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Dear Ms. Beard and Ms. Cyr:

Your offices have requested advice concerning the application of 18 U.S.C. § 207(a) to former employees of your respective agencies who might represent private parties in potential adjudicatory proceedings before the Nuclear Regulatory Commission (NRC). The administrative adjudication would concern a construction authorization application (license application) that may be submitted by the Department of Energy (DOE). The licensing proceedings would pertain to DOE's proposed construction of a disposal facility for high-level radioactive waste at Yucca Mountain, Nevada. The focus of recent discussions among DOE, NRC, and the Office of Government Ethics (OGE) has been on the question of whether certain pre-licensing matters should be viewed as part of the same particular matter involving specific parties as the licensing proceedings or whether there is more than one particular matter involving specific parties. It was agreed that OGE would address this question in one document for both agencies, which is the purpose of this letter.

Background

The history of the Yucca Mountain project is long and complicated. To the extent possible, we have attempted to set out the facts essential to our analysis in an abbreviated form. These facts have been gleaned primarily from numerous discussions and correspondence with officials of DOE and NRC over the course of several years, as well as our review of various documents. DOE and NRC officials have reviewed the description of the facts in this letter and have confirmed its accuracy.

Under the Nuclear Waste Policy Act of 1982 (Act), 42 U.S.C. § 10101, et seq., Congress directed DOE to find and characterize three sites for potential underground disposal of nuclear waste. In the 1987, Congress amended the Act and mandated that DOE characterize only one potential site for suitability for this purpose: Yucca Mountain, in the State of Nevada. If DOE found the Yucca Mountain site to be suitable -- and recommended and designated the site for development -- then the agency was to proceed to file a license application with NRC. If a license application were approved by NRC, DOE would construct and operate an underground storage facility at Yucca Mountain.

DOE embarked on the process of "site characterization," during which the many features of the Yucca Mountain site and the related technologies were examined to determine whether the site was indeed suitable. An important purpose of this process was to identify potential safety issues and propose measures to address those issues. In 1987, after Congress directed that all site characterization efforts be focused on Yucca Mountain alone, a site characterization plan (SCP) was developed by Science Applications International Corporation (SAIC), pursuant to a contract with DOE. DOE subsequently awarded a contract to TRW, Inc. to manage the site characterization studies and to provide other assistance in moving forward with the project. After 10 years, the contract was re-competed and awarded to Bechtel-SAIC Corporation, L.L.C., which concluded the site characterization work and other work to support the site recommendation decision of the Secretary of Energy (discussed below). Bechtel-SAIC also has begun work on other aspects of the Yucca Mountain project, which will include assistance in the preparation of a license application for submission to NRC.

It was always understood that the construction of any waste repository at Yucca Mountain would require NRC approval. The site characterization process was intended to "provide the data required for evaluation of the suitability of such site for an application to be submitted to [NRC] for a construction authorization for a repository." 42 U.S.C. § 10133(c)(1). The Act requires regular pre-application consultation between NRC and DOE, and NRC made site visits, received informational reports, and participated in numerous briefings with personnel from DOE and DOE contractors. See 42 U.S.C. § 10133(b). NRC provided numerous comments on the SCP and other documents concerning safety issues and the possible resolution of such issues, with a view toward assessing whether the "at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository." 42 U.S.C. § 10134(a)(1)(E). We have been advised by DOE that any license application will use a vast quantity of material developed during the site characterization

process and that many of the issues addressed in the site characterization process will be the subject of the NRC licensing proceedings.

