distribution of a determination request.

(a) The person submitting a request for a Commission determination shall file a signed original and nine copies of the request with the Commission at the address specified in § 62.3 of this part, with a copy also provided to the appropriate Regional Administrator at the address specified in Appendix D to Part 20 of this chapter. The request must be signed by the person requesting the determination or the person's authorized representative under oath or affirmation.

(b) Upon receipt of a request for a determination, the Secretary of the Commission will cause to be published in the Federal Register a notice acknowledging receipt of the request which will require that public comment on the request be submitted within 10 days of the date of the notice. A copy of the request will be made available for



inspection or copying in the Commission's Public Document Room, Washington, DC. The Secretary of the Commission will also transmit a copy of the request to the U.S. Department of Energy, to the Governors of the States of the Compact region where the waste is generated, to the Governors of the States with operating non-Federal low-level radioactive waste disposal facilities, to the Compact Commissions with operating regional low-level radioactive waste disposal facilities, and to the Governors of the States in the Compact Commissions with operating disposal facilities.

(c) Upon receipt of a request for a determination based on a serious and immediate threat to the common defense and security, the Commission will notify DOD and or DOE and provide a copy of the request as needed for their consideration.

(d) Fees applicable to a request for a Commission determination under this part will be determined in accordance with the procedures set forth for special projects under category 12 of § 170.31 of this chapter.

(e) In the event that the allocations or limitations established in Section 5(b) or 6(h) of the Act are met at all operating non-Federal or regional LLW disposal facilities, the Commission may suspend the processing or acceptance of requests for emergency access determinations until additional LLW disposal capacity is authorized by Congress.

#### § 62.12 Contents of a request for emergency access: General Information.

A request for a Commission determination under this part must include the following information for each generator to which the request applies:

- (a) Name and address of the person making the request;
- (b) Name and address of the person(s) or company(ies) generating the low-level radioactive waste for which the determination is sought;

(c) A statement indicating whether the generator is basing the request on the grounds of a serious and immediate threat to the public health and safety or the common defense and security.

(d) Certification that the radioactive waste for which emergency access is requested is low-level radioactive waste within Section 62.1(c) of this part.

(e) The low-level waste generation facility(ies) producing the waste for which the request is being made;

(f) A description of the activity that generated the waste;

(g) Name of the disposal facility or facilities which had been receiving the waste stream of concern before the generator was denied access;

(h) A description of the low-level radioactive waste for which emergency access is requested, including--

(1) The characteristics and composition of the waste, including, but not limited to--

(i) Type of waste (e.g. solidified oil, scintillation fluid, failed equipment);

(ii) Principal chemical composition;

(iii) Physical state (solid, liquid, gas);

(iv) Type of solidification media; and

(v) Concentrations and percentages of any hazardous or toxic chemicals, chelating agents, or infectious or biological agents associated with the waste;

(2) The radiological characteristics of the waste such as--

(i) The classification of the waste in accordance with § 61.55;

(ii) A list of the radionuclides present or potentially present in the waste, their concentration or contamination levels, and total quantity;

(iii) Distribution of the radionuclides within the waste (surface or volume distribution);

(iv) Amount of transuranics (nanocuries/gram);

(3) The minimum volume of the waste requiring emergency access to eliminate the threat to the public health and safety or the common defense and security;

(4) The time duration for which emergency access is requested (not to exceed 180 days);

(5) Type of disposal container or packaging (55 gallon drum, box, liner, etc.); and

(6) Description of the volume reduction and waste minimization techniques applied to the waste which assure that it is reduced to the maximum extent practicable, and the actual reduction in volume that occurred;

(i) Basis for requesting the determination set out in this part, including--

(1) The circumstances that led to the denial of access to existing low-level radioactive waste disposal facilities;

(2) A description of the situation that is responsible for creating the serious and immediate threat to the public health and safety or the common defense and security, including the date when the need for emergency access was identified;

(3) A chronology and description of the actions taken by the person requesting emergency access to prevent the need for making such a request,



including consideration of all alternatives set forth in § 62.13 of this part, and any supporting documentation as appropriate;

(4) An explanation of the impacts of the waste on the public health and safety or the common defense and security if emergency access is not granted, and the basis for concluding that these impacts constitute a serious and immediate threat to the public health and safety or the common defense and security. The impacts to the public health and safety or the common defense and security should also be addressed if the generator's services, including research activities, were to be curtailed, either for a limited period of time or indefinitely;

(5) Other consequences if emergency access is not granted;

(j) Steps taken by the person requesting emergency access to correct the situation requiring emergency access and the person's plans to eliminate the need for additional or future emergency access requests;

(k) Documentation certifying that access has been denied;

(l) Documentation that the waste for which emergency access is requested could not otherwise qualify for disposal pursuant to the Unusual Volumes provision [Section 5(c)(5) of the Act] or is not simultaneously under consideration by the Department of Energy (DOE) for access through the Unusual Volumes allocation;

(m) Date by which access is required;

(n) Any other information which the Commission should consider in making its determination.

#### § 62.13 Contents of a request for emergency access: Alternatives.

(a) A request for emergency access under this part must include information on alternatives to emergency access. The request shall

include a discussion of the consideration given to any alternatives, including, but not limited to, the following:

- (1) Storage of low-level radioactive waste at the site of generation;
  - (2) Storage of low-level radioactive waste in a licensed storage facility;
  - (3) Obtaining access to a disposal facility by voluntary agreement;
  - (4) Purchasing disposal capacity available for assignment pursuant to the Act;
  - (5) Requesting disposal at a Federal low-level radioactive waste disposal facility in the case of a Federal or defense related generator of LLW;
  - (6) Reducing the volume of the waste;
  - (7) Ceasing activities that generate low-level radioactive waste; and
  - (8) Other alternatives identified under paragraph (b) of this section.
- (b) The request must identify all of the alternatives to emergency access considered, including any that would require State or Compact action, or any others that are not specified in paragraph (a) of this section. The request should also include a description of the process used to identify the alternatives, a description of the factors that were considered in identifying and evaluating them, a chronology of actions taken to identify and implement alternatives during the process, and a discussion of any actions that were considered, but not implemented.
- (c) The evaluation of each alternative must consider:
- (1) Its potential for mitigating the serious and immediate threat to public health and safety or the common defense and security posed by lack of access to disposal;

(2) The adverse effects on public health and safety and the common defense and security, if any, of implementing each alternative, including the curtailment or cessation of any essential services affecting the public health and safety or the common defense and security;

(3) The technical and economic feasibility of each alternative including the person's financial capability to implement the alternatives;

(4) Any other pertinent societal costs and benefits;

(5) Impacts to the environment;

(6) Any legal impediments to implementation of each alternative, including whether the alternatives will comply with applicable NRC and NRC Agreement States regulatory requirements; and

(7) The time required to develop and implement each alternative.

(d) The request must include the basis for (1) rejecting each alternative; and (2) concluding that no alternative is available.

#### § 62.14 Contents of a request for an extension of emergency access.

A request for an extension of emergency access must include.

