



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

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Act, exemptions 6
FOIA- 2002-0860

Dear [redacted]

On [redacted] you wrote requesting the Office of the
General Counsel's views on the post-employment restrictions that
would be applicable to [redacted]

[redacted] should he accept a job in
the private sector. In our [redacted] response to that
letter we indicated that the application of 18 U.S.C. 207(a) to
the process for selecting and licensing a high-level waste
repository presented difficult issues. We stated that we were in
the process of trying to divide the high level waste repository
efforts of the Department of Energy (DOE) at Yucca Mountain into
"particular matters" and this process would take some time. We
indicated that, until we could more precisely address the
application of 18 U.S.C. 207(a), the safest course would be for
[redacted] not to represent private parties before the DOE with
the intent to influence action on matters relating to the
repository program.

Following that correspondence, we continued to discuss this matter
further with [redacted]. These discussions culminated in your
[redacted] letter in which you presented detailed information
regarding the nature of [redacted] involvement in matters
relating to Yucca Mountain as an NRC employee and a description of
the duties that he would perform for [redacted] the prime DOE contractor
for DOE's Nuclear Waste Management Program, including the Yucca
Mountain repository. We have carefully reviewed your letter and
the accompanying materials and have had further conversations with
[redacted]. We have also had extensive discussions with both DOE
and the Office of Government Ethics (OGE). The OGE concurs in the
guidance set forth in this letter.

I must emphasize that this advice is limited to [redacted]
situation and is not necessarily the approach that will be taken
with respect to other Nuclear Regulatory Commission employees who
have been involved in matters relating to the proposed waste
repository at Yucca Mountain. Our approach in other cases could
change as we continue to evaluate the application of 18 U.S.C. 207
to the Yucca Mountain proceeding.

It is our understanding that [redacted]
for a position as [redacted]

[redacted] is under consideration
on the DOE contract [redacted]

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mentioned above. [] would manage a staff with specific responsibilities for spotting potential regulatory issues relating to the Yucca Mountain Site characterization program, analyzing and evaluating consequences which pose a likelihood of delaying a construction authorization, and recommending strategies to DOE to address other issues relating to the Yucca Mountain repository, the Monitored Retrievable Storage Facility, and the transportation of nuclear waste to both of these facilities. This job would require him to frequently represent [] before DOE. Occasional representation of [] before the NRC or the Environmental Protection Agency would also be required.

At the NRC, [] was personally and substantially involved with some aspects of NRC's review of DOE's proposed activities at Yucca Mountain. In brief, it is our understanding that he was substantially involved in preparing NRC's comments on three portions of the Site Characterization Plan (SCP): (1) the design of the Exploratory Shaft Facility (ESF), (2) the conceptual design of the layout for the repository, and (3) plans for the design of the waste package that will contain the waste for emplacement. In addition, [] has been involved in the development of portions of NRC's generic regulations relating to the high-level waste repository (10 CFR Part 60) and staff generic interpretations of various aspects of those regulations. [] asserts that he has never been involved in or had supervisory responsibility for the Monitored Retrievable Storage Facility or any issues involving transportation of high-level waste, safeguards issues, siting issues (including geology, seismology, hydrology or climatology), or performance assessment (assessing the likelihood and consequences of waste leaking from packages after entombment in the repository).

After evaluating this information, I discussed with [] the implications of an opinion which would permit him to represent [] before DOE or other federal agencies with the intent to influence action on all matters relating to Yucca Mountain except for: (1) the design of the Exploratory Shaft Facility; (2) the layout for the repository; and (3) the design of the waste package. [] argued that restrictions should not be placed on his activities in those three areas because it is his understanding that DOE in the near future will be submitting to the NRC for review substantially-changed proposals in each of those areas.

He indicated that there probably will be major changes in the design and the location of the Exploratory Shaft Facility and that these modifications probably will necessitate a major change in the layout of the repository. He further indicated that the waste package that he reviewed contained a metal that DOE subsequently found to be unsuitable. Therefore, he expects that a completely new waste package using a different metal will probably be included in the revised DOE proposal. [] indicated that if the major changes he anticipates are not made, he would not engage in

Portion's withheld - EX 6

representational activities before the federal government with respect to the three items listed above.

Legal Analysis

The post-employment restrictions on federal employees are contained in section 207 of title 18, United States Code. It cannot be overemphasized that this statutory provision does not prevent [redacted] from working for any company, including a government contractor, on any matter relating to Yucca Mountain. The prohibitions in section 207 instead restrict a former federal employee's representation of a private party before any federal agency, even those agencies that never employed the individual. Section 207 prohibits all former federal employees from ever representing another person to the government with the intent of influencing government action on particular matters involving specific parties that they personally and substantially participated in while employed by the government. For two years after terminating government service, former employees cannot represent anyone to any federal agency on those particular matters that were under their official responsibility during the last year of government service that they did not personally and substantially participate in.