It was also known from the very beginning that the State of Nevada, certain local governments, and certain Indian tribes had distinct interests in the potential selection and licensing of Yucca Mountain as a waste disposal facility. For example, NRC regulations require the Commission to provide timely information to, and make NRC staff available to consult with, representatives of Nevada, affected units of local governments, and Indian tribes as appropriate, concerning the status of site characterization and other aspects of the Yucca Mountain project. 10 C.F.R. §§ 63.61, 63.62.[1] During the site characterization process, DOE and NRC officials had meetings with representatives of Nevada, local governments, and various Indian tribes. In addition to meetings, these entities have submitted comments to DOE concerning various safety and other concerns. DOE and NRC expect that Nevada, local governments, and the relevant tribes will be recognized as formal "parties" in any NRC licensing proceedings, which will be formal adjudicatory hearings before administrative judges.

Furthermore, Congress gave Nevada specific rights in the process leading up to any decision to submit a license application to NRC. If the President, upon the recommendation of the Secretary of Energy, determined that Yucca Mountain was suitable for an application to NRC, he was required first to submit a recommendation to Congress. Once Congress received the President's recommendation, Nevada had the right to disapprove this recommendation. Only if Congress acted to approve the President's recommendation, over the objection of Nevada, could DOE proceed with the submission of a license application to NRC. Specifically, the Act gave Congress "90 calendar days of continuous session," after receipt of Nevada's notice of disapproval, in which to pass a joint "resolution of repository siting approval." 42 U.S.C. § 10135(c).

On February 14, 2002, the Secretary of Energy recommended the Yucca Mountain site to the President. The President submitted his recommendation of the site to Congress the next day. On April 8, 2002, Nevada notified Congress of the state's disapproval. Then, on July 9, 2002, Congress passed a joint resolution of approval, which was signed by the President on July 23. DOE is now

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[1] The State of Nevada and 10 units of local government (9 Nevada counties and one California county) have special status under the Nuclear Waste Policy Act. No Indian Tribes have been similarly designated as "affected" under the Act. However, both DOE and NRC have made efforts to work with interested tribes.

authorized, therefore, to proceed with a license application to NRC.

DOE expects to submit a license application to NRC some time in 2004 for construction authorization.[2] The NRC adjudicatory proceedings will involve extensive scientific reviews and hearings. Because of the magnitude and complexity of the issues, NRC for several years has already been developing a "licensing support network," which provides access to the relevant documentary materials -- including documents prepared by DOE contractors during the site characterization process -- in order to make them available for discovery by parties to the eventual licensing hearings. Parties to the proceedings ultimately will have the opportunity to file "contentions" with one or more licensing boards, each composed of three administrative judges, which will be assigned to resolve issues posed by the license application. The decisions of the licensing boards are to be made after formal evidentiary hearings, and they are subject to review by the full Commission.

To summarize, since 1987, numerous DOE and NRC employees have been involved in various aspects of the site characterization process and related issues pertaining to the possible licensing of a nuclear waste storage facility at Yucca Mountain. In many cases, these employees were working in conjunction with contractor personnel who were evaluating various issues concerning the safety and suitability of the site for this purpose. The scientific and regulatory issues were legion, and it took many years before they were resolved to the extent that DOE and ultimately the President recommended the site as suitable for a license application. Now, DOE and NRC need to determine whether former employees who were involved in this process -- either personally and substantially, or as supervisors with official responsibility -- are prohibited by 18 U.S.C. § 207(a) from representing persons other than the United States in connection with any licensing proceedings concerning construction authorization for a depository at Yucca Mountain.[3]

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[2] In addition to construction authorization, DOE also will have to obtain an operating license from NRC in order to operate the facility and actually receive nuclear waste at Yucca Mountain. Pursuant to NRC regulations, 10 C.F.R. § 63.41, once construction is substantially complete and DOE has amended its license application under 10 C.F.R. § 63.24, NRC may issue a license for DOE to receive and possess nuclear waste at the repository. The timing of such a license is uncertain, but is expected by 2010.