(a) Updates of the information required in § 62.12 and § 62.13; and

(b) Documentation that the generator of the low-level radioactive waste granted emergency access and the State in which the low-level radioactive waste was generated have diligently, though unsuccessfully, acted during the period of the initial grant to eliminate the need for emergency access. Documentation must include (1) an identification of additional alternatives that have been evaluated during the period of the initial grant, and (2) a discussion of any reevaluation of previously



considered alternatives, including verification of continued attempts to gain access to a disposal facility by voluntary agreement.

§ 62.15 Additional information.

(a) The Commission may require additional information from a person making a request for a Commission determination under this part concerning any portion of the request.

(b) The Commission shall deny a request for a Commission determination under this part if the person making the request fails to respond to a request for additional information under paragraph (a) of this section within ten (10) days from the date of the request for additional information, or any other time that the Commission may specify. This denial will not prejudice the right of the person making the request to file another request for a Commission determination under this part.

§ 62.16 Withdrawal of a determination request.

(a) A person may withdraw a request for a Commission determination under this part without prejudice at any time prior to the issuance of an initial determination under § 62.21 of this part.

(b) The Secretary of the Commission will cause to be published in the Federal Register a notice of the withdrawal of a request for a Commission determination under this part.

§ 62.17 Elimination of repetition.

In any request under this part, the person making the request may incorporate by reference information contained in a previous application,

Statement, or report filed with the Commission provided that these references are updated, clear, and specific.

§ 62.18 Denial of request.

If a request for a determination is based on circumstances that are too remote and speculative to allow an informed determination, the Commission may deny the request.

Subpart C--Issuance of a Commission Determination

§ 62.21 Determination for granting emergency access.

(a) Not later than (45) days after the receipt of a request for a Commission determination under this part from any generator of low-level radioactive waste, or any Governor on behalf of any generator or generators located in his or her State, the Commission shall determine whether--

(1) Emergency access to a regional disposal facility or a non-Federal disposal facility within a State that is not a member of a Compact for specific low-level radioactive waste is necessary because of an immediate and serious threat (i) to the public health and safety or (ii) the common defense and security; and

(2) The threat cannot be mitigated by any alternative consistent with the public health and safety, including those identified in § 62.13.

(b) In making a determination under this section, the Commission shall be guided by the criteria set forth in § 62.25 of this part.

(c) A determination under this section must be in writing and contain a full explanation of the facts upon which the determination is based and the reasons for granting or denying the request. An affirmative determination must designate an appropriate non-Federal or regional

LLW disposal facility or facilities for the disposal of wastes, specifically describe the low-level radioactive waste as to source, physical and radiological characteristics, and the minimum volume and duration (not to exceed 180 days) necessary to eliminate the immediate threat to public health and safety or the common defense and security. It may also contain conditions upon which the determination is dependent.

§ 62.22 Notice of issuance of a determination.

(a) Upon the issuance of a Commission determination the Secretary of the Commission will notify in writing the following persons of the final determination: the person making the request, the Governor of the State in which the low-level radioactive waste requiring emergency access was generated, the Governor of the State in which the designated disposal facility is located, and if pertinent, the appropriate Compact Commission for such approval as is specified as necessary in Section 6(g) of the Act. For the Governor of the State in which the designated disposal facility is located and for the appropriate Compact Commission, the notification must set forth the reasons that emergency access was granted and specifically describe the low-level radioactive waste as to source, physical and radiological characteristics, and the minimum volume and duration (not to exceed 180 days) necessary to alleviate the immediate and serious threat to public health and safety or the common defense and security. For the Governor of the State in which the low-level waste was generated, the notification must indicate that no extension of emergency access will be granted under § 62.24 of this part absent diligent State and generator action during the period of the initial grant.



(b) The Secretary of the Commission will cause to be published in the Federal Register a notice of the issuance of the determination.

(c) The Secretary of the Commission will make a copy of the final determination available for inspection in the Commission's Public Document Room, 2120 L Street NW., Washington, DC.

§ 62.23 Determination for granting temporary emergency access.

(a) The Commission may grant temporary emergency access to an appropriate non-Federal or regional disposal facility or facilities provided that the determination required under § 62.21(a)(1) of this part is made;

(b) the notification procedures under § 62.22 of this part are complied with; and

(c) the temporary emergency access duration will not exceed forty-five (45) days.

§ 62.24 Extension of emergency access.

(a) After the receipt of a request from any generator of low-level waste, or any Governor on behalf of any generator or generators in his or her State, for an extension of emergency access that was initially granted under § 62.21, the Commission shall make an initial determination of whether--

(1) emergency access continues to be necessary because of an immediate and serious threat to the public health and safety or the common defense and security;

(2) the threat cannot be mitigated by any alternative that is consistent with public health and safety; and

(3) the generator of low-level waste and the State have diligently though unsuccessfully acted during the period of the initial grant to eliminate the need for emergency access.

(b) After making a determination pursuant to paragraph (a) of this section, the requirements specified in §§ 62.21(c) and 62.22 of this part, must be followed.

§ 62.25 Criteria for a Commission determination.

(a) In making the determination required by § 62.21(a) of this part, the Commission will determine whether the circumstances described in the request for emergency access create a serious and immediate threat to the public health and safety or the common defense and security.

(b) In making the determination that a serious and immediate threat exists to the public health and safety, the Commission will consider, notwithstanding the availability of any alternative identified in § 62.13 of this part:

(1) The nature and extent of the radiation hazard that would result from the denial of emergency access, including consideration of--

(i) The standards for radiation protection contained in Part 20 of this Chapter;

(ii) Any standards governing the release of radioactive materials to the general environment that are applicable to the facility that generated the low level waste; and

(iii) Any other Commission requirements specifically applicable to the facility or activity that is the subject of the emergency access request; and

(2) The extent to which essential services affecting the public health and safety (such as medical, therapeutic, diagnostic, or research activities) will be disrupted by the denial of emergency access.

(c) For purposes of granting temporary emergency access under § 62.23 of this part, the Commission will consider the criteria contained in the Commission's Policy Statement (45 FR 10950, February 24, 1977) for determining whether an event at a facility or activity licensed or otherwise regulated by the Commission is an abnormal occurrence within the purview of Section 208 of the Energy Reorganization Act of 1974.

(d) In making the determination that a serious and immediate threat to the common defense and security exists, the Commission will consider, notwithstanding the availability of any alternative identified in § 62.13 of this part (1) whether the activity generating the wastes is necessary to the protection of the common defense and security, and (2) whether the lack of access to a disposal site would result in a significant disruption in that activity that would seriously threaten the common defense and security. The Commission will consider the views of the Department of Defense (DOD) and or the Department of Energy (DOE) regarding the importance of the activities responsible for generating the LLW to the common defense and security, when evaluating requests based all, or in part, on a serious and immediate threat to the common defense and security.

(e) In making the determination required by § 62.21(a)(2) of this part, the Commission will consider whether the person submitting the request (1) has identified and evaluated any alternative that could mitigate the need for emergency access; and (2) has considered all pertinent factors in its evaluation of alternatives including state-of-the-art technology and impacts on public health and safety.



