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May 15, 2003

FOI/PA REQUEST

Case No: 2003-0281
Date Rec'd: 5-15-03
Action Off: [Signature]
Related Cases: [Signature]

VIA HAND DELIVERY

Carol Ann Reed
FOIA/Privacy Act Officer
U.S. Nuclear Regulatory Commission
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Re: **Freedom of Information Act Request:**
Office of Inspector General Case No. 01-01S

Dear Ms. Reed:

In an Office of Inspector General ("OIG") Event Inquiry (Case No. 01-01S) dated April 25, 2003, concerning U.S. Nuclear Regulatory Commission ("NRC") oversight of operations at the Indian Point, Unit 2 nuclear power plant ("IP2"), the OIG made, among others, the following finding:

On four occasions between 1997 and 2000, the Region I Administrator sought additional NRC oversight for IP2 by seeking to have NRC's senior managers place IP2 on NRC's Watch List via the agency's Senior Management Meeting process. . . . OIG concurs with the Region I Administrator and his staff that placing IP2 on the Watch List sooner might have sufficiently motivated the licensee to cause earlier improved performance.¹

¹

See Office of the Inspector General Event Inquiry, NRC Enforcement of Regulatory Requirements and Commitments at Indian Point, Unit 2, Case No. 01-01S (April 25, 2003), at 25 ("Event Inquiry Report"). The Event Inquiry Report was made available to the public in its entirety on April 30, 2003 (ADAMS accession number ML031200172).

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In support of this finding, the OIG cited to statements made by the Region I Administrator regarding IP2 at Senior Management Meetings in June 1997, January 1998, July 1998, and May 2000.²

Pursuant to the Freedom of Information Act (5 U.S.C. § 552), I hereby request any and all meeting minutes in the possession of the NRC, including all of its offices and divisions, pertaining to NRC Senior Management Meetings on June 10-11, 1997; January 6-7, 1998; July 14-15, 1998; and May 10-11, 2000.

Should the NRC propose to withhold any record, document or other piece of information requested herein pursuant to Freedom of Information Act Exemption 5,³ by virtue of the so-called "deliberative process privilege," such an exemption should not be applied because the NRC has waived the exemption. In the Event Inquiry Report, the OIG discusses in detail the presentations of the Region I Administrator at the above-referenced Senior Management Meetings regarding performance at IP2. OIG *adopted the reasoning* of the Regional Administrator at those meetings, stating, "OIG concurs with the Region I Administrator and his staff that placing IP2 on the Watch List sooner might have sufficiently motivated the licensee to cause earlier improved performance." (Event Inquiry Report at 26.)

The NRC may not rely on a FOIA exemption to justify withholding information that is already in the public domain. *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001). In *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975), the Supreme Court held that production of ostensibly predecisional material is necessary where "an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion."⁴ *Id.* at 161. Another court has stated, with respect to meeting minutes, "if, in explaining its collective decision, the [agency] expressly adopts or incorporates any element of a Commissioner's or a staff member's prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as predecisional." *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991). See *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 973 (7th Cir. 1977) (holding that, where the decision of the Special Prosecutor was consistent with conclusions reached in a prior internal memorandum (the object of a FOIA request) and "gained

² See Event Inquiry Report at 22-23. Specifically, the Event Inquiry Report cites, for at least one meeting, "minutes of the SMM proceedings." *Id.* at 22.

³ See 5 U.S.C. § 552(b)(5). Exemption 5 protects from disclosure inter-agency or intra-agency memoranda or letters which would not be available by law to a party in litigation with the agency.

⁴ The "final opinion" at issue here is the OIG's determination that placing IP2 on the Watch List sooner might have motivated the licensee to cause earlier improved performance. Event Inquiry Report at 26.

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support therefrom," the requested internal memorandum was to be disclosed in its entirety "in order to assess the strength of the reasoning that was behind the . . . legal conclusions"); *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1197 (D.C. Cir. 1991) (distinguishing between "reference to a report's conclusions [and] adoption of its reasoning," and noting that "it is the latter that destroys the privilege").

The OIG expressly adopted the reasoning and conclusions of the Region I Administrator described in the minutes of the above-referenced Senior Management Meetings in a report released to the public. Therefore, all information connected with the discussion of IP2 at those meetings that might otherwise be protected under Exemption 5 is appropriately disclosed to the public, as the Staff has waived the exemption.

For each and any requested item (or portion thereof) that you withhold pursuant to a Freedom of Information Act exemption, please provide an index itemizing and describing the items withheld and individually disclosing the specific basis for the withholding. I agree to pay whatever expenses may be associated with this request. Please notify me in the event that the expected costs exceed \$250.00. For any fees or expenses incurred pursuant to this request, please forward an invoice, along with the requested records and information, to my attention at the above address. If you have any questions regarding this request, then please contact me by telephone at (202) 371-5824, or by e-mail at bpoole@winston.com.

I anticipate that this constitutes a "simple" request that can be completed within 20 working days, pursuant to 10 C.F.R. § 9.25(d)(1). I look forward to receiving your notification in this regard. Thank you for your expeditious consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Brooke D. Poole", written in a cursive style.

Brooke D. Poole