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

CHAIRMAN

COMM CIRR

January 23, 1980

The Honorable Abraham Ribicoff
Chairman, Committee on Governmental
Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter responds to your request for the views of the Nuclear Regulatory Commission on legislative proposals for comprehensive regulatory reform. The Commission has decided to comment on those reform issues which would most directly and significantly affect its operations and responsibilities. We have chosen to direct our review to S. 2147, the "Regulatory Flexibility and Administrative Reform Act of 1979," because it is the most recent of the comprehensive regulatory reform proposals and because it incorporates a number of concepts and requirements of earlier bills. However, the views which we express below are intended to encompass the major issues raised by earlier bills, most particularly S. 262, the "Reform of Federal Regulation Act of 1979." When necessary to assure the completeness of our comments, we have made specific reference to S. 262.

Comprehensive regulatory reform is an important issue for the Congress and for the Nuclear Regulatory Commission. The Commission favors such reform and supports S. 2147, as qualified by the following comments:

1. Regulatory Analysis. The Commission believes that the sufficiency of the regulatory analysis should not be an issue for judicial review. It is important that the regulatory analysis be competently and responsibly done, and independent agencies can be held accountable for this task through periodic, selective review by the Congressional Budget Office or a similar entity. Such judicial review is an unsatisfactory alternative because it would encourage an agency to prepare a litigation document rather than an analysis that was framed according to the specific needs of the agency decisionmaker. However, the analysis could be examined by the courts like any documentary matter in the rulemaking file which forms the basis of the rule. As a final matter, the Commission wishes to emphasize the importance of providing for a waiver procedure such as that contained in S. 2147. Commissioner Bradford believes that judicial review of the sort afforded under NEPA would convey a much greater importance to regulatory analysis. He would leave the determination of whether such importance is desirable to the Congress, while noting that the risk of a "litigation document" is no greater here than under NEPA. He believes that the real issue is one of resources and priorities.

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2. Agency Regulatory Agenda. It is unclear whether S. 2147 would authorize the Regulatory Policy Board to designate an agency rule as a major rule, over the objection of the agency. S. 2147 offers no rationale for giving the Board such power over independent agencies, and NRC would oppose it. Congress should clarify that the Board would not have such power. However, the Commission would support giving the Board authority to request an independent agency to designate a particular rule as a major rule and make a non-binding request that the agency prepare a regulatory analysis in the case of a proposed rule, or periodically review the rule in the case of an existing rule. The Commission's principal concern is the degree of control which the Board would have over an independent agency.

3. Agency Deadlines. If the courts are to be permitted to take account of missed agency deadlines, Congress should be explicit about its intentions. Courts could foreseeably become the enforcers of agency deadlines, and such an eventuality would have uncertain and not necessarily beneficial effects on the quality of agency decisionmaking. Thus, Congress should make it clear that (1) a strong judicial role is not intended, and (2) courts may consider agency deadlines but should not accord them weight beyond that given to other relevant factors, including the agency's justification for its inaction.

4. Centralization of Agency Planning and Management Functions. S. 262 would require the Commission to designate a single office within the agency to have "primary responsibility for the planning and management" of its regulatory activities. Under our interpretation of the bill, the Commission's designation of its Executive Director for Operations would comply with this provision. The Executive Director now acts as the Commission's agent and chief staff officer. If Congress intends this provision to require a different course of action, then the Commission would oppose the provision because it would confuse the line of operational management within the agency.

5. Expedited Hearing Procedures for Licensing. The Commission believes that Congress should clarify the meaning in S. 2147 of the exemption for NRC proceedings from the mandatory expedited hearing format. It should be explicitly stated that the exemption is not intended to prohibit NRC from conducting any of its proceedings under the expedited format or to require NRC to use the formal, trial-type hearing procedures of the APA in every NRC adjudication. Commissioner Kennedy would prefer a Congressional statement of clarification which encouraged, but did not require, the use of the expedited format by NRC. Commissioner Bradford agrees with the exemption as written in S. 2147. No Commissioner would support the removal of the exemption from S. 2147.

   S. 262 does not exempt NRC proceedings from the mandatory expedited format. Therefore the Commission unanimously opposes that provision in S. 262 because it believes that agencies should not be required to use expedited procedures. The Commission (Commissioners Gilinsky, Kennedy and Hendrie, and myself) believes that it should have discretionary

authority under S. 262 to use the expedited format. We recognize that current law can be construed to give agencies such authority, but believe that the litigation uncertainty associated with the current authority makes it unattractive. Commissioner Bradford would oppose a provision in S. 262 granting the Commission new discretionary authority to use expedited hearing procedures.

