

January 27, 1983



SECY-83-40

ADJUDICATORY ISSUE

(NEGATIVE CONSENT)

For: The Commissioners

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-710 (IN THE MATTER OF SOUTH
CAROLINA ELECTRIC & GAS CO.)

Facility: Virgil C. Summer Nuclear Station, Unit 1

Purpose: To inform the Commission of an Appeal Board
decision [which, in the General Counsel's view,
EX 5

Review Time Expires: February 22, 1983

Petitions for Review: None

Discussion: In ALAB-710 the Appeal Board concluded its sua
sponte review of the Licensing Board's
decisions and affirmed its authorization of

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the issuance of an operating license. ^{2/} The Appeal Board discussed three issues: (1) localization of the Charleston earthquake; (2) on-site use of drugs and alcohol during construction; and (3) the Licensing Board's calling of Board witnesses. Each of these is addressed below. In our opinion,

(1) Whether the 1886 Charleston Earthquake Should be Localized to the Immediate Charleston Area

At the construction permit (CP) stage, the NRC staff and the Licensing Board concluded that the seismicity in the vicinity of Charleston, S.C., including the 1886 earthquake, was related to structures beneath the Coastal Plain province in the Charleston area and should not be assumed to migrate outside of the immediate Charleston area. LBP-73-11, 6 AEC 213, 218 (1973). The Board's conclusion was based upon opinions from the United States Geological Survey (USGS) and the National Oceanic and Atmospheric Administration, upon the staff analysis in the SER and upon the testimony of two expert witnesses.

In the operating license (OL) proceeding, the Licensing Board concluded "that there is no new information that warrants reopening this matter at this operating license stage for a re-determination on the merits." Slip Op. at 67. That conclusion was based upon a summary

^{2/} The Licensing Board had issued a partial initial decision covering the seismic issues in controversy on July 20, 1982 and a supplemental partial initial decision covering the remaining issues in controversy on August 4, 1982. Only the licensee filed exceptions, which the Appeal Board dismissed in ALAB-694 because the licensee was not aggrieved by the decision. ALAB-694 was discussed in SECY-82-424.

of the USGS position on the matter, a reassessment by the licensee of the impact of Charleston seismicity on the Summer site in light of the data compiled by USGS since the CP stage, and a review of this evidence by staff. Staff's position was that "the 1886 Charleston earthquake can be reasonably related to the complex geological structure unique to the region and in consideration of the recurrent seismicity in the area should not, in developing the earthquake design basis for the facility, be assumed to occur at the Summer site." Id. at 67. Staff further recommended, however, that geological and seismological research be continued in the Charleston area.

In ALAB-710, the Appeal Board considered the effect of a board notification issued subsequent to the OL Licensing Board's decision which indicated that USGS had recently "clarified" its position on the Charleston earthquake. USGS now believes that an earthquake of the magnitude of the Charleston earthquake should not be ruled out at locations away from Charleston solely on the basis of earlier USGS statements. The Appeal Board, noting that staff was evaluating the significance of the USGS clarification and would take whatever steps were necessary to provide assurance of the safe operation of Summer, concluded that this information did not provide a basis for reexamining the CP Licensing Board's conclusions.

We believe that

Staff is evaluating the impact of this letter, and, if it should turn out in the course of the staff's review of this matter at affected plants that further action is required at Summer, staff can take appropriate action at that time, outside of this proceeding.

(2) On-site Drug and Alcohol Use During Construction

The Licensing Board acknowledged that the allegation of on-site use of drugs and alcohol was investigated and confirmed by I&E, but that such use was found not to be widespread, nor to have significantly affected safety-related work, nor to be unusual in large construction efforts. The Board noted in an aside that "[t]he evidence is not clear whether NRC policy is that such practice is not to be tolerated, or that it is to be tolerated in moderation so long as safety is not compromised." Slip Op. at 38.

The Appeal Board, in ALAB-710, expressed concern "that the Commission might be incorrectly perceived as indifferent to drug and alcohol use at nuclear facilities." Slip Op. at 4. The Board referred to the Commission's pending rulemaking on drug and alcohol abuse as an indication of awareness of the problem. The Appeal Board, noting that the rulemaking appeared to cover only operating plants, suggested that "the Commission may find it useful to explore in the ongoing rulemaking the safety consequences of alcohol and drug use during construction." Id.

