

May 26, 2004

Martin G. Malsch, Esq.
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7918 Jones Branch Drive, Suite 600
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Dear Mr. Malsch:

I am responding to your letter to the Commission dated May 5, 2004, in which you advised the Commission that the U.S. Department of Energy (DOE) had committed to provide notice to the State of Nevada 45 days in advance of any shipment of the material in the Fernald silos to the Nevada Test Site. Concluding that DOE's commitment had eliminated the emergency aspect, you inquired about certain particulars regarding the procedure for the U.S. Nuclear Regulatory Commission's (NRC's) consideration of the actions requested in State of Nevada's Petition for Emergency Action, dated April 14, 2004 (Nevada Petition). Finally, you sought two Commission actions related to the Nevada Petition: first that the Commission order DOE to answer the Nevada Petition promptly and second that NRC oppose proposed Section 634 of the Energy Bill pending before the Congress.

At the outset, the NRC appreciates your acknowledgment that DOE's commitment had eliminated the need for haste that the Nevada Petition had earlier sought. Nonetheless, recognizing that the principal parties concerned were the State of Nevada and a Cabinet level agency of the U.S. Government, with the extent of the Commission's authority an issue at the core of the matter, the Commission itself had already undertaken to consider the Nevada Petition. As you are aware, within a week of the petition's filing, the Commission formally requested DOE's response to Nevada's arguments that shipping the Fernald material to the Nevada Test Site without an NRC license would violate the Atomic Energy Act of 1954 and Section 312 of Public Law 108-137. While the time in which DOE initially anticipated that it could respond has elapsed, the delay is not excessive and the State of Nevada has the protection of the 45-day notice. Therefore, the Commission declines to consider issuance of an order to DOE.

Because this matter is being entertained by the Commission itself, a Petition Manager and a Petition Review Board will not be appointed and other aspects of the 2.206 procedures are not relevant. You will recall that the Nevada Petition was not filed under the authority of 10 C.F.R. 2.206 and the petition recognized that Section 2.206 was likely not applicable. Nevada indicated that it was most concerned about expedition and the elimination of uncertainty. Those goals will be served by Commission consideration and decision in the first instance.

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Turning to your request that the Commission review the materials you have sent regarding the proposed Section 634 and thereafter oppose it, the Commission is aware of the content of Section 634 in H.R.6 and S.2095. The NRC will not hesitate to provide its views to the Congress on this or any other provision should the Commission determine it is appropriate to do so.

Sincerely,

/RA/

Annette Vietti-Cook
Secretary of the Commission