

## **Statement of Joseph R. Egan**

### **Before the House Subcommittee On the Federal Workforce and Agency Organization**

#### ***“Yucca Mountain Project: Have Federal Employees Falsified Documents?”***

April 5, 2005

Mr. Chairman and members of the subcommittee, thank you for the opportunity to address you today on this important national issue. My name is Joe Egan. I am a nuclear engineer and an attorney specializing in nuclear safety and environmental litigation. My Tysons Corner firm, Egan Fitzpatrick Malsch & Cynkar, PLLC, has handled a wide variety of nuclear cases over the past decade, including several involving the Department of Energy complex. I have been asked to address two specific issues related to your investigation of falsified documents at DOE's proposed Yucca Mountain nuclear waste repository. One is quality assurance, and the other involves DOE's ongoing efforts to suppress information about the misdeeds of its Yucca contractors and the geologic inadequacy of the Yucca site.

#### **Introduction**

On September 11, 2001, Nevada's Attorney General appointed me Special Deputy Attorney General to assist the Governor's Office and Nevada's Agency for Nuclear Projects in litigation and NRC licensing proceedings involving Yucca. I worked with those offices to assemble a small, world-class team of highly experienced nuclear and environmental attorneys and independent scientific experts to undertake this task. Our team has been performing a thorough evaluation of the scientific and legal integrity of the work done by DOE and its contractors at Yucca, and we have filed several lawsuits challenging that work.

One of those suits does not directly involve Nevada, though the State is closely following it. It is a class-action suit brought by private attorneys, including my firm, on behalf of the workers at Yucca who drilled five miles of tunnels into the silica-laden rock there without mandatory respiratory protection. It relies on the testimony of experienced industrial hygienists that DOE's contractors falsified air quality and health and safety records at the project to save time and money on drilling, leading to gross and dangerous overexposures to toxic dust. So document falsification is not a new issue at Yucca.

Approximately a year into our review of the technical record for the project, I opined publicly that there would never be an ounce of nuclear waste buried at Yucca Mountain. I strongly maintain that view today. Indeed, in light of problems now emerging at a dizzying pace, epitomized by those your subcommittee is investigating, I believe it is quite possible, if not probable, that an application for a construction permit for the Yucca project will never even be docketed by the NRC, let alone granted. The project appears poised to sink on the character and fitness of DOE to be an NRC licensee,

and on the profoundly defective quality and inaccuracy of the records and scientific analyses supporting DOE's technical work. It is of vital importance to Nevadans and the nation as a whole that these records and analyses not be suppressed or hidden by DOE.

### **The Forced Disclosure of DOE's Emails**

Last June, DOE purported to certify to NRC that all of its relevant documents concerning the Yucca project – some 2.1 million – had been made publicly available on an electronic database called the Licensing Support Network, or LSN. We challenged that certification before an NRC Licensing Board, arguing that DOE had improperly withheld at least six million documents, including roughly four million emails it had misleadingly called “archival” emails. DOE tried to create the impression in its certification that these emails were so old as to no longer be relevant to the project. On examination by the Licensing Board, however, it was learned that these emails were not archival at all, but extended through at least the year 2002 or 2003. The Licensing Board agreed with us that DOE had not shown good faith, and that emails often offer the most candid, unvarnished assessment of the facts.

On August 31 of last year, NRC's Licensing Board granted our request to strike DOE's document certification on three independent grounds. Among other things, the Board required DOE to produce all of its “archival” emails and perhaps millions of additional withheld records. It is only because of our motion to strike and the Board's inquiry that the emails that are the subject of this hearing came to light. The Board's order forced DOE's outside attorneys to have to review these emails for various privileges that might apply. I commend those attorneys, Hunton & Williams, for advising Secretary Bodman to disclose publicly that some of the emails evidenced falsified scientific data by the government's own scientists. It bears noting, however, that DOE really had no option but to disclose this information, since the emails were about to be forced into the public domain under compulsion of the Board's order.

It will be troubling, to say the least, if your investigation reveals that DOE's Yucca managers knew of the falsifications for years prior to this forced disclosure, and long prior to having declared the Yucca site “suitable” and recommending it to President Bush and the Congress. The discovery of document falsification by anyone at Yucca should immediately have been brought to project superiors and been fully investigated. Such conduct should immediately have raised issues of whether DOE's contractors may or should have been subject to debarment under federal contracting laws, whether they may or should have been liable for treble damages under the False Claims Act, whether bonuses should have been withheld, whether other civil or criminal statutes were implicated, and whether DOE itself, if indeed it tolerated such conduct, possesses the character and fitness to be an NRC licensee under NRC's regulations that will now, for the first time ever, be applicable to DOE.

## **Additional Troubling Emails**

Since Secretary Bodman's disclosure, we have been combing DOE's electronic database for additional evidence of document falsification. We have already located additional emails that do evidence such falsification, as well as DOE's knowledge of gross deficiencies in the quality and accuracy of the records supporting DOE's scientific analyses of Yucca Mountain. Some of these emails, which appear to be only the tip of the iceberg, are attached as exhibits to my prepared statement. Additional emails are posted on Nevada's Nuclear Projects Office website at <http://www.canwin.org/LSN/>. When coupled with the emails DOE has recently released to your subcommittee, what the documents appear to show is a project so amiss, and so tremendously adrift from what NRC's quality assurance rules require, that it is almost impossible to imagine that DOE could any longer establish the basic prerequisites to even complete its license application, let alone survive four years of NRC litigation over it.

