

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



May 5, 1982

MEMORANDUM FOR: Commissioner Ahearne *Wohl*
FROM: Martin G. Malsch, Deputy General Counsel
SUBJECT: COMMISSIONER AHEARNE'S QUESTIONS RE:
SECY-82-72A -- "COORDINATED PROGRAM FOR STEAM
GENERATORS"

In SECY-82-72A, EDO describes a proposed management structure to coordinate an NRC-industry steam generator research program. You asked OGC to address the following questions:

- (1) Do you see any legal problems with respect to either the Policy Group or the Steering Committee in the way NRC participation is defined in each?
- (2) Do you see any difficulties coming from the process described for development and implementation of regulatory requirements?

The answer to these questions is yes. The intended results of the program appear to be recommendations to the Commission on regulatory requirements and on areas of research. Thus, as presently organized the program appears to be subject to the Federal Advisory Committee Act (FACA). 5 USC Appendix I.

The FACA defines an advisory committee as:

... [A]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof ... which is --

... (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations ...

The definition is extremely broad and includes nearly any type of group used by federal agencies to obtain advice.

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Enclosure 2

SECY-82-72A indicates that the program will be organized by the NRC. Further, the final goal is to see that "the appropriate national standards, guides or regulations [are] prepared and implemented." Obviously, any new NRC regulations governing steam generators would have to be promulgated by the NRC. The proposals of the policy group would, then, be recommendations to the Commission. These characteristics -- formation and participation by the NRC and solicitation of advice or recommendations -- are indicative of an advisory committee.

On the other hand, the group has characteristics not normally associated with an advisory committee -- the policy group will actually allocate funds and manage research programs. Such operational functions are not normally allocated to advisory committees. 1/ The proposed group is, then, somewhat of a hybrid. However, since the NRC is forming the group and since the end result is to produce recommendations to the Commission, the group would be subject to FACA. This means that the group would have to be approved by GSA, certified by the NRC as necessary in the public interest, and chartered. The membership of the committee would have to be "fairly balanced in terms of the point of view represented and the functions to be performed by the advisory committee ..." 10 CFR § 7.6(b)(2). Once the group was established it would be governed by the procedural requirements of FACA which provide for open, public meetings, etc. 5 U.S.C. Appendix I, section 10.

If the same program were a voluntary program established by industry, only those portions of the activities of the committee during which it provided advice and recommendations to the Commission would be subject to FACA. The group could do everything contained in the proposed coordinated program except provide advice and recommendations to the Commission. 2/ The group could even initiate discussions of its program with the NRC to get NRC comments on the program without being subject to

1/ In fact, FACA provides that advisory committees are to be used only for advisory functions and that determinations as to action to be taken and policy to be expressed are to be made solely by an officer of the federal government. 5 U.S.C. Appendix I, section 9(b). We will address this matter later in the text.

2/ Unsolicited comments on the Commission's programs would probably not bring such a group within the FACA. Whether the group was an "advisory committee" would depend on whether the factual circumstances demonstrated that the NRC had "utilized" the group to obtain advice within the meaning of that term as used by FACA.

FACA. ^{3/} If, however, the group is utilized as an advisory committee at some later point, it is then subject to the procedural requirements of FACA.

In our view, then, the proposed program would be subject to the FACA, and failure to treat the policy group as an advisory committee could lead to a court challenge. The Commission should give careful consideration to the organization and goals of the program in light of FACA. We would be happy to work with the staff in developing such a program.

We also foresee possible legal problems with the funding pool described on page 8 of Enclosure 1 to SECY-82-72A. The "first option" provides for a pool of research funds to which all of the participants, including NRC, contribute. There are at least two problems with this approach. First, there are numerous constraints on how and by whom federal funds may be obligated. At first glance, the pool arrangement seems to allow the policy group to obligate NRC research funds. Such a procedure -- a non-government employee obligating federal funds -- would not be proper. Governmental functions must be performed by government employees. OMB Circular No. A-120, April 14, 1980; OMB Circular A-76, April 5, 1979. Determining when and how government funds are to be obligated is one of the most basic of governmental functions. ^{4/} This problem could be avoided if there were some mechanism by which the funds could be transferred to the group so that the money would no longer be government money. The proposed means of transfer to the group is not clear in SECY-82-72A. Any such transfer mechanism would have to be more defined and would have to be studied before we could draw any final conclusion about its legality.

A second problem is one that is recognized in SECY-82-72A. Since NRC funds are to be thrown into a common pool with industry

^{3/} The District Court for the District of Columbia held in Consumers Union v. Dept. of HEW, 409 F.Supp. (D.D.C. 1976), that meetings between FDA and representatives of the Cosmetic, Toiletry and Fragrance Association (CTFA) were not subject to FACA. The court based its decision on the fact that the meetings were not called to consider proposals dealing with agency action. They were essentially consultations concerning CTFA's own proposals for voluntary action by the CTFA. The FDA was primarily responding to a CTFA-initiated and CTFA-administered program.

^{4/} Also, FACA places some restrictions on what functions an advisory committee may perform. 5 U.S.C. Appendix I, section 9(b).

money, there is the possibility that it would appear that NRC funds would be used to resolve reliability and economic problems of steam generators rather than to resolve safety problems. It is questionable whether such a use of NRC research funds would be proper. The legislative history of the Energy Reorganization Act (93 Pub.L. 438; 88 Stat. 1253 (1974)) indicates that Congress authorized NRC to do only "safety" related research. Any developmental or promotional research was to be conducted by ERDA, and the NRC was to perform "confirmatory assessments" relating to safe operation and to the protection of commercial reactors. See e.g. H.R.Rep. No. 1445, 93rd Cong., 2d Sess. 34-35 (1974); S.Rep. No. 1252, 93rd Cong., 2d Sess. 34-35 (1974); S.Rep. No. 980, 93rd Cong., 2d Sess. 2, 24, 58-60 (1974). Some method of assuring that NRC funds were only spent on safety-related projects would solve this problem.

One suggestion for avoiding this problem altogether would be to prevent NRC funds from actually being co-mingled with funds from the industry groups. The NRC could decide, for example, to set aside a certain sum to be used for steam generator research. The Commission could then consider recommendations or other information from the policy group in deciding on what specific research to expend those set aside funds.

In conclusion, it is the view of this office that there are some legal difficulties associated with the proposed coordinated steam generator research program. We would suggest that the organization of the program be reconsidered in light of the applicability of the FACA. Further, we would suggest that a funding method other than the "pool" suggested as one option in the paper could be examined to avoid the possible difficulties inherent in the pooling arrangement.

cc: Chairman Palladino
Commissioner Gilinsky
Commissioner Roberts
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