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(3) Calling Independent Board Witnesses

The Licensing Board's decision in this proceeding to call its own witnesses has already been the subject of much controversy. We will not repeat the procedural history which led to ALAB-663 (the Appeal Board's ruling on the Board's decision to call its own witnesses) and the Commission's decision not to review ALAB-663. CLI-82-10, 15 NRC 1377 (1982).

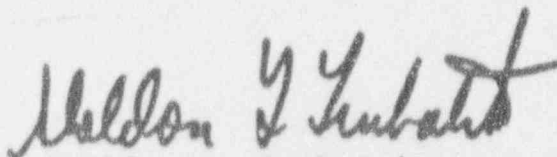
While ALAB-663 could have been the end of the matter, the Licensing Board attached an appendix to its seismic decision in which it critiqued ALAB-663 and justified its decision to call Board witnesses. In ALAB-710, the Appeal Board responded to the appendix by repeating several of the major points of ALAB-663. Chairman Rosenthal separately questioned the propriety of the Licensing Board's attachment of an appendix restating its position when that position had already been overruled by the Appeal Board. The issue of calling independent witnesses was before the Commission when it considered whether to review ALAB-663. The Commission did not take review then. 4/

4/ TOGC

recommended that

EX 5

EX.5



Sheldon L. Trubatch
Acting Assistant General Counsel

Attachments:

- (1) ALAB-710
- (2) USGS letter

SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Friday, February 11, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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Attachment 1

absence of permissible exceptions, we have examined sua sponte each decision, as well as substantial portions of the underlying evidentiary record. Although we do not subscribe to every subsidiary finding of the Licensing Board, our review has disclosed no error affecting the validity of the ultimate result reached by that Board (including the several conditions that it imposed upon reactor operation). Accordingly, that result is affirmed. ^{3/} We do, however, have comments on two points raised by the Licensing Board's decisions.

First, in the July 20 partial initial decision, the Board noted that, although scientific opinion is "mixed", it found no new evidence that would warrant reassessment of the Licensing Board's determination at the construction permit stage that the 1886 Charleston earthquake should be localized to the immediate Charleston area. ^{4/} Subse-

^{3/} On October 22, 1982, the Licensing Board entered an unpublished order in which it denied a post-August 4 motion of intervenor Brett Bursey to reopen the record on a quality assurance question. No appeal has been taken from that order. Absent exceptional circumstances (and none is apparent here), we do not review sua sponte the action taken by licensing boards on reopening motions filed subsequent to the rendition of the last initial decision in the proceeding. Thus, we have not passed on the merits of the October 22 order.

^{4/} LBP-82-55, supra, 16 NRC at ___ & n.5, ___ (slip opinion at 7-8 & n.5, 65-67, 73). See South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-73-11, 6 AEC 213, 218, 225, modified and affirmed, ALAB-114, 6 AEC 253 (1973).

quent to the Board's decision and while our sua sponte review was under way, we received a board notification indicating that the U.S. Geological Survey has recently "clarified" its position on the Charleston earthquake. 5/ According to the NRC staff, the USGS believes that an earthquake of that magnitude should not be categorically ruled out at locations away from Charleston solely on the basis of an earlier USGS statement. We do not believe that this information provides a basis for reexamining the earlier construction permit Licensing Board's conclusions, and thus we agree with the Board below that there is no reason here to reopen the record on the Charleston earthquake. The staff is currently evaluating the significance of the USGS clarification, and, should the evidence of record be substantially undermined, we expect the staff to see that applicants take whatever steps are necessary to provide reasonable assurance of the safe operation of Summer.

Second, the Board's August 4 supplemental decision noted several instances of confirmed -- albeit neither widespread nor significantly affecting safety-related work -- drug and alcohol use on-site during plant construction. The Board stated that "[t]he evidence is not clear whether

5/ BN-82-122 (December 17, 1982).

