

May 18, 2007

Martin G. Malsch
Egan, Fitzpatrick & Malsch, PLLC
2001 K Street, N.W., Suite 400
Washington, D.C. 20006

SUBJECT: NEVADA'S REQUEST FOR A BINDING OPINION ON "REASONABLE
EXPECTATION" IN 10 CFR PART 63

Dear Mr. Malsch:

In your letter, dated April 26, 2007, you asked, on behalf of the State of Nevada, for a binding interpretation, pursuant to 10 CFR § 63.5, that the phrase "reasonable expectation," as it appears in numerous places in 10 CFR Part 63, has the same meaning as the phrase "reasonable assurance" as this term appears in the regulations of the U.S. Nuclear Regulatory Commission (NRC). You express concern that the U.S. Department of Energy (DOE) may attach some special significance to the term "reasonable expectation" that distinguishes it from "reasonable assurance" and believe that any such misapprehension must be corrected.

The Commission's regulations authorize the General Counsel to issue formal, written interpretations of laws, regulations, and other sources of authority or guidance, which are recognized as binding on the Commission. Following issuance, these interpretations are codified in 10 CFR Part 8 of NRC's regulations. However, this authority is exercised very sparingly and only in instances involving major policy or legal questions. Your speculation as to a possible misunderstanding of these terms by DOE clearly does not meet this standard. However, the Commission has discussed this question at some length in various venues which I will repeat for your information. The views and discussion in this letter do not constitute a formal interpretation under 10 CFR § 63.5 or an interpretation by the General Counsel under 10 CFR Part 8.

The question whether "reasonable expectation" means something different from "reasonable assurance" was raised in comments on NRC's proposed rule establishing 10 CFR Part 63 and was addressed by the Commission in the final rule. See 66 FR 55732, 55739 - 55740; November 2, 2001. Commenters expressed the opinion that some view "reasonable assurance" as being more stringent than "reasonable expectation" and that a connotation had developed around the term "reasonable assurance" that could lead to an extreme approach of selecting worst case values for important parameters. The Commission rejected the view that use of "reasonable assurance" as a basis for judging compliance compels focus on extreme values (i.e., tails of distributions) for representing the performance of a Yucca Mountain repository. However, the Commission decided that to avoid misunderstanding and to achieve consistency with the Environmental Protection Agency's (EPA) final standards, it would adopt EPA's preferred criterion of "reasonable expectation" for purposes of judging compliance with the postclosure performance objectives. Further, the Commission placed a detailed definition of "reasonable expectation" in 10 CFR § 63.304 and described the concept in 10 CFR § 63.101(a)(2), a description substantially similar to its description of "reasonable assurance" in its proposed rule. See proposed § 63.101(a)(2) (64 FR 8640, 8674; February 22, 1999). Thus, the meaning the Commission attaches to the term "reasonable expectation" is clear.

If any lingering doubts remained as to the Commission's view that there is no meaningful difference between "reasonable assurance" and "reasonable expectation," they were surely resolved in the context of the lawsuit brought by the State of Nevada seeking review of both the EPA and the NRC regulations governing a geologic repository at Yucca Mountain. See Nuclear Energy Institute v. Environmental Protection Agency, 373 F.3d 1251 (D.C. Cir. 2004). The Commission stated in its brief that the two formulations are "virtually indistinguishable" and that, as applied to Yucca Mountain, "there is no consequential difference between the two standards, given the nature of the determinations at issue." See Brief for the Federal Respondents at 47-48. The court's decision notes that the parties had satisfactorily resolved this issue among themselves:

NRC explained in its brief that there is 'no consequential difference' between the reasonable assurance and reasonable expectation standards and that the two are, in fact '[v]irtually [i]ndistinguishable.' Respondent's Br. at 47-48. Moreover, during oral argument, counsel for NRC confirmed that the two standards are substantively identical. See Oral Argument Tr. at 106-07. Nevada deemed NRC's representation sufficient to satisfy its claim. See Petitioners' Reply Br. At 29 (noting NRC's 'welcome' concession that reasonable assurance and reasonable expectation are 'identical' standards).

373 F.3d at 1300.

Sincerely,

/RA/

Karen D. Cyr
General Counsel

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

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