In sum and with respect to both bills, the Commission believes that both expedited hearing procedures and formal hearing procedures are appropriate tools for the Commission to have at its disposal and that the Commission should have the discretion to decide which procedures to use for a given situation. Commissioner Kennedy also believes that Congress, through legislative history, should encourage agencies to use expedited procedures. Commissioner Bradford believes that only formal procedures are appropriate for NRC power reactor licensing proceedings at present.

6. Separation of Functions. S. 2147 indirectly results in more restrictive separation-of-functions rules for NRC because it abolishes the current exception from such rules for initial licensing proceedings. The less restrictive rules for expedited proceedings which would ordinarily apply to initial licensing cases will not apply to NRC because NRC proceedings are exempt from the expedited format.

   As a consequence of recent experiences in which ex parte constraints on communications between the Commission and its staff have made the agency's performance of its duties more difficult, the Commission is reconsidering whether it has struck the correct balance between having adequate technical information to protect health and safety and assuring the fairness of our proceedings. We expect to complete our study, obtain public comment and transmit our views to the Congress by April 15, 1980. Until such time as our study is completed, we would oppose changes in the law which broadened ex parte prohibitions. Repeal of the current exemption for initial licensing proceedings would have this effect on NRC. The Commission believes that Congress should explicitly recognize in legislative history that special circumstances apply to NRC proceedings, and that it will await NRC's recommendations on whether special separation-of-functions rules are needed for NRC proceedings.

7. Agency Review of Decisions. Congress should make it explicit in both S. 2147 and S. 262 that the grounds which are to be specified by the agency for review of decisions are only those grounds applicable to discretionary review by agency heads. Congress should leave no doubt that the Commission's existing system for review, including the use of the Atomic Safety and Licensing Appeal Board, is not affected by the bills.

8. Funding for Intervenors. The Commission (Commissioners Gilinsky and Bradford, and myself) believes that a comprehensive regulatory reform bill should authorize a pilot program for the funding of expenses for

public participation. Commissioner Bradford and I believe that such a program should be administered by the agencies rather than the Administrative Conference. Commissioner Gilinsky favors administration of the program by the Conference, in consultation with the agencies. Commissioner Bradford and I would also support a program administered by the Conference in consultation with the agencies, although this is not our preference. Commissioners Kennedy and Hendrie oppose such a program. However, if such a program were authorized nonetheless, they would prefer the Conference to administer it.

9. Administrative Conference. The Commission supports the changes in S. 2147, but would oppose amendments which authorized the Conference to adopt binding rules of administrative procedure or which reduced the Conference's independence from the Executive Branch. As to S. 262, the Commission incorporates its comments with respect to funding for intervenors but does not wish otherwise to comment on the structure of the Conference under that bill.

10. Open Communications in Informal Rulemaking. The Commission (Commissioners Gilinsky and Hendrie, and myself) opposes the open communications provisions in S. 2147 as written. Commissioner Kennedy strongly supports the provisions in S. 2147. However, the Commission (Commissioners Kennedy and Bradford, and myself) believes it could support a rule which required logging of outside contacts if --

    (i) it applied only to agency decisionmakers (agency heads and hearing boards); however, this would not be intended to sanction an agency's staff serving as a mere conduit for outside communications to or from agency heads and boards in order to circumvent the logging requirement;

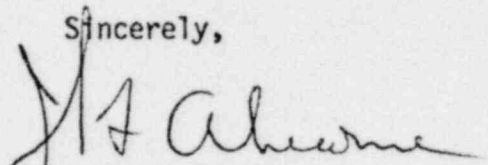
    (ii) it was established on a pilot basis, to expire after five years unless renewed by Congress;

    (iii) it was coupled with a clear statement of legislative intent that the rule contained all of the requirements and prohibitions applicable to an agency for informal rulemaking, and that communications between the agency and its staff were permitted and were not subject to such requirements and prohibitions.

11. Regulatory Flexibility Analysis. The scope of the analysis that an agency is to perform should be clarified to require agencies chiefly to identify and give special notice for proposed rules that could have adverse impacts on individuals and small entities, and not to require an analysis of those impacts. Congress also should make explicit that an

agency's description of alternatives should focus on those actions that involve requirements having less burdensome direct effects. Finally, the substance of the waiver provisions that apply to the regulatory analysis should also apply to the flexibility analysis so that an agency may properly defer compliance with the required procedure in the case of an emergency.

Sincerely,



John F. Ahearne

cc: Senator Charles H. Percy