NRC policy is that such practice is not to be tolerated, or that it is to be tolerated in moderation so long as safety is not compromised," and went on to find quality control of construction to be acceptable. ^{6/} We have no quarrel with the Board's findings and conclusions -- only some concern that the Commission might be incorrectly perceived as indifferent to drug and alcohol use at nuclear facilities. But in fact, the Commission is now considering this matter in a pending rulemaking. ^{7/} Although that proceeding does not appear to cover construction workers at a plant that has not yet received an operating license (and thus the incidents described in this record), it does reflect an important awareness of the potential adverse effect on the public health and safety attributable to drug and alcohol use on-site by workers at nuclear facilities. Accordingly, the Commission may find it useful to explore in the ongoing rulemaking the safety consequences of alcohol and drug use during construction, as well as during plant operation.

^{6/} LBP-82-57, supra, 16 NRC at ___ (slip opinion at 37-38).

^{7/} See 47 Fed. Reg. 33980 (August 5, 1982). See also NUREG-0903, "Survey of Industry and Government Programs to Combat Drug and Alcohol Abuse" (June 1982).

2. We turn briefly to the Licensing Board's comments on calling independent Board witnesses, contained in the rather lengthy appendix to its July 20 partial initial decision. We have no desire to belabor the matter further; we simply reaffirm what we said in ALAB-663, 14 NRC 1140 (1981). ^{8/} Several of the major points of that opinion, however, are worth repeating here.

First, licensing boards of course have the authority to call witnesses of their own. This is necessary for the fulfillment of our shared goal of a fully developed record on matters of safety and environmental significance. But like other licensing board rulings, calling independent witnesses is subject to appellate review. The exercise of this discretion must be reasonable; within the framework of NRC proceedings, that means that the boards may take this extraordinary action only after (i) giving the parties to the proceeding every fair opportunity to clarify or supplement their previous testimony, and (ii) showing why it cannot reach an informed decision without independent

^{8/} A month before the Board's July 20 partial initial decision, the Commission issued an order in which it declined to take review of ALAB-663. CLI-82-10, 15 NRC 1377 (1982).

witnesses. 9/

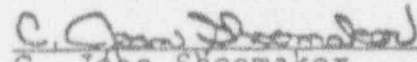
Second, licensing boards are obliged to explain their rulings, particularly when they are out of the ordinary. Reviewing courts require agencies to explain their rulings, and, accordingly, we must expect no less from the hearing boards. Rather than viewing a request for explanation as a burden or inappropriate intrusion upon its authority, a board (or indeed any decisionmaking entity) should recognize that it is to its own advantage to explain why it has reached the conclusions it has. A board's well-reasoned memorandum or decision is its principal means of official communication and it should exploit it to the fullest.

Finally -- and most important to the orderly functioning of the adjudicatory process -- licensing boards are bound to comply with appeal board directives, whether they agree with them or not. The same is true with respect to Commission review of appeal board action and judicial review of agency action. Any other alternative would, in our view, be unworkable and unacceptably undermine the rights of the parties.

9/ Here, our scrutiny of the referenced citations to the hearing transcript and the Board's statements gave us substantial cause to doubt that the Board had done so, both at the time we received the staff's motion for directed certification and as the matter proceeded. Our various directions to the Board reflected not undue interference with the Board's discretion, but rather our legitimate concern that these procedures were not being observed.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

(The concurring opinion of Mr. Rosenthal follows.)

Concurring opinion of Mr. Rosenthal:

Insofar as the appendix to the July 20 partial initial decision is concerned, I am constrained to add one further observation to those contained in the above opinion. In my view, the Licensing Board's endeavor to perpetuate the controversy over its calling independent witnesses of its own was not only unseemly but of no possible useful purpose. At least for this proceeding, that controversy had come to an end when, on June 22, the Commission declined to review ALAB-663. ^{1/} Moreover, the Licensing Board had previously detailed its reasons for thinking that resort to its own witnesses was justified. ^{2/} In these circumstances, the most that the appendix did or could do was to record the Board's continuing belief that it was right and thus we were wrong with regard to the independent witness question.