(f) In making the determination required by § 62.21(a)(2) of this part, the Commission will consider implementation of an alternative to be unreasonable if (1) it adversely affects public health and safety, the environment, or the common defense and security; or (2) it results in a significant curtailment or cessation of essential services, affecting public health and safety or the common defense and security; or (3) it is beyond the technical and economic capabilities of the person requesting emergency access; or (4) implementation of the alternative would conflict with applicable State or local or Federal laws and regulations; or (5) it cannot be implemented in a timely manner.

(g) The Commission shall make an affirmative determination under § 62.21(a) of this part only if all of the alternatives that were considered are found to be unreasonable.

(h) As part of its mandated evaluation of the alternatives that were considered by the generator, the Commission shall consider the characteristics of the wastes (including: physical properties, chemical properties, radioactivity, pathogenicity, infectiousness, and toxicity, pyrophoricity, and explosive potential); condition of current container; potential for contaminating the disposal site; the technologies or combination of technologies available for treatment of the waste (including incinerators; evaporators-crystallizers; fluidized bed dryers; thin-film evaporators; extruders evaporators; and Compactors); the suitability of volume reduction equipment to the circumstances (specific activity considerations, actual volume reduction factors, generation of secondary wastes, equipment contamination, effluent releases, worker exposure, and equipment availability); and the administrative controls which could be

applied, in making a determination whether waste to be delivered for disposal under this part has been reduced in volume to the maximum extent practicable using available technology.

§ 62.26 Criteria for designating a disposal facility.

(a) The Commission shall designate an appropriate non-Federal or regional disposal facility if an affirmative determination is made pursuant to §§ 62.21, 62.23, or 62.24 of this part.

(b) The Commission will exclude a disposal facility from consideration if:

(1) The low-level radioactive wastes of the generator do not meet the criteria established by the license agreement or the license agreement of the facility; or

(2) The disposal facility is in excess of its approved capacity; or

(3) Granting emergency access would delay the closing of the disposal facility pursuant to plans established before the receipt of the request for emergency access; or

(4) The volume of waste requiring emergency access exceeds 20 percent of the total volume of low-level radioactive waste accepted for disposal at the facility during the previous calendar year.

(c) If, after applying the exclusionary criteria in paragraph (b) of this section, more than one disposal facility is identified as appropriate for designation, the Commission will then consider additional factors in designating a facility or facilities including--

(1) Type of waste and its characteristics,

(2) Previous disposal practices,

(3) Transportation,

- (4) Radiological effects,
  - (5) Site capability for handling waste, .
  - (6) The volume of emergency access waste previously accepted by each site both for the particular year and overall, and
  - (7) Any other considerations deemed appropriate by the Commission.
- (d) The Commission, in making its designation, will also consider any information submitted by the operating non-Federal or regional LLW disposal sites, or any information submitted by the public in response to a Federal Register notice requesting comment, as provided in paragraph (b) of § 62.11 of this part.

#### Subpart D--Termination of Emergency Access

##### § 62.31 Termination of emergency access.

(a) The Commission may terminate a grant of emergency access when emergency access is no longer necessary to eliminate an immediate threat to public health and safety or the common defense and security.

(b) The Commission may terminate a grant of emergency access if an applicant has provided inaccurate information in its application for emergency access or if the applicant has failed to comply with this part or any conditions set by the Commission pursuant to this part.

Dated at Rockville, MD, this \_\_\_\_\_ day of \_\_\_\_\_, 1989.

For the Nuclear Regulatory Commission.

\_\_\_\_\_  
Samuel J. Chilk,  
Secretary of the Commission.



Enclosure 2

## XV. List of Subjects

Administrative practice and procedure, ~~D~~enial of access, ~~E~~mergency access to low-level waste disposal, ~~L~~ow-level radioactive waste, ~~L~~ow-level radioactive waste policy amendments act of 1985, Low-level radioactive waste treatment and disposal, ~~N~~uclear materials, Reporting and record-keeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, and the Low-Level Radioactive Waste Policy Amendments Act of 1985, the NRC is adopting a new 10 CFR Part 62.

Part 62 - Criteria and Procedures for Emergency Access to  
Non-Federal and Regional Low-Level  
Waste Disposal Facilities

1. A new Part 62 is added to 10 CFR to read as follows:

Subpart A - General Provisions

Section:

- 62.1 Purpose and Scope.
- 62.2 Definitions.
- 62.3 Communications.
- 62.4 Interpretations.
- 62.5 Specific Exemptions.
- 62.8 Information Collection Requirements: OMB Approval

## Subpart B - Request for a Commission Determination

- 62.11 Filing and distribution of a determination request.
- 62.12 Contents of a request for emergency access: General information.
- 62.13 Contents of a request for emergency access: Alternatives.
- 62.14 Contents of a request for an extension of emergency access.
- 62.15 Additional information.
- 62.16 Withdrawal of a determination request.
- 62.17 Elimination of repetition.
- 62.18 Denial of ~~access~~ request.

## Subpart C - Issuance of a Commission Determination

- 62.21 Determination for granting emergency access.
- 62.22 Notice of issuance of a determination.
- 62.23 Determination for granting temporary emergency access.
- 62.24 Extension of emergency access.
- 62.25 Criteria for a Commission determination.
- 62.26 Criteria for designating a disposal facility.

Subpart D - ~~Compliance with Conditions of Emergency Access;~~

## Termination of Emergency Access

- 62.31 Termination of Emergency Access.

AUTHORITY: Secs. 81, 161, as amended, 68 Stat. 935, 948, 949, 950, 951, as amended. (42 U.S.C. 2111, 2201); secs. 201, 209, as amended, 88 Stat. 1242, 1248, as amended (42 U.S.C. 5841, 5849); secs. 3, 4, 5, 6, 99 Stat. 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857. (42 U.S.C. 2021c, 2021d, 2021e, 2021f).



~~Proposed~~

Changes to Statement of

Considerations

✓

In addition, Subpart B also sets forth procedures for the filing and distribution of a request for a Commission determination. It provides for publishing in the Federal Register a notice of receipt of a request for emergency access to inform the public that Commission action on the request is pending. Although comment is not required by the Act or the Administrative Procedure Act, Subpart B provides for a 10-day public comment period on the request for emergency access.

In the event that the case for requesting emergency access is to be based totally or in part on the threat posed to the common defense and security, Subpart B <sup>(deleted)</sup> ~~requires that a statement of support from the Department of Energy (DOE) or the Department of Defense (DOD) (as appropriate) be submitted as part of the initial request for emergency access. If the request is based entirely on common defense and security concerns, NRC will not proceed with the emergency access evaluation until the statement of support is submitted.~~ <sup>(added)</sup> ~~specifies that upon receiving such a request, NRC will consult with the Department of Energy (DOE) or the Department of Defense (DOD) to ascertain the importance to the common defense and security of the activities producing the LLW for which emergency access is requested. A statement from either agency supporting the LLW generator's claim regarding the importance of his activities to the common defense and security will be required in order for NRC to make an affirmative serious and immediate threat to the common defense and security determination.~~ <sup>and</sup>

#### Subpart C - Issuance of a Commission Determination

For the NRC to grant emergency access, the Commission must first conclude that there is a serious and immediate threat to the public health and safety or the common defense and security, and second that there are no available mitigating alternatives. Subpart C sets out the procedures to be followed by the Commission in considering requests for emergency access, for granting extensions of emergency access, and for granting temporary emergency access; establishes the criteria and standards to be used by the Commission in making those determinations; and specifies the procedures to be followed in issuing them.