[3] In addition to construction authorization, DOE also would have to obtain an operating license from NRC, as explained in the

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Application of 18 U.S.C. § 207(a)

Section 207(a) restricts representational activity only in connection with a particular matter involving specific parties. The particular matter must involve specific parties "both at the time that the Government employee acts in an official capacity and at the time in question after Government service." 5 C.F.R. § 2637.201(c)(4).[4] Furthermore, it must be the same particular matter involving specific parties at both times, although it is well-established that "the same particular matter may continue in another form or in part." Id.

Our recent discussions with your offices have involved a two-part inquiry: (1) Did the site characterization process (and any other efforts pertaining to the decision to proceed with a license application) constitute a particular matter or matters involving specific parties? (2) If so, is such matter or matters part of the same particular matter involving specific parties as the eventual licensing proceedings? We believe that the answers to these questions are interrelated.

There is no doubt that the license application and the formal NRC adjudication constitute a particular matter involving specific parties. Until 1989, section 207(a) specifically included "application" as an example of a particular matter involving specific parties: "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties." Pub. L. No. 95-521, § 501(a) (1978)(emphasis added). When the statute was restructured in 1989, primarily for readability purposes, the list of examples was dropped from section 207(a) and moved to a general

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[3](...continued)
previous footnote. We do not view the post-employment issues concerning any operating license proceedings to be ripe. The circumstances and issues involved in a possible operating license adjudication are as yet unclear, and it would be speculative for OGE to venture an analysis at this time.

[4] Section 207 was amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194 (November 30, 1989). These amendments became effective on January 1, 1991, and apply to all employees retiring from Government on or after that date. The regulations at 5 C.F.R. part 2637 predate these amendments. However, part 2637 still provides useful guidance concerning those elements of section 207 that remain essentially unchanged from the prior version of the statute.

definition of "particular matter" in section 207(i)(3), which again includes "application"; it is clear that no substantive change was intended and that applications continue to be particular matters involving specific parties.[5] Indeed, license application hearings, in particular, may be viewed as quintessential "party matters," having as they do a quasi-judicial character involving formal parties who have formal procedural rights and obligations. See OGE Informal Advisory Letters 99 x 21 (license application is particular matter involving specific parties); 82 x 7 (same); Presidential Memorandum, Preventing Conflicts of Interest on the Part of Special Government Employees, 28 Federal Register 4539, 4543 (May 7, 1962)("judicial and quasi-judicial proceedings"); cf. Attorney General's Manual on the Administrative Procedure Act 41 (1947)("licensing proceedings constitute adjudication by definition"). DOE, as the license applicant, as well as Nevada, certain local governments, affected Indian tribes, and other persons who can demonstrate standing will likely be afforded formal status as parties to the NRC adjudication, with specific procedural rights under the rules and statutory provisions governing NRC licensing hearings. See 42 U.S.C. § 2239(a)(1)(A).

Having established that the NRC licensing proceedings constitute a particular matter involving specific parties, we also find these proceedings to be a continuation of the same particular matter that involved the earlier site characterization process, as well as other efforts that were in anticipation of a potential license application. Two particular matters are viewed as the same, for purposes of section 207(a), if they share a common "nucleus of operative facts." United States v. Medico Indus., Inc., 784 F.2d 840, 843 (1986); see also EEOC v. Exxon Corp., 202 F.2d 755, 757 (5th Cir. 2000)(facts "substantially overlapping"). In making such determinations, it is appropriate to consider "the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest." 5 C.F.R. § 2637.201(c)(4).