Needless to say, members of a licensing board are entitled to hold their own opinions respecting rulings of higher authority -- so long as any disagreement with those rulings is not employed as a basis for ignoring directives that the board is obliged to obey. But the propriety of unnecessarily encumbering the official reports of this

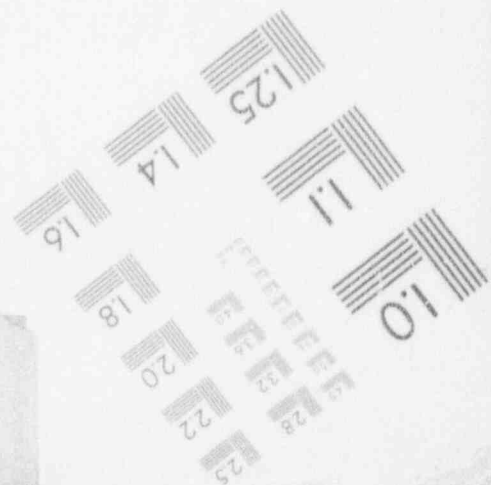
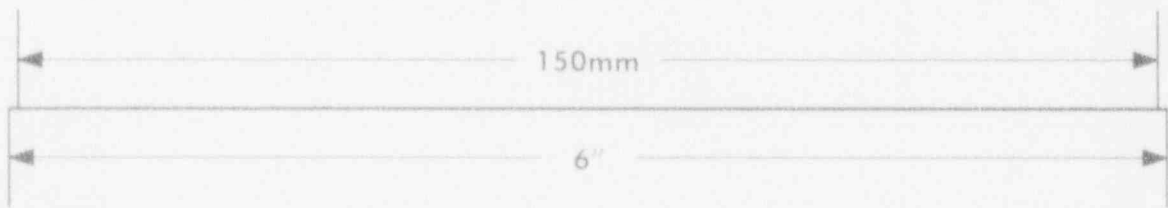
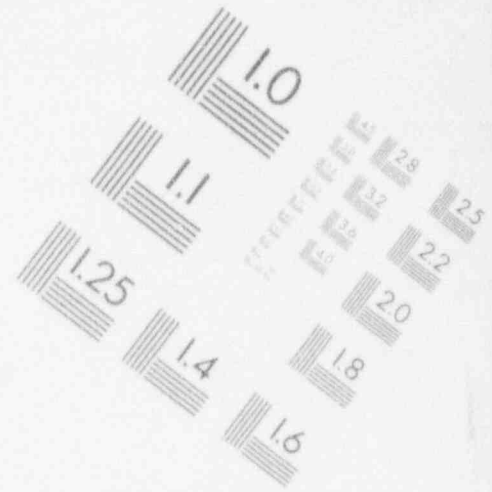
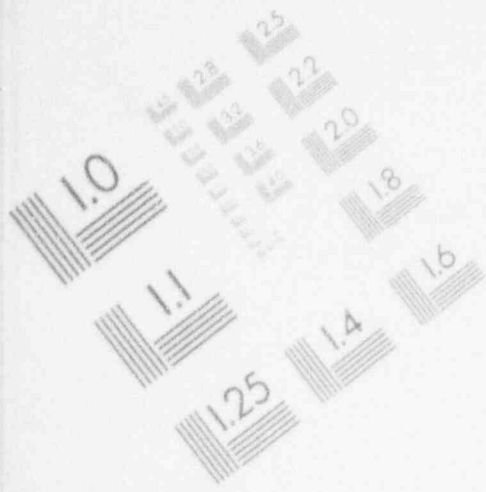
^{1/} CLI-82-10, 15 NRC 1377 (1982).

^{2/} See LBP-81-47, 14 NRC 865 (1981).

agency with an extended dissertation on wholly academic points is quite a different matter. In this instance, it is difficult to fathom what interest the members of our Bar and others who follow the course of NRC adjudicatory proceedings might have in knowing whether the Licensing Board remained persuaded of the correctness of its earlier expressed conclusions on the independent witness question.