Section 207 does not prohibit representations relating to rulemaking or the formulation of general policy standards or objectives. Therefore, there are no restrictions on [redacted] post-employment activities resulting from his work in developing NRC's high-level waste regulations and generic guidance interpreting those regulations.

Under the regulations implementing section 207, whether a "particular matter involving a specific party" continues after the employee terminates government service depends on:

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. section 2637.5(c)(4).

The Office of Government Ethics advised that the review of the Yucca Mountain site is a particular matter involving parties. 18 U.S.C. 207 became applicable when in 1987 Congress specified that DOE was to characterize initially only one site--Yucca Mountain.

Recognizing that the site will not be licensed until early in the next century, the OGE indicated that the NRC had the flexibility to divide the NRC review of matters relating to Yucca Mountain into a number of particular matters and suggested that we try to do so. Consistent with those suggestions, we have attempted to divide the review of Yucca Mountain into a number of matters.

Portions withheld - Ex. 6

Consistent with those suggestions, we have attempted to divide the review of Yucca Mountain into a number of matters.

As indicated above, [] was heavily involved in NRC's review of a portion of the Site Characterization Plan submitted to the NRC by DOE for review. We do not believe that the law requires the Site Characterization Plan to be treated as a single particular matter. Neither [] nor his subordinates participated in the review of substantial portions of that Plan. Rather, they limited their involvement to the three areas delineated above. We, therefore, believe that he participated personally and substantially in three particular matters involving parties: (1) issues relating to the Exploratory Shaft Facility; (2) issues relating to the layout of the repository; and (3) issues relating to the design of the waste container.

In evaluating whether he may represent [] before the federal government with respect to those three matters, OGC reviewed pertinent Office of Government Ethics opinions (80 x 4, 87 X 14, 84 X 16), and consulted with the technical staff at the NRC familiar with NRC's Yucca Mountain review. We had an extensive discussion with the OGE whether a substantially-revised proposal by DOE in these three areas would constitute new particular matters. A senior NRC official in the [] assisted us in explaining to OGE the expected major changes.

The OGE concluded that, in applying the definition of a "particular matter" in the regulations implementing section 207, the three SCP matters that [] participated in personally and substantially would still constitute the same "particular matters," even if substantially changed in the forthcoming DOE proposal. The OGE noted that, even a significant revision of the design of the ESF, the repository layout, and the conceptual design for a waste package would still involve the same basic facts, related issues, and parties, and an important federal interest. There has also been no significant lapse in time nor any change in technology. Therefore, because it is OGE's view that DOE's forthcoming proposal would not constitute significantly-changed circumstances, we believe that, should [] leave government service, he would be barred from representing [] or any other private party before any federal agency on these three aspects of the SCP.

We also discussed with OGE whether implementation of those design aspects of the SCP, such as construction of the ESF, would constitute new particular matters. The OGE did not reach an opinion on this issue, believing that it would be more appropriate to resolve this issue once implementation was ready to begin as more facts become available. However, they indicated that any such ruling would not permit [] ever to recommend design changes in the three areas he had worked on for the NRC. We understand that, the OGE did agree, if requested, to revisit this

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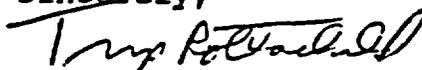
issue when there is actual implementation of the Site Characterization Plan.

In light of [] assertions that neither he nor those he supervised had any involvement in matters relating to the Monitored Retrievable Storage Facility, any particular matters relating to transportation of high-level waste to Yucca Mountain, safeguards, siting, or performance assessment, he may represent [] before DOE or any other agency on all these matters upon termination of federal service.

One last item merits mention. In my last letter to you, I indicated that 18 U.S.C. 207(c) would bar [] for one year after terminating his NRC employment from meeting or communicating with the NRC on behalf of a private party on any matter with the intent to influence agency action. OGC subsequently learned that, late in the last legislative session, Congress enacted legislation amending that restriction so that it now applies only to employees paid at the SES-5 level or above. [] is paid at a lesser rate and, therefore, this restriction will not apply to him.

If you need further guidance regarding the post-employment restrictions applicable to [] please do not hesitate to contact me. Should [] take a position with [] the OGE recommends that he initially seek guidance from DOE on any issues that arise relating to whether he can represent [] before the DOE. We understand that the DOE will consult with NRC ethics officials, as appropriate.

Sincerely,



Trip Rothschild
Deputy Assistant General
Counsel

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