Consider what the few e-mails available to us before DOE's recent disclosures show. They show current project management (Bechtel/SAIC) directing its quality assurance personnel not to use the word "violated" in their audit reports ("noncompliant," a less disturbing term, was preferred) (Exhibit 1); project personnel adopting the position that NRC should be given "minimum information" (Exhibit 2); project personnel afraid to call whole programs deficient because fixing them would be too expensive (Exhibit 3); secret communications that question whether critical representations to the NRC about safety priorities are correct (Exhibit 4); efforts to "keep some people in blissful ignorance" about technical problems (Exhibit 5); an assumption that the proof "that will get us through the regulatory hoops" need not be "rigorous" (Exhibit 6); a program that carefully manipulates statistics to assure that the results are always "in the right place" (Exhibit 7); a program where scientific instruments are documented as properly calibrated before they are even received, much less calibrated (Exhibit 8); a project where discord and distrust are so rampant that senior officials are called "swindlers," "certifiable jerks," and worse, and the management of the principal contractor is called "craven and ignorant" (Exhibit 9). They evidence a project where dramatic and unexpected information ("Water Water Everywhere") apparently gives DOE "ulcers" but not enough discomfort to delay a scientific report to Congress so the new information can be included (Exhibit 10). To be sure, there are some good people that tried to do the right thing. For example, DOE quality assurance reviews in August of 2000 concluded that there was "evidence of major flaws in the approach taken towards implementation of an effective Quality Assurance Program," and "the wrong culture of the individuals involved" (Exhibit 11). As one documentation manager complained, "I don't know how to fight lies and misinformation, and no one seems to care about the truth, or even making sure the right people are doing the right stuff" (Exhibit 12). But who at DOE listens?

NRC's quality assurance rules are designed to ensure that all technical findings in a license application are supported by a proper and believable document pedigree. For example, it is not enough for DOE simply to claim that the infiltration rate of water through Yucca's rock is value X. DOE must also be able to show that the instruments used to measure the parameters necessary to calculate X were approved instruments that

were properly calibrated, that the technician using those instruments was properly qualified and used the instruments properly, and that records of that technician's qualifications, his instrument calibrations, his findings and his calculations were properly preserved, checked or double checked, and filed.

But the documents emerging show that DOE will very likely not be able to do this. They evidence such things as the falsification of instrument calibrations. They show gross negligence in the taking and recording of data. They illustrate the almost total lack of pedigree of key numbers DOE has been using in its performance assessment of Yucca Mountain, painting a "garbage in, garbage out" picture.

It was problems such as these that in 1982 caused the multi-billion dollar, 97-percent complete Zimmer nuclear power plant in Ohio to be abandoned prior to completion of NRC licensing proceedings. Because of poor quality control, station operators could not warrant the accuracy and pedigree of their own design and construction documents. NRC considers quality assurance to be one of the most important features in licensing, and has referred to it, if not done properly, as the "Achilles heel" of a project.

Yucca appears likely to witness a similar fate as Zimmer.

### **DOE's Efforts to Suppress Its Documents**

This may depend, of course, on whether Nevada and interested members of the general public get *full access* to the key documents that will illustrate what actually went on at the project. In a public project this important to the nation and to the health and safety of Nevadans and the environment, one would think that full disclosure of all documents would be a given, except of course those involving classified or homeland security sensitive documents. Why should *anything* be hidden about the Yucca project? What is it that Nevadans and the general public are not entitled to know about DOE's work at Yucca?

And yet, DOE has underway efforts carefully calculated to shield from public view broad categories of documents under the rubric of various "privileges." DOE is claiming it can withhold perhaps hundreds of thousands of key documents on privilege grounds. For example, DOE is withholding from the public its entire draft license application for Yucca Mountain. Our fear is that emails such as those provided to the subcommittee and other incriminating documents, as yet unknown, may soon be forever unavailable to the public due to the attempted application of such privileges.

DOE may even attempt to shield blanket categories of future scientific analysis that will go to the very heart of the suitability of Yucca Mountain to retain radioactive waste and to meet NRC regulations under new and stricter licensing rules. Last summer, as you know, the Court of Appeals for the D.C. Circuit invalidated the primary radiation standard DOE had been using to assess the performance of the Yucca repository, claiming the government had "unabashedly rejected" the findings and recommendations

of the National Academy of Sciences in setting that standard. As a result, the EPA and the NRC are now required to promulgate a new and stricter standard for DOE to use in its performance models, one consistent with sound science.

It would be tragic if DOE's input to a new radiation standard for the repository, or its technical analyses of Yucca's adherence to that new standard, are shielded from public view because of some specious claim involving the attorney work product or deliberative process privilege, for example. Yet, that appears to be the direction DOE is heading.

Governor Guinn has recently sought to invoke Nevada's prerogative under Section 117 of the Nuclear Waste Policy Act (NWPA) to demand full and complete information from the Secretary of Energy on the Yucca project. To date, the Secretary has declined to provide Nevada with the draft license application, for example, claiming that it is protected from disclosure due to privileges notwithstanding Nevada's rights under the NWPA.

In conclusion, the truth about the safety of the Yucca Mountain repository should not depend solely on what can be wrung by Nevada from civil and administrative litigation. Yucca is one of the nation's largest, and its most potentially dangerous, public works projects. It poses issues of profound importance to human beings and the nation for millennia to come. As today's hearing demonstrates, there should be no secrets associated with this project. What is there to hide?

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