Subpart C provides that NRC, in determining whether there is a serious and immediate threat to the public health and safety, will consider: (1) the nature and extent of the radiation hazard that would result from the denial of access including consideration of the standards for radiation protection contained in 10 CFR Part 20, any standards governing the release of radioactive materials to the general environment that are applicable to the facility that generated the low-level waste, and any other Commission requirements specifically applicable to the facility or activity which is the subject of the emergency access request and, (2) the extent to which essential services such as medical, therapeutic, diagnostic, or research activities will be disrupted by the denial of emergency access.

In determining whether there is a serious and immediate threat to the common defense and security, Subpart C provides that the Commission will consider whether the activity generating the LLW is necessary to protect the common defense and security and whether the lack of access to a disposal site would result in a significant disruption in that activity that would seriously threaten the common defense and security. Subpart C also specifies that the Commission will <sup>seek and</sup> consider DOD and DOE viewpoints ~~in a statement of support to be filed with the request for emergency access.~~ on the importance of the activities responsible for generating the LLW to the common defense and security.

*added* → Under Subpart C, if the Commission makes either of the above determinations in the affirmative, then the Commission will consider whether alternatives to emergency access are available to the requestor. The Commission will consider whether the person submitting the request has identified and evaluated the alternatives available which could potentially mitigate the need for emergency access. The Commission will



activity licensed or otherwise regulated by the Commission is an abnormal occurrence within the purview of Section 208 of the Energy Reorganization Act of 1974. This provision requires the Commission to keep Congress and the public informed of unscheduled incidents or events which it considers significant from the standpoint of public health and safety. Under the criteria established in the Commission's policy statement, an event will be considered an abnormal occurrence if it involves a major reduction in the degree of protection provided to public health and safety. Such an event could include--

- a. Moderate exposure to, or release of, radioactive material;
- b. Major degradation of safety related equipment; or
- c. Major deficiencies in design, construction, use of, or management controls for licensed facilities or activities.

In deciding whether to grant temporary emergency access, the Commission will evaluate whether the emergency access situation falls within the criteria in the Commission's policy statement on abnormal occurrences.

(2) To the common defense and security--

Although NRC is required by the Act to determine that there is either a serious and immediate threat "to the public health and safety," or to "the common defense and security," realistically NRC cannot make the latter judgement without some information from DOD and DOE which will assist NRC in identifying those situations involving the denial of access to LLW disposal which constitute a serious and immediate threat to the national defense and security, or the importance of a particular LLW generator's activities in maintaining those objectives. While NRC

*(for change)  
see next*

Insert for page 21

(Add the new language here to text on page 21.)

Discussions with DOD and DOE regarding the proposed arrangement have led NRC to include a ~~slightly~~ modified procedure in the final rule. A generator whose request for emergency access is based in whole or in part on a serious and immediate threat to the common defense and security is no longer required to include a DOD or DOE statement of support for that claim in the request package submitted to NRC. Rather, NRC will consult with DOD or DOE directly to ascertain the importance of the activities responsible for generating the LLW to the common defense and security. ~~DOD or DOE will have to support the generator's claim regarding the strategic importance of his activities for NRC to determine that emergency access should be granted in order to protect the common defense and security.~~

Letters of intent

~~Walter Commission Staff~~  
Negotiations with DOD and DOE regarding this procedure were underway in parallel with the development of the final rule. ~~A written agreement~~ between the NRC and DOD and DOE that establishes the process for obtaining the DOD and DOE recommendations on the importance of the requestor's activities to the common defense and security ~~is expected by the end of 1988.~~ DOD and DOE staffs are aware of the 45 day response time imposed on NRC to make the emergency access determinations and the agreement will provide for expeditious action by DOD and DOE.

by the time the rule is published.

(We considered adding this language to the rule after the other paragraph - please advise if staff feels this is desirable. Thanks.)

I'm reaching a determination as to whether emergency access should be granted in order to protect the common defense and security, the NRC will consider whether DOE and/or DOD support the generator's claim regarding the strategic importance of the activity.

has the Congressional mandate for this determination, the staff believe it necessary to consider DOD and DOE information as part of the decision-making process.

NRC considered several approaches for involving DOD and DOE in the process of determining whether requests for emergency access should be granted on the basis of a serious and immediate threat to the common defense and security. <sup>In the proposed rule</sup> NRC ~~has concluded~~ <sup>would be decided</sup> that the best way to provide such interaction <sup>is</sup> to require that requests filed with NRC for emergency access ~~which are made entirely, or in significant part,~~ on the basis of a serious and immediate threat to the common defense and security, <sup>would have to</sup> ~~should~~ include appropriate certification from DOE <sup>and</sup> or DOD substantiating the requestor's claim that such a threat <sup>would</sup> ~~will~~ result if emergency access is not granted. <sup>NRC proposed that</sup> The necessary certification in the form of a statement of support should be acquired by the requestor <sup>statement of support</sup> ~~prior~~ <sup>could</sup> to applying to NRC for emergency access so the ~~certification can~~ be a part of the actual petition.

*Insert new  
language here* → Congress deliberately gave the NRC the responsibility for making the common defense and security determination rather than leaving the determination with DOD or DOE. So while the Commission intends to give the DOD and DOE <sup>statements of support</sup> ~~certifications~~ and recommendations full consideration in evaluating requests for emergency access, the Commission will not treat them as conclusive.

(b) Determination on Mitigating Alternatives.

As directed by Section 6 of the Act, even if a situation exists which poses a serious and immediate threat to the public health and safety or the common defense and security, emergency access is not to be granted if alternatives are available to mitigate the threat in a manner



~~Proposed~~ Changes

to 10 CFR Part 62.

~~Enclosure~~

(p.3)

Commission at the address specified in § 62.3 of this part, with a copy also provided to the appropriate Regional Administrator at the address specified in Appendix D to Part 20 of this chapter. The request must be signed by the person requesting the determination or the person's authorized representative under oath or affirmation.

(b) Upon receipt of a request for a determination, the Secretary of the Commission will cause to be published in the Federal Register a notice acknowledging receipt of the request which will require that public comment on the request be submitted within 10 days of the date of the notice. A copy of the request will be made available for inspection or copying in the Commission's Public Document Room, Washington, DC. The Secretary of the Commission will also transmit a copy of the request to the U.S. Department of Energy, to the Governors of the States of the Compact region where the waste is generated, to the Governors of the States with operating non-Federal low-level radioactive waste disposal facilities, to the Compact Commissions with operating regional low-level radioactive waste disposal facilities, and to the Governors of the States in the Compact Commissions with operating disposal facilities.

added → (c) Upon receipt of a request for a determination based on a serious and immediate threat to the common defense and security, the Commission will notify DOD and DOE and provide a copy of the request as needed for their consideration.

