

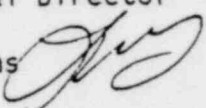
August 14, 1979

SECY-79-392A

COMMISSIONER ACTION

For: The Commissioners

From: Robert B. Minogue, Director, Office of Standards Development
Howard K. Shapar, Executive Legal Director

Thru: Executive Director for Operations 

Subject: SECY-79-392 - ANALYSIS OF THE ADVANTAGES AND DISADVANTAGES OF ALTERNATIVE FORMS FOR THE HEARING ON OCCUPATIONAL EXPOSURE STANDARDS (COMMISSIONER ACTION ITEM)

Purpose: To change the recommendation of the subject paper and to respond to questions from Commissioner Ahearne transmitted by memorandum of July 27, 1979, Chilk to Gossick.

Category: This paper covers a policy question.

Discussion: Since the preparation of SECY-79-392, June 14, 1979, there has been a change in the EPA staff. The new Deputy Assistant Administrator for Radiation Programs, David Rosenbaum, has indicated his preference for a hybrid type hearing that differs somewhat from the format discussed as Alternative 2* in SECY-79-392. That is, Mr. Rosenbaum favors (1) conduct of the hearing by a panel limited to an EPA hearing officer, technical representatives from each of the other sponsoring Federal agencies and, perhaps, a technical representative from EPA, and (2) permitting all participants to question each other, but with certain (as yet unspecified) procedures, such as time constraints, rather than the usual rules regarding cross-examination. These procedures should assure development of an adequate record on which to base subsequent rulemaking action by the sponsoring agencies but preclude undue protraction of the hearing.

The pros and cons associated with this (fourth) Alternative are:

4. Modified hybrid type

* A hybrid type hearing that, following the recent pattern in S-3 and the hearing on Authority for Access to or Control Over Special Nuclear Material conducted in 1978, would provide for an initial hearing before a small hearing board or a panel limited to representatives of the sponsoring Federal agencies, but would allow participants to request cross-examination on critical factual issues and would provide for limited discovery.

1403 021

7911280 004

Pros: (1) takes less time and resources to complete than Alternative 3.**

(2) more likely to develop an adequate record than Alternatives 1*** or 2 depending on the latitude afforded to participants.

(3) avoids difficulties associated with selection of issues, selection of hearing panel, and control of the hearing identified with Alternative 1.

Cons: (1) may require more time and resources than Alternatives 1 and 2 depending on the time constraints imposed on participants.

(2) discovery may not be appropriate for this type of hearing which probably would not have formally identified "parties" to the hearing and is likely to have a great many participants.

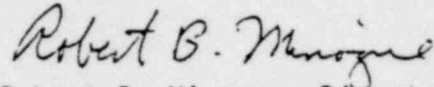
By memorandum from Chilk to Gossick dated July 27, 1979, the staff was requested to respond to a number of questions raised by Commissioner Ahearne regarding SECY-79-392. The staff response is enclosed.

Recommendation: At the time SECY-79-392 was prepared, the staff had been informed that EPA did not favor the hybrid type hearing (Alternative 2) or the adjudicatory type hearing (Alternative 3). In view of EPA's apparent change of position, as reflected by Mr. Rosenbaum, to favor a modified hybrid type hearing format (being treated as Alternative 4), and since this format would allow for fuller and more direct public participation than Alternatives 1 and 2, the staff recommends that the Commission approve continued negotiations with EPA and OSHA to reach accord on and make arrangements for either a modified legislative type hearing, a hybrid type

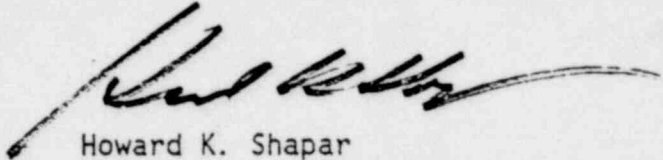
** A full adjudicatory hearing with full rights of discovery and cross-examination as in nuclear power reactor licensing hearings.

*** A modified legislative type hearing, before a panel comprised of members representing not only the sponsoring Federal agencies, but also representing a broad range of interests, such as unions, industry and environmental organizations. The panel would receive both oral and written statements and would ask questions of participants to develop a complete record, including the basis for all statements. Anyone could suggest questions to the panel as a whole or to individual members of the panel, but no one other than members of the panel could ask participants questions directly. There would be no provision for discovery.

hearing, or a modified hybrid type hearing along the lines that the staff understands Mr. Rosenbaum to prefer (Alternatives 1, 2, or 4).