In the present case, the basic facts, issues and parties involved in the licensing adjudication coincide significantly with the facts, issues and parties involved in the site characterization process. See Medico, 784 F.2d at 843. Indeed, one of the fundamental purposes of the site characterization process was to

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[5]The leading Senate proponent of the 1989 amendments stated that many of the changes to section 207 "simply reflect an effort to make the statute more readable," and he entered into the record a section-by-section analysis stating that section 207(a)(1) is "similar to current law." 135 Cong. Rec. S 15954 (November 17, 1989)(remarks of Sen. Levin).

determine whether Yucca Mountain was suitable for DOE and the President to recommend that a license application be submitted to NRC. To this end, NRC officials reviewed and commented on important documents pertaining to site characterization, with a view toward helping DOE identify issues that would have to be addressed before a license could be issued. See 99 x 21 (submission of product for agency approval part of same particular matter as pre-submission discussions with agency). As noted above, we have been advised that large quantities of documentary material generated in connection with the site characterization will be used to support DOE's license application. In addition, for several years, NRC has been preparing a system that will make available a large volume of documents generated during the pre-licensing period in order to make them available for discovery by the parties in any licensing proceedings. Moreover, we cannot say that any confidential information developed during the pre-licensing period, including information pertaining to agency deliberative processes, would be irrelevant to issues in the licensing proceedings. Clearly, the licensing proceedings involve the same continuing Federal interest in ensuring that Yucca Mountain is a safe repository for nuclear waste. While there has been some passage of time since Yucca Mountain first became the focus of DOE's site characterization efforts, under these circumstances, the time elapsed is not reason enough to conclude that the licensing proceedings should be viewed as a separate matter from all the pre-licensing efforts that are so demonstrably related to the licensing proceedings. See, e.g., OGE Informal Advisory Letter 93 x 32 (same particular matter despite 10 year lapse).[6]

Finally, we conclude that this same particular matter involved specific parties as of the time that Congress narrowed the site characterization focus to Yucca Mountain. Section 207(a) is implicated once the Government identifies parties to a particular matter, either where persons have expressed an interest in participating in the matter or where other circumstances indicate that persons have an obvious and distinct stake in participating in the matter. See, e.g., OGE Informal Advisory Letter 96 x 21. After Congress mandated the characterization of Yucca Mountain alone, it was apparent that DOE was a potential license applicant for Yucca Mountain, that the State of Nevada would be a participant

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[6] There may be certain Yucca Mountain matters, apart from the site characterization process, that are sufficiently distinct from the licensing proceedings that they constitute different particular matters. Such matters will have to be evaluated by your offices on a case-by-case basis, utilizing the factors set out in 5 C.F.R. § 2637.201(c)(4). OGE is ready to assist you, as needed, in making such determinations.

in any licensing proceedings, and that the affected local governments and Indian tribes also were likely participants. During the ensuing years, moreover, DOE and NRC officials met with each other, and they also met with (and received correspondence from) representatives of Nevada, local governments, and the tribes concerning various issues that would be of significance in any licensing proceedings. See 99 x 21 ("Where a company was involved in discussing the development of its technology and a specific product with a view toward submitting a product for approval, those discussions would be part of a particular matter involving specific parties").

Based on the foregoing, we have determined that former employees who participated personally and substantially in the site characterization or any other efforts pertaining to the licensing of Yucca Mountain are permanently barred from representational activity in connection with the license application and the related NRC adjudication. 18 U.S.C. § 207(a)(1). Any former employees who did not participate personally and substantially but had official responsibility for such pre-licensing matters during their last year of Government service will be barred from representational activity in connection with the licensing proceedings for two years after they left Government. 18 U.S.C. § 207(a)(2).

Depending on the circumstances, former employees may be able to take advantage of exceptions to these prohibitions. Among others, there are exceptions for representational activity on behalf of the United States, for certain kinds of testimony under oath or statements under penalty of perjury, and for certain scientific and technological communications made under specific conditions. See 18 U.S.C. § 207(a)(1) & (2), (j). Former employees should consult with ethics officials at their former agency concerning the potential application of any exception.