(d) Fees applicable to a request for a Commission determination under this part will be determined in accordance with the procedures set forth for special projects under category 12 of § 170.31 of this chapter.

(e) In the event that the allocations or limitations established in Section 5(b) or 6(h) of the Act are met at all operating non-Federal or regional LLW disposal facilities, the Commission may suspend the processing or acceptance of requests for emergency access determinations until additional LLW disposal capacity is authorized by Congress.

§ 62.12 Contents of a request for emergency access: General Information.

A request for a Commission determination under this part must include the following information for each generator to which the request applies:

- (a) Name and address of the person making the request;
- (b) Name and address of the person(s) or company(ies) generating the low-level radioactive waste for which the determination is sought;

*add* { (c) A statement indicating whether the generator is basing the request on the grounds of a serious and immediate threat to the public health and safety or the common defense and security. }

(d) Certification that the radioactive waste for which emergency access is requested is low-level radioactive waste within Section 62.1(c) of this part.

*e-*  
(e) The low-level waste generation facility(ies) producing the waste for which the request is being made;

*f*  
(f) A description of the activity that generated the waste;

*g*  
(g) Name of the disposal facility or facilities which had been receiving the waste stream of concern before the generator was denied access;

*h*  
(h) A description of the low-level radioactive waste for which emergency access is requested, including--

(1) The characteristics and composition of the waste, including, but not limited to--

*still*  
(i) Type of waste (e.g. solidified oil, scintillation fluid, failed equipment);

(ii) Principal chemical composition;

(iii) Physical state (solid, liquid, gas);

(iv) Type of solidification media; and

(v) Concentrations and percentages of any hazardous or toxic chemicals, chelating agents, or infectious or biological agents associated with the waste;



- (2) The radiological characteristics of the waste such as--
- (i) The classification of the waste in accordance with § 61.55;
  - (ii) A list of the radionuclides present or potentially present in the waste, their concentration or contamination levels, and total quantity;
  - (iii) Distribution of the radionuclides within the waste (surface or volume distribution);
  - (iv) Amount of transuranics (nanocuries/gram);
- (3) The minimum volume of the waste requiring emergency access to eliminate the threat to the public health and safety or the common defense and security;
- (4) The time duration for which emergency access is requested (not to exceed 180 days);
- (5) Type of disposal container or packaging (55 gallon drum, box, liner, etc.); and
- (6) Description of the volume reduction and waste minimization techniques applied to the waste which assure that it is reduced to the maximum extent practicable, and the actual reduction in volume that occurred;
- (7) Basis for requesting the determination set out in this part, including--
- (1) The circumstances that led to the denial of access to existing low-level radioactive waste disposal facilities;
  - (2) A description of the situation that is responsible for creating the serious and immediate threat to the public health and safety or the common defense and security, including the date when the need for emergency access was identified;

✓  
(3) A chronology and description of the actions taken by the person requesting emergency access to prevent the need for making such a request, including consideration of all alternatives set forth in § 62.13 of this part, and any supporting documentation as appropriate;

(4) An explanation of the impacts of the waste on the public health and safety or the common defense and security if emergency access is not granted, and the basis for concluding that these impacts constitute a serious and immediate threat to the public health and safety or the common defense and security. The impacts to the public health and safety or the common defense and security should also be addressed if the generator's services, including research activities, were to be curtailed, either for a limited period of time or indefinitely;

(5) Other consequences if emergency access is not granted;

(A) Steps taken by the person requesting emergency access to correct the situation requiring emergency access and the person's plans to eliminate the need for additional or future emergency access requests;

(B) Documentation certifying that access has been denied;

(C) Documentation that the waste for which emergency access is requested could not otherwise qualify for disposal pursuant to the Unusual Volumes provision [Section 5(c)(5) of the Act] or is not simultaneously under consideration by the Department of Energy (DOE) for access through the Unusual Volumes allocation;

~~(4) Where the request is made wholly or in significant part on the basis of a serious and immediate threat to the common defense and security, a Statement of Support from DOE or DOD certifying that access to disposal is necessary to mitigate the threat to the common defense and security.~~

*This is replaced by  
the insert (C)  
on the previous  
page (p. 52)*

*deleted -  
new language  
added as  
(C) on page  
51*

*(no change -  
also for purpose)*

- (m) Date by which access is required;
- (n) Any other information which the Commission should consider in making its determination.

§ 62.13 Contents of a request for emergency access: Alternatives.

(a) A request for emergency access under this part must include information on alternatives to emergency access. The request shall include a discussion of the consideration given to any alternatives, including, but not limited to, the following:

- (1) Storage of low-level radioactive waste at the site of generation;
- (2) Storage of low-level radioactive waste in a licensed storage facility;
- (3) Obtaining access to a disposal facility by voluntary agreement;
- (4) Purchasing disposal capacity available for assignment pursuant to the Act;
- (5) Requesting disposal at a Federal low-level radioactive waste disposal facility in the case of a Federal or defense related generator of LLW;
- (6) Reducing the volume of the waste;
- (7) Ceasing activities that generate low-level radioactive waste; and
- (8) Other alternatives identified under paragraph (b) of this section.

(b) The request must identify all of the alternatives to emergency access considered, including any that would require State or Compact action, or any others that are not specified in paragraph (a) of this section. The request should also include a description of the process used



p. 62

(ii) Any standards governing the release of radioactive materials to the general environment that are applicable to the facility that generated the low level waste; and

(iii) Any other Commission requirements specifically applicable to the facility or activity that is the subject of the emergency access request; and

(2) The extent to which essential services affecting the public health and safety (such as medical, therapeutic, diagnostic, or research activities) will be disrupted by the denial of emergency access.

(c) For purposes of granting temporary emergency access under § 62.23 of this part, the Commission will consider the criteria contained in the Commission's Policy Statement (45 FR 10950, February 24, 1977) for determining whether an event at a facility or activity licensed or otherwise regulated by the Commission is an abnormal occurrence within the purview of Section 208 of the Energy Reorganization Act of 1974.

(d) In making the determination that a serious and immediate threat to the common defense and security exists, the Commission will consider, notwithstanding the availability of any alternative identified in § 62.13 of this part (1) whether the activity generating the wastes is necessary to the protection of the common defense and security, and (2) whether the lack of access to a disposal site would result in a significant disruption in that activity that would seriously threaten the common defense and security. The Commission will consider the views of the Department of Defense (DOD) and the Department of Energy (DOE) ~~in the Statement of Support as submitted by the person requesting emergency~~

✓  
added

~~access.~~ [ regarding the importance of the activities responsible for generating the LLW to the common defense and security, when ]

evaluating requests based all, or in part, on a serious and immediate threat to the common defense and security.

10 CFR Part 62 Reg  
Analysis

~~Proposed~~ Change to  
Reg Analysis

Reg  
Analysis

Section 6 of the Act be applied only in "rare emergencies," it is not expected that the regulation will be applied with any frequency.

In order to implement this final rule, it may be necessary for NRC staff to develop guidance to assist applicants in preparing their requests, and to assist NRC staff in conducting their reviews. This may represent an additional commitment of NRC resources.