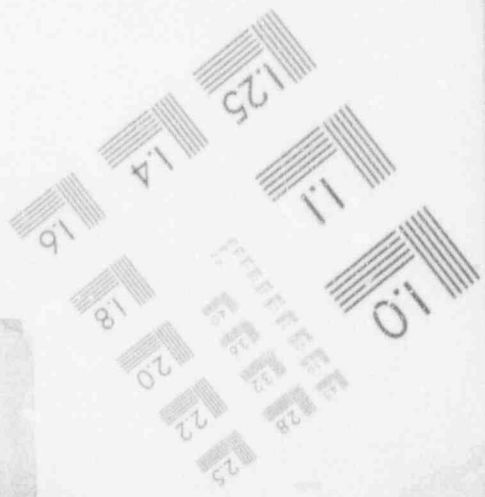
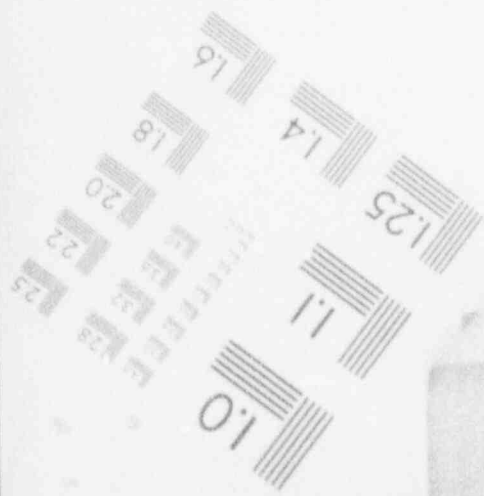
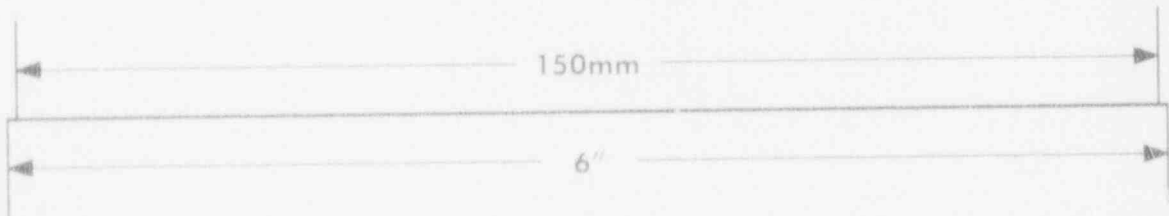
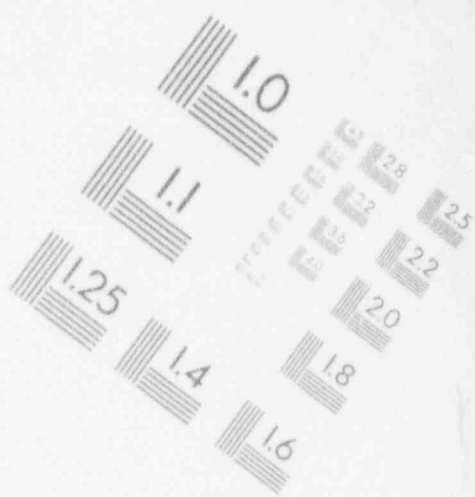
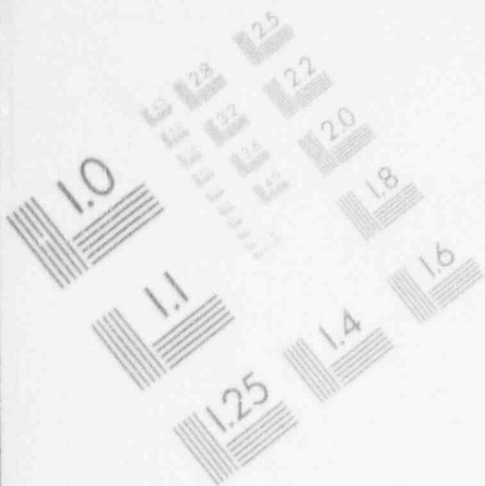
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IMAGE EVALUATION TEST TARGET (MT-3)



