

DIST: NRC Central ELD Rdr  
 Subj. File Rdr  
 Cyr Chron Engelhardt/Shapar  
 JPM/JL/SB/RM/JC Info

May 8, 1981

MEMORANDUM FOR: John G. Davis, Director  
 Office of Nuclear Materials  
 Safety and Safeguards

FROM: Howard K. Shapar  
 Office of Executive Legal Director

SUBJECT: USE OF ORDERS TO IMPOSE GENERIC REQUIREMENTS  
 ON MULTIPLE LICENSEES

On March 26, 1981, the Office of Nuclear Materials Safety and Safeguards issued 14 virtually identical orders modifying 14 uranium mill licenses to require that each licensee submit sampling and analysis results of the environmental monitoring program at its facility. I reluctantly interposed no legal objection (see my memo to you of March 2, 1981), but expressed considerable concern with the continuing practice of imposing generic requirements by order rather than by rule. A primary basis for this concern was the possibility of multiple adjudicatory hearings attendant upon proceeding by order rather than by rule.

Seven demands for hearing have now been received from uranium mill licensees seeking to contest various aspects of the March 26 Orders. Even if the issues raised by the licensees are similar enough to permit some consolidation, the resources required to litigate these cases will be substantial, placing a significant burden on your technical people as well as my own staff. This predictable development underscores the importance of my previous repeated recommendation (in my memos of Nov. 14, 1980 and March 2, 1981, copies of which are attached for ready reference) that rulemaking be used in all future NRC actions imposing new requirements of general applicability on licensees.

Original signed  
 by H. K. Shapar

Howard K. Shapar  
 Executive Legal Director

B107060156 B1050B  
 CF SUBJ  
 M-4 LIC CF

Attachments:  
 As Stated

cc: William J. Dircks, EDO  
 Harold R. Denton, Dir., NRR  
 Victor Stello, Jr., Dir., I&E

*M-4  
 lic*

OFFICE	CONTACT: Karen Cyr, OELD	OELD <i>kc</i>	OELD	<i>by</i>
SURNAME	*-27269	KCyr/ct	JPMurray	HKShapar
DATE		5/8/81	5/8/81	5/8/81



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

NOV 14 1980

MEMORANDUM FOR: Harold R. Denton, Director  
Office of Nuclear Reactor Regulation

John G. Davis, Director  
Office of Nuclear Material Safety and Safeguards

Victor Stello, Jr., Director  
Office of Inspection & Enforcement

FROM: Howard K. Shapar  
Executive Legal Director

SUBJECT: RECENT ORDERS ISSUED TO NUMEROUS LICENSEES

I have recently been asked to review several orders which were to be issued to multiple licensees, sometimes numbering in the hundreds. As you know, the agency process for formulation of an order is defined as "adjudication" under the Administrative Procedure Act (APA). Although I have reluctantly withheld legal objection in those particular instances, I wish to state that in the future it would be highly preferable, and consonant with the philosophy of the APA, to proceed in similar cases by rule, rather than order.

The Attorney General's Manual on the APA, perhaps the most authoritative source on the philosophy of the Act, states that "the entire Act is based upon a dichotomy between rulemaking and adjudication .... Rulemaking is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rulemaking is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct." Given the scope, nature and purpose of the recent orders I have reviewed, it is clear to me that they are appropriate subjects of rules.

Proceeding by rulemaking rather than adjudication in such cases offers significant practical benefits. First, a rule represents the final agency position on a given matter. There would be no need to allocate scarce agency resources to administrative adjudications which are almost certain to develop. Although at the present time any significant rule must, of course, be approved by the Commission, the time necessary to complete this step could be minimized by making an early decision to proceed with a rule. Rules, as well as orders, can be made immediately effective under appropriate circumstances. Therefore, time considerations should not necessarily militate against the use of rulemaking procedures.

Dupe of

81φ226φ536

Second, as the Attorney General recognized, the rulemaking procedures of the APA are designed to ensure that policy is formulated by key agency personnel relying heavily upon their expert staff members hired for that purpose and not by hearing examiners. Commission regulations and practice accord with this view of rulemaking. On the other hand, in an adjudicatory proceeding, a Licensing or Appeal Board has only the record made before it when asked to resolve disputed issues. Although the Boards usually do an acceptable job of resolving factual and legal disputes, experience shows they have more difficulty when asked to pass upon or interpret new staff policies without the benefit of Commission input. Added to this problem is the substantial time required for an adjudication to reach the Commission level for authoritative resolution. Hence rulemaking accords with the philosophy of the APA and affords the opportunity for key decisionmakers to focus on policy issues in a timely fashion.

I strongly recommend in the future that when new requirements of general applicability are to be imposed upon licensees the requirements be imposed by rule rather than order. The rulemaking mechanism is fully consistent with the philosophy of the APA and offers significant benefits over adjudication with no substantial drawbacks. To minimize the possibility of legal objection in the future, I suggest that you contact me or my staff at the earliest possible time to discuss whether particular situations involving numerous licensees warrant proceeding by a mechanism other than rulemaking.

  
Howard K. Shapar  
Executive Legal Director

cc: W. Dircks, EDO