Prior Guidance

In the early 1990's, NRC, in consultation with OGE, determined that several different aspects of site characterization, as well as certain miscellaneous pre-licensing matters, were different particular matters from each other. At that time, any licensing of the facility appeared to be remote in the future and subject to numerous political and other intervening factors. Furthermore, in the experience of OGE, NRC, and DOE, the Yucca Mountain project was unprecedented in magnitude and complexity. Absent any imminent or reasonably certain licensing proceedings, it made practical sense to divide the massive and complex work of site characterization into several discrete particular matters, especially since the work on many of these separate matters involved specialized technical areas relatively separate from each other (e.g., cask

certification, hydrology, exploratory shaft design and construction, geochemistry, etc.).

Now, however, the executive branch has determined to proceed with a license application, and Congress has approved that determination. To the extent that it once may have been appropriate to view certain aspects of site characterization and other pre-licensing issues as being separate from each other, it is clear now that these matters will converge in one license application and the ensuing adjudication. See OGE Informal Advisory Letter 99 x 12 (previously separate claims may become part of same particular matter when joined in class action). Where the facts and issues involved in various pre-licensing efforts become the subject of the same licensing proceedings, there is no justification for treating any issues or subject areas covered by those proceedings as being separate particular matters. See United States v. Trafficante, 328 F.2d 117, 119 (5th Cir. 1964)(test not whether former employee participated in "same specific issues"); OGE Informal Advisory Letter 94 x 3 (fact that different issues may be involved does not mean there are separate matters). OGE long has held that each stage in an administrative adjudication "involves the same particular matter," and "we do not foresee that any such adjudication would be divisible into separate particular matters for purposes of section 207(a)." OGE Informal Advisory Letter 81 x 23.

Additionally, DOE has informed us that there may be some uncertainty, among certain former employees, stemming from the fact that DOE has had three different management and operating (M & O) contracts to support its Yucca Mountain project since 1987. As discussed above, DOE operations -- including the SCP, site characterization studies, and other pre-licensing work -- were carried out in conjunction with SAIC, TRW, and Bechtel-SAIC, successively. In some cases, former employees were involved in Yucca Mountain solely during the pendency of a different contract or contracts than the one now in force. Of course, it is frequently the case that successive contracts are viewed as being different particular matters from each other. See 5 C.F.R. § 2637.201(c)(4)(Example 1)(explaining circumstances in which "follow on" contract is new particular matter). Consequently, DOE advises us, some former DOE employees may question whether their involvement during the pendency of a prior contract should disqualify them from representing persons in connection with the licensing proceedings now. It is unnecessary, however, for us to determine whether the three M & O contracts may have been separate matters from each other at any given time or with respect to any particular part of DOE's Yucca Mountain operations. The fact remains that any site characterization or other efforts related to the decision to proceed with a license application are inseparable from the licensing proceedings, regardless of which support

contract was in force at the time.[7] In determining whether a former employee may represent private parties in connection with the NRC licensing proceedings, the relevant consideration is not who was the M & O contractor at any particular point, but whether the former employee was involved in operations anticipating the licensing proceedings.

I understand that your offices will make a concerted effort to contact any former employees who may have been advised that various pre-licensing matters were deemed to be separate from each other. Your offices will provide those individuals with a copy of this letter and will explain the implications of section 207(a) for any former employee who was involved in pre-licensing matters that are now embraced by the licensing proceedings. In that connection, this letter is intended to provide advice only about the current limits on representational activities that former employees may undertake, now that the previously separate matters have converged in a single particular matter involving specific parties, i.e., the licensing proceedings. It is not intended to cast doubt on the advice in which we previously concurred, prior to this convergence, to the effect that certain aspects of site characterization and other pre-licensing matters could be viewed as being separate particular matters from each other. Former employees legitimately may have participated in representational activities consistent with that view, and the legality of those activities is not being called into question by the guidance contained in this letter.

Sincerely,

Amy L. Comstock
Director

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[7] One could analogize, for example, to a former employee who participated for the Government in an enforcement action: even if the Government used several different support contractors during the course of the investigation and any enforcement proceedings, the former employee would be disqualified from representing private parties in connection with the same action, regardless of which support contract was in effect at the time of his or her Government service.