

June 14, 1979

SECY-79-392

For: The Commissioners

From: **COMMISSIONER ACTION**
Robert A. Wroble, Director, Office of Standards Development
Howard K. Sniapar, Executive Legal Director

Thru: Executive Director for Operations *[Signature]*

Subject: ANALYSIS OF THE ADVANTAGES AND DISADVANTAGES OF ALTERNATIVE FORMS FOR THE HEARING ON OCCUPATIONAL EXPOSURE STANDARDS

Purpose: To obtain Commission approval of the hearing form that the staff is negotiating with EPA and OSHA.

Category: This paper covers a policy question.

Discussion: By Item A.4, memorandum of November 30, 1978, Chilk to Gossick, the staff was directed to provide the Commission with an analysis of the advantages and disadvantages of alternative forms for the hearing on the adequacy of occupational dose-limiting standards, including the NRDC petition (PRM-20-6) and the Bertell petition (PRM-20-6A). The analysis was to include consideration of the need to provide rights ordinarily associated with NRC adjudicatory proceedings, such as discovery and cross-examination, in order to assure a full airing of the issues and the development of an adequate record on which to base subsequent rulemaking action by the NRC.

By memorandum of May 7, 1979, Chilk to Gossick, the staff was advised of the Commission's approval of the advance notice of public hearing (SECY-79-1A), and in Item 1, was requested to provide to the Commission as soon as possible the analysis of the alternative forms for the hearing to be cosponsored by EPA-NRC-OSHA. The staff notes that the requested analysis that follows considers the format to be used in the joint EPA-NRC-OSHA hearing, only. Since other agencies are involved, and EPA has the lead in the conduct of the hearing, the form of the hearing is a matter that requires negotiation with the other agencies. For the subsequent unilateral NRC rulemaking hearing(s) to be held on the implementation of the EPA guidance, the Commission may direct the use of any specific format that it chooses.

1434 269

The question of whether or not a public hearing should be held on the adequacy of current occupational exposure standards, the proposed EPA guidance for Federal regulatory agencies, and the petitions pending before the EPA and the NRC, is largely one of policy. Although section 189a. of the Atomic Energy Act requires that NRC hold a "hearing" upon request of any interested person in rulemaking proceedings involving the activities of licensees, this "hearing" requirement as applied to rulemaking has been held to be satisfied by affording opportunity to submit written comments.¹ Over the past several years a number of judicial decisions

in the U.S. Courts of Appeals have suggested the need for hearings in agency rulemaking proceedings where there are disputes about critical factual matters and a hearing is necessary to assure meaningful public participation and judicial review.² However, the more recent decision of the U.S. Supreme Court in Vermont Yankee Nuclear Power Corp. v. NRDC³ indicates that in the absence of constitutional constraints or extremely compelling circumstances (not here applicable) Courts may not, in the interest of meaningful public participation or other policy reasons, mandate that there be cross-examination in rulemaking proceedings or even that public hearings be held in rulemaking proceedings, where this is not required by statute. The precise impact that Vermont Yankee will have upon the large body of rulemaking law in the Courts of Appeals cited in footnote 2 is a matter of some debate among legal scholars. There is still the possibility that an agency rulemaking decision could be reversed by a Court if the record of decision is so sparse on critical issues, particularly critical factual issues, that the Court finds that there can be no meaningful judicial review. Public hearings, particularly public hearings with some adjudicatory trappings (like limited cross-examination) may produce a more complete record on critical issues. From this standpoint, the absence of public hearings, or the absence of cross-examination, in rulemaking proceedings, may increase the chances of judicial reversal, not because of failure of the agency to follow adequate procedures, but because of failure to develop an adequate record.

In view of these considerations, we have been discussing the following three basic alternative types of hearing with the EPA and OSHA staff:

1. A modified legislative type hearing, before a panel comprised of members representing not only the sponsoring Federal

²E.g., NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1260 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629-31, 649 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973); Walter Holm & Co. v. Hardin, 499 F.2d 1009, 1016 (D.C. Cir. 1971). See also, Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U.Chi. L. Rev. 401 (1975); Wright, Court of Appeals Review of Federal Regulatory Agency Rulemaking, 26 Admin. L. Rev. 199 (1974); Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375 (1974). Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 234-49 (1974); Note, The Judicial Role in Defining Procedural Requirements for Agency Rulemaking, 87 Harv. L. Rev. 782 (1974); Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 Calif. L. Rev. 1276, 1313-30 (1972); Claggett, Informal Action--Adjudication--Rulemaking: Some Recent Developments in Federal Administrative Law, 1971 Duke L. J. 51, 78.