Since Section 6 precludes NRC Agreement States from making emergency access decisions, the final action will not have an impact on Agreement State resources.

#### 4.2.3 Department of Energy (DOE)/Department of Defense (DOD)

NRC is requiring that requests for emergency access based totally or in significant part on a serious and immediate threat to the common defense and security, <sup>be supported</sup> ~~include a statement of support from~~ <sup>by</sup> DOD and/or DOE. NRC estimates that approximately five staff weeks or approximately 25 staff days would be required for each emergency access request processed by DOE or DOD. At the same rate as NRC, it would cost under \$8,000 per ~~certification~~ <sup>common defense and security request</sup>.

### 5. DECISION RATIONALE

NRC decided on the approach in the final rule in light of the Congressional directives in Section 6 of the Act and considering the comparison of alternatives as discussed in the preceding section.

### 6. IMPLEMENTATION

The schedule for implementation of the rule is dictated primarily by the schedules and milestones in the Act. The Act sets out three milestone dates requiring the States and Compacts to demonstrate specific progress towards the development of new LLW disposal capacity, or their LLW generators may be denied further access to existing disposal sites.

The first date for potential denial of access was January 1, 1987. The States were able to satisfy the requirements for that milestone and none were denied access. January 1, 1989 is the next date when the three operating LLW disposal facilities can refuse to accept waste from a particular State. NRC plans to issue the final rule by November 1988, so it will be in place before



Enclosure 3



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

AC24-2

PDR

JAN 19 1989

MEMORANDUM FOR: David L. Meyer, Chief  
Rules and Procedures Branch  
Division of Rules and Records  
Office of Administration  
and Resources Management

FROM: Eric S. Beckjord, Director  
Office of Nuclear Regulatory Research

SUBJECT: IMPLEMENTATION OF COMMISSION ACTION: PUBLICATION  
OF NEW 10 CFR PART 62

By memorandum dated December 1, 1988, the Secretary of the Commission indicated that the Commission (with all Commissioners agreeing) has voted to approve the publication of the final rule on emergency access to low-level waste disposal facilities set out in SECY-88-298.

Please implement the Commission's action by arranging for publication of the enclosed final rule in the Federal Register.

Enclosed are three copies of the Federal Register notice and copies of the pages marked-up with the changes requested by your office for transmittal to the Office of the Secretary. Also enclosed is a Congressional letter package for transmittal to GPA/CA which includes seven copies of the public announcement for transmittal to GPA/PA. In addition, enclosed is a copy of the final regulatory analysis (which includes the environmental assessment and finding of no significant impact) for transmittal to the PDR.

A handwritten signature in cursive script that reads "Eric S. Beckjord".

Eric S. Beckjord, Director  
Office of Nuclear Regulatory Research

Enclosures:

1. FRN (and 3 copies)
2. R+R Changes to FRN
3. Congressional Letter Package
4. Final Regulatory Analysis



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

JAN 19 1989

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Rules and Procedures Branch  
Division of Rules and Records  
Office of Administration  
and Resources Management

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A handwritten signature in dark ink, reading "Eric S. Beckjord", is positioned above the typed name and title.

Eric S. Beckjord, Director  
Office of Nuclear Regulatory Research

Enclosures:

1. FRN (and 3 copies)
2. R+R Changes to FRN
3. Congressional Letter Package
4. Final Regulatory Analysis



JAN 19 1989

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Rules and Procedures Branch  
Division of Rules and Records  
Office of Administration  
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ORIGINAL SIGNED BY

Eric S. Beckjord, Director  
Office of Nuclear Regulatory Research

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Enclosures:

1. FRN (and 3 copies)
2. R+R Changes to FRN
3. Congressional Letter Package
4. Final Regulatory Analysis

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1/19/89

NRC ISSUES RULES FOR GRANTING EMERGENCY ACCESS  
TO EXISTING LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITIES

The Nuclear Regulatory Commission is issuing regulations that establish criteria and procedures for evaluating requests for emergency access to operating non-federal low-level radioactive waste disposal facilities.

Under the terms of the Low-Level Radioactive Waste Policy Amendments Act of 1985, individual states and regional compacts must take certain actions leading to the development of their own low-level radioactive waste disposal capacity within the periods of time specified in the Act. If these actions are not taken within the time frames specified, generators of low-level radioactive wastes within the non-complying state or regional compact may be denied access to existing disposal facilities after January 1, 1989.

However, the Act authorizes the Commission to grant low-level waste generators or states emergency access to any of the operating non-federal low-level waste disposal facilities. In order to grant such a request, the Commission must find that such action "...is necessary to eliminate an immediate and serious threat to the public health and safety or the common defense and security ..." and that "...the threat cannot be mitigated by any alternative consistent with the public health and safety, including storage of low-level radioactive waste at the site of generation or in a storage facility, obtaining access to a disposal facility by voluntary agreement, purchasing disposal capacity available for assignment or ceasing the activities that generate the low-level waste."

Under the new NRC regulation, a person seeking emergency access must submit detailed information to the Commission on the need for access to low-level waste disposal sites; the quantity, type and nature of the material requiring disposal; impacts on public health and safety or common defense and security if emergency access is not granted; the alternatives considered; and the process used to conclude that none of the alternatives are reasonable.

In making a determination that the circumstances described in a request for emergency access create a serious and immediate threat to the public health and safety, the Commission will consider:

(1) the nature and extent of the radiation hazard that will result from the denial of emergency access, including consideration of the NRC's standards for radiation protection contained in Part 20 of its regulations, any standards for the release of radioactive materials to the general environment that apply to the facility that generated the low-level waste, and any other Commission requirements that apply to the facility or activity for which emergency access is being requested; and

(2) the extent to which essential services such as medical, therapeutic, diagnostic or research activities will be disrupted by the denial of emergency access to waste disposal facilities.

In making a determination that the circumstances described create a serious and immediate threat to the common defense and security, the Commission will consider:



(1) whether the activity generating the wastes is necessary to the protection of the common defense and security (giving consideration to the views of the Department of Defense and the Department of Energy) and

(2) whether the lack of access to a disposal site will result in a significant disruption in that activity that will seriously threaten the common defense and security.

The new rule also sets out criteria for determining whether to grant "temporary" emergency access. The Act allows the Commission to authorize such temporary access for not more than 45 days, without considering available alternatives, if it concludes that the threat to the public health and safety or common defense and security warrants such action.

If the Commission determines that there is a need for emergency access, or "temporary" emergency access, it will then decide which operating non-federal low-level waste disposal facility should receive the waste, using criteria--set out in the rule--such as whether the waste and the disposal facility are compatible or whether a disposal facility has been previously designated to receive emergency access waste.

A proposed rule on this subject was published in the Federal Register on December 15, 1987. Changes made as a result of the comments received are mainly clarifying in nature. The procedures and the criteria to be used in making emergency access decisions are essentially unchanged.

The final rule will be effective on \_\_\_\_\_ (30) days after publication in the Federal Register on \_\_\_\_\_).

