

# EGAN, FITZPATRICK & MALSCH, PLLC

Counselors at Law

2001 K Street, N.W. • Suite 400  
Washington, D.C. 20006  
Tel: (202) 662-2103  
Fax: (202) 662-2105

www.nuclearlawyer.com

1777 N.E. Loop 410 • Suite 600  
San Antonio, Texas 78217  
Tel: (210) 820-2667  
Fax: (210) 820-2668

Joseph R. Egan  
Martin G. Malsch

Charles J. Fitzpatrick

April 26, 2007

Karen D. Cyr, Esq.  
General Counsel  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

RE: *Nevada's Request for a Binding Opinion on "Reasonable Expectation"*  
in 10 C.F.R. Part 63

Dear Ms. Cyr:

On behalf of the State of Nevada, I am asking for a binding interpretation of one part of the Commission's regulations in 10 C.F.R. Part 63. Specifically, Nevada is asking, pursuant to 10 C.F.R. § 63.5, that you confirm in writing that the phrase "reasonable expectation" as it appears in numerous places in Part 63 (e.g., § 63.31(a)(2)) means the same as the more traditional and well understood phrase "reasonable assurance" in NRC regulation.

As you may recall, this precise issue was raised by Nevada in *Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). Nevada initially argued there that NRC acted arbitrarily and capriciously, and in violation of the Atomic Energy Act, when it abandoned years of precedent and replaced "reasonable assurance" of safety with "reasonable expectation" of safety as the geologic repository post-closure safety standard. In response to Nevada's arguments, NRC stated in its brief to the Court, and confirmed during oral argument, that there was "no consequential difference" between "reasonable expectation" and "reasonable assurance" and that the two standards were "virtually [i]ndistinguishable" and "substantively identical." See Respondent's [NRC's] Brief at 47-48; Oral Argument Transcript at 106-7; *Nuclear Energy Institute v. EPA*, *supra*, at 253. Nevada viewed NRC's statements as a "welcome concession," and the Court concluded it did not need to address the matter because of NRC's stated concession. *Id.*

Because of all this, Nevada had considered the matter settled. However, in the Department of Energy's recent presentations to NRC Staff and the Advisory Committee on Nuclear Waste, DOE emphasized the "reasonable expectation" standard in a way that suggests it may see some special significance in the phrase that distinguishes it from "reasonable assurance." As you know, DOE is working toward the goal of filing its Yucca Mountain construction authorization application by June 30, 2008. If DOE's plans and schedules depend

Karen D. Cyr, Esq.  
General Counsel  
April 26, 2007

in any significant way on "reasonable expectation" meaning something different than "reasonable assurance," now is the time to correct this mistaken interpretation so DOE's license application plans can be adjusted as appropriate.

I know I do not have to underline the importance of Yucca Mountain for the Department, NRC, the State, other interested parties, and the nation as a whole. A prompt formal opinion of the General Counsel is essential if we are to avoid extended litigation over NRC's standard for review and licensing.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a long horizontal line that tapers to the right.

Martin G. Malsch  
Counsel for Nevada

cc: Members of the Nuclear Waste Technical Review Board  
Members of the NRC Advisory Committee on Nuclear Waste  
Ward Sproat, Director, Office of Civilian Radioactive Waste Management,  
U.S. Department of Energy  
Lawrence E. Kokajko, NRC Office of Nuclear Material Safety and Safeguards  
Elizabeth Cotsworth, Director, Office of Radiation and Indoor Air, U.S.  
Environmental Protection Agency