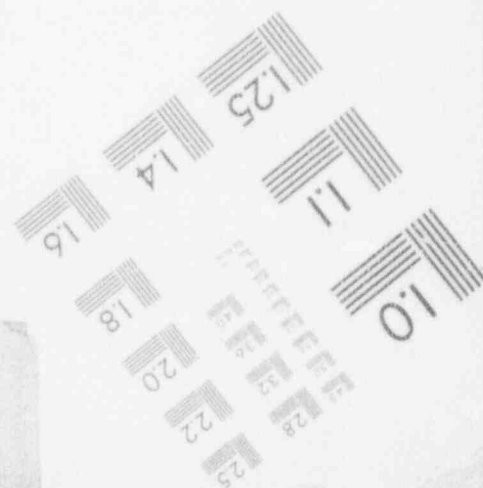
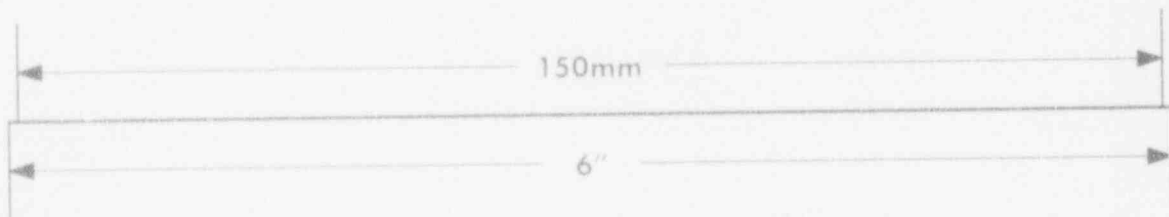
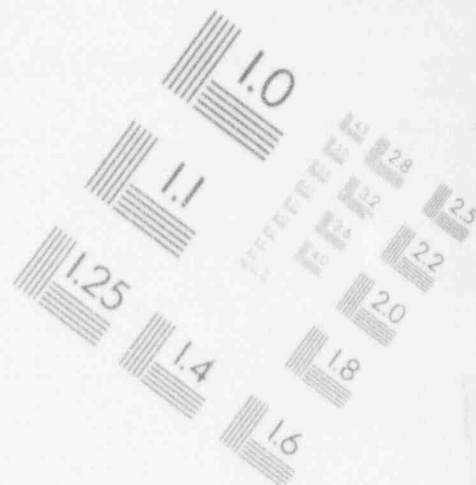
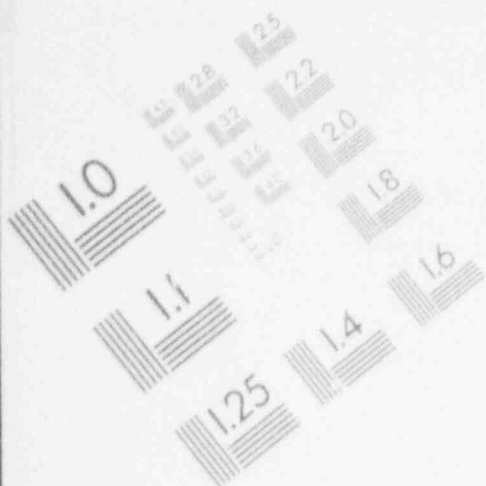
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IMAGE EVALUATION TEST TARGET (MT-3)