Enclosure 4

## REGULATORY ANALYSIS

### 10 CFR Part 62 - Criteria and Procedures for Granting Emergency Access to Non-Federal or Regional Low-Level Waste Disposal Facilities

#### 1. STATEMENT OF THE PROBLEM

Section 6 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (PL 99-240, January 15, 1986) "the Act", directs the Nuclear Regulatory Commission (NRC) to grant a generator or State "emergency access" to any non-Federal commercial LLW disposal facility if access to those facilities has been denied and that access is necessary in order to eliminate an immediate and serious threat to the public health and safety or the common defense and security. The Act also requires that a determination be made as to whether the threat can be mitigated by any alternative consistent with the public health and safety, including ceasing the activities that generate the waste. NRC must be able, with the information provided by the requestor, to make both determinations prior to granting emergency access.

The Act further directs NRC to designate an operating LLW disposal facility to receive the waste which is granted emergency access and directs NRC to notify the appropriate State and Compact officials regarding the designation. The Act provides NRC with 45 days from the time a request is received to determine whether emergency access is required and to designate a facility.

Although the Act does not require NRC to develop a rule to carry out its Section 6 responsibilities, NRC staff recommended a rulemaking to establish the procedures and criteria that will be used in making the required emergency access determinations. In order for a requestor to be eligible for emergency access consideration they must have already been denied access to LLW disposal by the States or Compacts with operating disposal facilities. Thus implicit in any decision to grant emergency access is the fact that such a decision will override the sited States' and/or Compacts' expressed desire not to accept waste from that particular State or generator. Although Congress provided NRC the statutory responsibility for implementing Section 6 and gave the Commission



authority to decide whether or not access will be provided, emergency access decisions are likely to be controversial and could be challenged. By setting out the procedures and criteria for making emergency access decisions in a rule which reflects public comment, NRC intends to minimize potential delays in the actions necessary to protect the public health and safety.

## 2. OBJECTIVES

The objective of this final rule is to establish criteria and procedures to be used by the Commission to make the determination required by the Act that emergency access to operating non-Federal or regional low-level waste disposal facilities should be granted because denial of access has created a serious and immediate threat to the public health and safety or the common defense and security, that cannot be mitigated by any alternative consistent with protecting the public health and safety.

## 3. ALTERNATIVES

### 3.1 Using Rulemaking

Under this alternative the criteria and procedures to be used by NRC to make emergency access decisions would have the force of law. Using rulemaking also provides binding criteria and procedures and therefore would add predictability and stability to the regulatory process. In addition, rulemaking allows for input from potentially affected individuals and organizations, should minimize potential delays in the actions necessary to protect the public health and safety, and will help to ensure that the Commission will be able to make a decision on emergency access requests in the time required by the Act. These effects are desirable since emergency access decisions are likely to be highly controversial.

### 3.2 Using a Policy Statement

The alternative of issuing a Commission Policy Statement to establish the procedures for emergency access decisions was rejected. Under this alternative, the criteria and procedures would not have the force of law. In

addition, since policy statements are typically broad, a policy statement was not considered appropriate to establish the detailed criteria and procedures required to implement NRC's emergency access responsibilities.

### 3.3 Taking No Action

The alternative of taking no action was also rejected. Under this alternative, both the person requesting an emergency access determination and the Commission would have to rely on the language in Section 6 of the Act for guidance as to what information was to be used by the Commission to make the determinations. The Commission could not be assured of receiving the relevant information necessary for a determination and that could cause delays in the Commission's mandated determination response time of 45 days. Also, guidance as to how the Commission will make its determination is necessary to comply with the spirit of the Congressional directive, to provide predictability in the regulatory process, and to assist the Commission in making individual determinations.

## 4. CONSEQUENCES

### 4.1 Benefits

The principal benefit of the rule flows from the fulfillment of the statutory objective that decisions to deny access to low-level radioactive waste disposal facilities made pursuant to provisions of the Act should not result in a serious and immediate threat to the public health and safety or the common defense and security. In those cases where emergency access is granted under the rule, the requestor will receive the benefit of continuing the activity responsible for generating the waste at least until the grant expires. Society will benefit from continuing access to the goods or services produced by that activity and the elimination of a serious threat to the public health and safety. Since emergency access decisions will be made on an individual generator/licensee basis, and since NRC staff cannot predict the number of requests that might be received, it is not possible to quantify the benefits associated with the rule.

## 4.2 COSTS

### 4.2.1 Applicants for Emergency Access

Generators of LLW, NRC or NRC Agreement States licensees, Governors or other State chief executive officers on behalf of the generators or other "persons" as defined in the proposed rule may request emergency access. Because the circumstances will be different for each applicant, it is not possible to quantify the time or resources required for each of the applicants to collect the information and perform the analysis on which the request will be based. This is particularly true when it comes to the possible need for long term data collection and the in depth analysis and consideration that will be necessary to evaluate alternatives. NRC staff estimates that regardless which of these persons requests emergency access, approximately two (2) weeks of the requestor's professional staff time will be required to process the paperwork necessary to complete a request for an NRC determination pursuant to the requirements set out in the Act and which have been codified in the proposed rule.

Other possible costs associated with this final action could actually be incurred through the requirements and the very specific mandates in Section 6 of the Act. If NRC does not grant a request for emergency access, the applicant may have to alter the activities generating the waste in question, even to the point of ceasing them for some period of time, or possibly curtailing them altogether. The costs to the requestor could come from expenditures either in time or resources required to alter the activities or processes responsible for generating the wastes, or from loss of income from reduced or curtailed production. Since NRC is mandated to make emergency access decisions, these costs would result regardless of the issuance of this rule.

### 4.2.2 NRC

As provided by Section 6 of the Act, NRC will only have about 30 working days to respond to each request for emergency access (45 calendar days = 6 and 1/2 weeks = approximately 30 working days). NRC anticipates that approximately 180 staff days will be required for each request. Using generic cost estimates of \$40/hr x 8 hours x 180, it would cost NRC under \$60,000 per request. NRC cannot project the number of requests that might be received, so total costs to the NRC cannot be estimated. However, given the Congressional intent that



Section 6 of the Act be applied only in "rare emergencies," it is not expected that the regulation will be applied with any frequency.

In order to implement this final rule, it may be necessary for NRC staff to develop guidance to assist applicants in preparing their requests, and to assist NRC staff in conducting their reviews. This may represent an additional commitment of NRC resources.

Since Section 6 precludes NRC Agreement States from making emergency access decisions, the final action will not have an impact on Agreement State resources.

#### 4.2.3 Department of Energy (DOE)/Department of Defense (DOD)

NRC is requiring that requests for emergency access based totally or in significant part on a serious and immediate threat to the common defense and security, be supported by DOD and/or DOE. NRC estimates that approximately five staff weeks or approximately 25 staff days would be required for each emergency access request processed by DOE or DOD. At the same rate as NRC, it would cost DOD or DOE under \$8,000 per request based on common defense and security.

### 5. DECISION RATIONALE

NRC decided on the approach in the final rule in light of the Congressional directives in Section 6 of the Act and considering the comparison of alternatives as discussed in the preceding section.