³435 U.S. 519 (1978).

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.

2. 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.
3. A full adjudicatory hearing with full rights of discovery and cross-examination as in nuclear power reactor licensing hearings.

The pros and cons of these are set forth below:

1. Modified legislative type.

Pros: (1) takes least time and resources to complete.

(2) provides for the development of an adequate record by permitting questioning by panel members who represent a broad range of interests. Because of this broad-interest panel, the need for formal cross-examination to ensure a full airing of controversial issues is diminished.

(3) EPA favors this type of hearing.

Cons: (1) the lack of cross-examination and discovery puts the burden on the panel to develop an adequate record.

(2) inconsistent with procedures followed on S-3 and the access clearance proceedings.

2. Hybrid type.

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

1434 271

- (2) more likely to develop an adequate record than Alternative 1 depending on the latitude afforded to participants in requesting and obtaining cross-examination on critical issues.
- (3) consistent with procedures in S-3 and access clearance proceedings.

Cons: (1) requires more time and resources than Alternative 1. For example, selection of issues appropriate for cross-examination may be difficult and time consuming.

- (2) cross-examination and discovery may not be appropriate for this type of hearing which has no formally identified "parties" to the hearing and may have a great many participants.
- (3) does not provide for full cross-examination and discovery and therefore has increased chance for judicial reversal.
- (4) EPA does not favor this type of hearing.

3. Adjudicatory type.

Pros: (1) most likely to develop an adequate record.

- (2) avoids the need to identify particular issues suitable for cross-examination.

Cons: (1) will take the most time and resources.

- (2) An adjudicatory type hearing might discourage participation by citizens groups and individuals unfamiliar with adjudicatory procedures although these persons could still make their views known by limited appearances.
- (3) cross-examination may not be appropriate for resolution of policy as opposed to factual issues.
- (4) EPA opposes this type of hearing.

In view of these considerations of the alternative forms for the hearing, and recognizing the desires of the Commission to assure a full airing of the issues and the development of an adequate record, the staff has been negotiating with EPA and OSHA for a hearing of the modified legislative type (Alternative 1) or the hybrid type (Alternative 2).

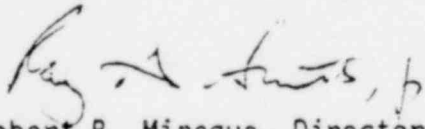
1434 272

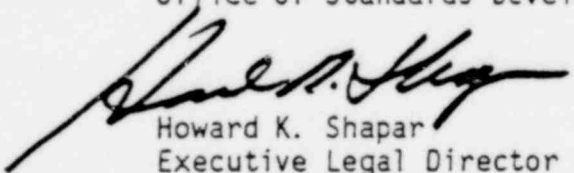
From our preliminary discussions with EPA staff, we expect that they will resist the feature of the hybrid type hearing that would permit cross-examination on specific topics as allowed by the hearing board. Such a provision would be unique to the type of hearing traditionally conducted by EPA in this field and there is some reluctance to set a precedent in this particular hearing. EPA staff feels that a full airing of issues and development of a complete record for this fact-finding hearing can be achieved by a modified legislative type hearing (Alternative 1) before a panel comprised of members representing a broad range of interests. In addition to directing their own questions to participants, there would be a high probability that at least one panel member would be receptive to any valid question from a participant and would direct such question to the other participants. We believe that a modified legislative type hearing (Alternative 1) could develop a full record of the issues, assuming that the members of the hearing panel were carefully chosen with a view to a complete airing of the issues. However, hybrid hearings retain some advantage by permitting quick "follow-up" questions.

Recommendation:

That the Commission:

Approve continued negotiations with EPA and OSHA to conduct a modified legislative type hearing (Alternative 1).


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Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Thursday, June 28, 1979.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT June 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.

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1434 273