Robert B. Minogue, Director
Office of Standards Development



Howard K. Shapar
Executive Legal Director

Enclosures:

1. Memorandum Chilk to Gossick, 7-27-79
2. Staff Response to Commissioner Ahearne's Questions on SECY-79-392

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Wednesday, August 29, 1979.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT August 22, 1979, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:

Commissioners
Commission Staff Offices
Exec. Dir. for Opers.
ACRS
Secretariat

1403-023




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

OFFICE OF THE
SECRETARY

July 27, 1979

MEMORANDUM FOR: Lee V. Gossick, Executive Director
for Operations

FROM: Samuel J. Chilk, Secretary 

SUBJECT: SECY-79-392 - ANALYSIS OF THE ADVANTAGES
AND DISADVANTAGES OF ALTERNATIVE FORMS
FOR THE HEARING ON OCCUPATIONAL EXPOSURE
STANDARDS (COMMISSIONER ACTION ITEM)

The staff is requested to respond to the questions raised by
Commissioner Ahearne in his response of July 10, 1979.
(SECY Suspense: August 10, 1979)

Attachment:
Commissioner Ahearne's
Comments on SECY-79-392

cc:
Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne -
General Counsel
Acting Director, OPE
Director, OCA
Director, OPA
Director, SD
Exec Legal Director

1403 024

CONTACT:
SJS Parry (SECY)
41410

7910010428

Mr. Ahearne's comments on SECY-79-392:

"No. 1 is not well defined. Missing are important features such as how will the panel reach conclusions (a consensus, vote, the Chairman's decision?), on what issues will the panel reach decisions or make recommendations, how will the outside representatives be chosen, and how will the procedure be kept under control? I also question the Pros and Cons description of No. 1. Cons should include the large number of panel members making it difficult to manage the proceedings and judicial risks of no cross-examination at all (for consistency - if having only partial cross-examination is a Con for No. 2, having none at all should definitely be a Con for No. 1).

Regarding No. 2, it is not obvious why (or whether) EPA is really against it. The discussion on p. 5 implies that participants could request cross-examination under both No. 1 and No. 2, but that the Board would conduct the questioning under No. 1 and the participant S under No. 2. Is this accurate?

If EPA does object to No. 2 and my understanding of the comments on p. 5 is accurate, would EPA object to No. 2 with the modification that the Board conducts the questioning?"

1403 025

STAFF RESPONSE TO COMMISSIONER AHEARNE'S QUESTIONS ON SECY-79-392

Question:

"No. 1 is not well defined. Missing are important features such as how will the panel reach conclusions (a consensus, vote, the Chairman's decision?), on what issues will the panel reach decisions or make recommendations, how will the outside representatives be chosen, and how will the procedure be kept under control? I also question the Pros and Cons description of No. 1. Cons should include the large number of panel members making it difficult to manage the proceedings and judicial risks of no cross-examination at all (for consistency - if having only partial cross-examination is a Con for No. 2, having none at all should definitely be a Con for No. 1).

Staff Response:

The only decisions that are envisioned for the panel are those that would be associated with conducting the hearing in such a manner as to permit a full airing of the issues and to develop an adequate record on which to base subsequent rulemaking action by the sponsoring Federal agencies. The panel would not be charged with making recommendations on the substantive issues. The details of panel selection have not been finalized pending resolution of the broader question of overall hearing format. The staff had discussed the modified legislative type alternative with EPA and OSHA staff with the understanding that, under that format, the hearing panel would be selected by EPA with the advice and concurrence of NRC and OSHA. The selection would be carefully made in order to achieve acceptable representation of a broad range of interests, such as unions, industry, and public interest organizations, as well as the sponsoring Federal agencies. The staff understood that the hearing panel would be controlled by an EPA hearing officer, with prearranged procedures regarding time allotted to each panel member for questioning, etc., to assure

1403 026

orderly conduct of the hearing. The staff agrees with your comments regarding the con arguments.

Question:

Regarding No. 2, it is not obvious why (or whether) EPA is really against it. The discussion on p. 5 implies that participants could request cross-examination under both No. 1 and No. 2, but that the Board would conduct the questioning under No. 1 and the participants under No. 2. Is this accurate?

If EPA does object to No. 2 and my understanding of the comments on p. 5 is accurate, would EPA object to No. 2 with the modification that the Board conducts the questioning?"

Staff Response:

Your understanding of the hearing formats discussed in SECY-79-392 is accurate. That is, as discussed in that paper, under Alternative 1, the modified legislative type hearing, the hearing panel would conduct the questioning, while participants would conduct the questioning under Alternative 2, the hybrid type hearing.

However, there has been a change in the EPA staff since the preparation of SECY-79-392. The new Deputy Assistant Administrator for Radiation Programs, David Rosenbaum, has indicated his preference for a hybrid type hearing that differs somewhat from the format discussed as Alternative 2 in SECY-79-392, as discussed in this present staff paper. It is clear that Mr. Rosenbaum does not oppose the hybrid type hearing format. In view of his indicated preference, and because this approach would allow for fuller and more direct public participation, the staff now recommends that the Commission approve continued negotiations with EPA and OSHA to conduct either a modified legislative type hearing, a hybrid type hearing, or a modified hybrid type hearing along the lines the staff understands Mr. Rosenbaum to prefer (Alternatives 1, 2, or a new 4).

1403 027