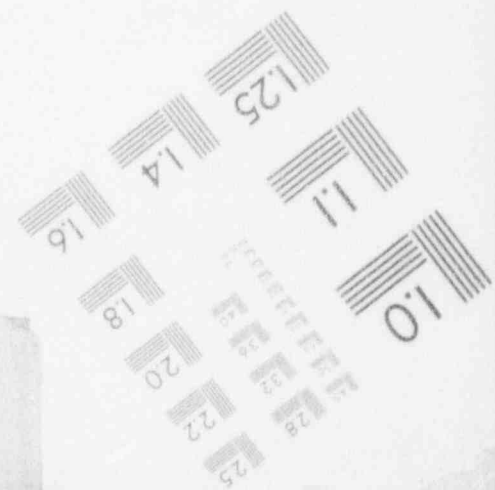
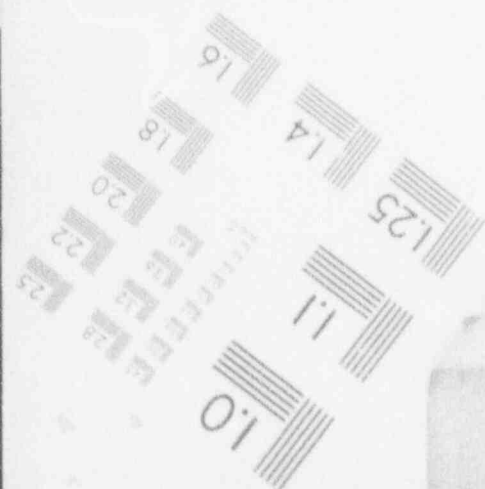
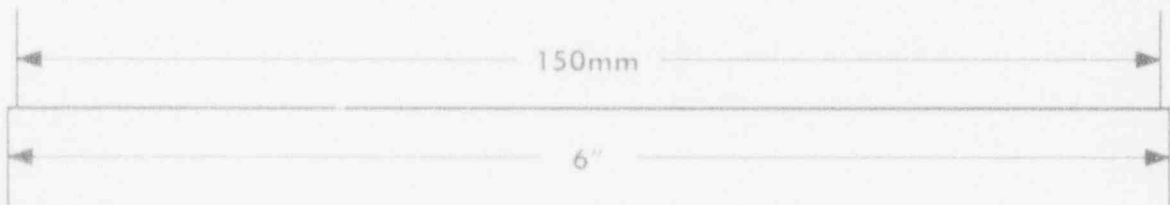
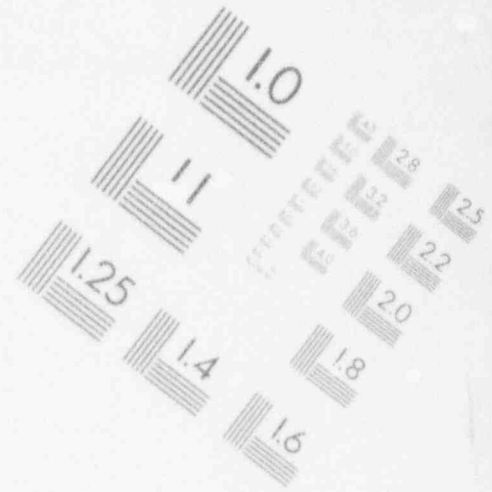
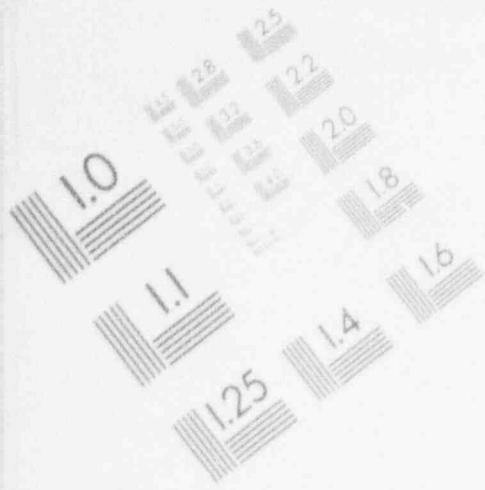
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IMAGE EVALUATION TEST TARGET (MT-3)



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IMAGE EVALUATION TEST TARGET (MT-3)



Attachment 2



United States Department of the Interior

GEOLOGICAL SURVEY
RESTON, VA. 22092

Rehm

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In Reply Refer To:
Mail Stop 905

NOV 16 1982

Dr. Robert E. Jackson
Chief, Geosciences Branch
Division of Engineering
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Bob:

The purpose of this letter is to clarify our position on the seismic potential of certain regions of the Eastern United States. In our letter of December 30, 1980, on the same subject we expressed the view that "... the likelihood of a Charleston sized event in other parts of the Coastal Plain and Piedmont is very low."

As you are aware, after several years of intensive study in the Charleston region, no geologic structure or feature can be identified unequivocally as the source of the 1886 Charleston earthquake. However, as studies in the Charleston region and elsewhere along the Atlantic margin have progressed, it has become evident that the general geologic structure of the Charleston region can be found at other locales within the eastern seaboard (Appalachian Piedmont, Atlantic Coastal Plain, and Atlantic Continental Shelf).

Because the geologic and tectonic features of the Charleston region are similar to those in other regions of the eastern seaboard, we conclude that although there is no recent or historical evidence that other regions have experienced strong earthquakes, the historical record is not, of itself, sufficient grounds for ruling out the occurrence in these other regions of strong seismic ground motions similar to those experienced near Charleston in 1886. Although the probability of strong ground motion due to an earthquake in any given year at a particular location in the eastern seaboard may be very low, deterministic and probabilistic evaluations of the seismic hazard should be made for individual sites in the eastern seaboard to establish the seismic engineering parameters for critical facilities.

As stated in our letter of December 30, 1980, earthquakes similar to the 1886 Charleston, South Carolina, event should be considered as having the potential to occur in the vicinity of Charleston and seismic engineering parameters of critical facilities in that area should be determined on that basis.

Sincerely yours,

James F. Devine
Assistant Director for
Engineering Geology

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