### 6. IMPLEMENTATION

The schedule for implementation of the rule is dictated primarily by the schedules and milestones in the Act. The Act sets out three milestone dates requiring the States and Compacts to demonstrate specific progress towards the development of new LLW disposal capacity, or their LLW generators may be denied further access to existing disposal sites.

The first date for potential denial of access was January 1, 1987. The States were able to satisfy the requirements for that milestone and none were denied access. January 1, 1989 is the next date when the three operating LLW disposal facilities can refuse to accept waste from a particular State. NRC plans to issue the final rule by November 1988, so it will be in place before

that January 1989 potential denial of access date. Once the final rule is issued, its actual implementation will be triggered by NRC receipt of a request for emergency access.

In the event that a request for emergency access is made before the final rule is in place, NRC will use the procedures and criteria in the proposed rule to the extent possible to make the necessary determinations.

## 7. ENVIRONMENTAL ASSESSMENT

An Environmental Impact Statement need not be prepared in connection with this rulemaking action because promulgation of the final rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. The final rule would establish criteria and procedures for a Commission determination under Section 6 of the Act that emergency access to an operating non-Federal LLW disposal facility is necessary to avert a serious and immediate threat to the public health and safety or the common defense and security. The final rule is an administrative action which serves to codify the criteria and procedures in the Act. The adoption of such implementing procedures and criteria by promulgation of a final rule does not have an environmental effect.

Making a Commission determination to grant emergency access in accordance with these criteria and procedures should also be without adverse environmental impact. The provisions in the rule will be activated only at the request of a LLW generator or State government official on behalf of a generator because serious impacts to the public health and safety, the common defense and security, and possibly the environment are anticipated as a result of denial of access to a LLW disposal facility. NRC will become involved only when the need for corrective action has been identified. Once NRC receives a request, the Commission's primary responsibility and concern will be to take the action necessary to assure that the public, the national security and the environment are protected. Whether the Commission decides to grant emergency access, or to deny it because alternatives are available, NRC will make the decision only when satisfied that the action to be recommended will minimize the effects of concern and maximize needed protection.

The Commission designation of the LLW disposal facility to receive the LLW approved for emergency access should not result in adverse impacts to the

environment. First, Section 6(h) dictates that the total quantity of emergency access LLW approved for disposal at any non-Federal or regional LLW disposal facility must fall within the volume caps established by the Act, and for any 12-month period, be less than 20 percent of the total volume of LLW accepted by that facility during the previous calendar year. Thus, the amount of waste provided disposal under the emergency access provision will be much less than the total amount of LLW that will be disposed of in regional or non-Federal disposal facilities. In addition, waste granted emergency access will have to be processed, transported and handled in a manner that complies with applicable safety regulations. Second, NRC will be considering the characteristics of the LLW requiring emergency access in designating the receiving facilities in order to assure that they are compatible and that the impacts from each individual grant of emergency access are minimized.

#### 8. REGULATORY FLEXIBILITY ANALYSIS

NRC is using this final rule to implement the statutory requirements for granting emergency access to non-Federal or regional LLW disposal facilities under Section 6 of the Act. Based upon the information available and in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities.

The final rule has the potential to affect any generator of LLW. However, in order for the requirements of the rule to be imposed on a generator, he must request emergency access to a non-Federal or regional LLW disposal facility, having been denied access because the State or Compact Region in which he is located has failed to comply with the milestones for LLW disposal development in Section 5 of the Act.

Establishing criteria and procedures for requesting and granting emergency access will have a positive benefit for small and large generators alike. It will enable them to better plan to avoid LLW disposal access problems, thus providing the certainty required for economic growth and development.

The impact of the recordkeeping requirements on any affected licensees should be minimal since the information that must be provided if a generator requests emergency access would most likely be collected and assembled as part of any process to decide a course of action if necessary access to LLW disposal was not going to be available.



NRC ISSUES RULES FOR GRANTING EMERGENCY ACCESS  
TO EXISTING LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITIES

The Nuclear Regulatory Commission is issuing regulations that establish criteria and procedures for evaluating requests for emergency access to operating non-federal low-level radioactive waste disposal facilities.

Under the terms of the Low-Level Radioactive Waste Policy Amendments Act of 1985, individual states and regional compacts must take certain actions leading to the development of their own low-level radioactive waste disposal capacity within the periods of time specified in the Act. If these actions are not taken within the time frames specified, generators of low-level radioactive wastes within the non-complying state or regional compact may be denied access to existing disposal facilities after January 1, 1989.

However, the Act authorizes the Commission to grant low-level waste generators or states emergency access to any of the operating non-federal low-level waste disposal facilities. In order to grant such a request, the Commission must find that such action ". . . is necessary to eliminate an immediate and serious threat to the public health and safety or the common defense and security . . ." and that ". . . the threat cannot be mitigated by any alternative consistent with the public health and safety, including storage of low-level radioactive waste at the site of generation or in a storage facility, obtaining access to a disposal facility by voluntary agreement, purchasing disposal capacity available for assignment or ceasing the activities that generate the low-level waste."

Under the new NRC regulation, a person seeking emergency access must submit detailed information to the Commission on the need for access to low-level waste disposal sites; the quantity, type and nature of the material requiring disposal; impacts on public health and safety or common defense and security if emergency access is not granted; the alternatives considered; and the process used to conclude that none of the alternatives are reasonable.

In making a determination that the circumstances described in a request for emergency access create a serious and immediate threat to the public health and safety, the Commission will consider:

(1) the nature and extent of the radiation hazard that will result from the denial of emergency access, including consideration of the NRC's standards for radiation protection contained in Part 20 of its regulations, any standards for the release of radioactive materials to the general environment that apply to the facility that generated the low-level waste, and any other Commission requirements that apply to the facility or activity for which emergency access is being requested; and

(2) the extent to which essential services such as medical, therapeutic, diagnostic or research activities will be disrupted by the denial of emergency access to waste disposal facilities.

In making a determination that the circumstances described create a serious and immediate threat to the common defense and security, the Commission will consider:

(1) whether the activity generating the wastes is necessary to the protection of the common defense and security (giving consideration to the views of the Department of Defense and the Department of Energy) and

(2) whether the lack of access to a disposal site will result in a significant disruption in that activity that will seriously threaten the common defense and security.

The new rule also sets out criteria for determining whether to grant "temporary" emergency access. The Act allows the Commission to authorize such temporary access for not more than 45 days, without considering available alternatives, if it concludes that the threat to the public health and safety or common defense and security warrants such action.

If the Commission determines that there is a need for emergency access, or "temporary" emergency access, it will then decide which operating non-federal low-level waste disposal facility should receive the waste, using criteria--set out in the rule--such as whether the waste and the disposal facility are compatible or whether a disposal facility has been previously designated to receive emergency access waste.

A proposed rule on this subject was published in the Federal Register on December 15, 1987. Changes made as a result of the comments received are mainly clarifying in nature. The procedures and the criteria to be used in making emergency access decisions are essentially unchanged.

The final rule will be effective on \_\_\_\_\_ (30) days after publication in the Federal Register on \_\_\_\_\_).