

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

<b>In the Matter of</b>	)	<b>Docket No. PAPO-00, PAPO-0001</b>
	)	
<b>U.S. DEPARTMENT OF ENERGY</b>	)	<b>ASLBP No. 04-829-01-PAPO</b>
	)	<b>ASLBP No. 08-861-01-PAPO-BD01</b>
<b>(High Level Waste Repository: Pre-Application Matters</b>	)	<b>April 3, 2008</b>

**MOTION OF THE STATE OF NEVADA TO DISQUALIFY THE LAW FIRM OF  
MORGAN, LEWIS & BOCKIUS LLP BECAUSE OF CONFLICTS OF INTEREST**

On March 24, 2008, six lawyers with the law firm of Morgan, Lewis & Bockius LLP ("Morgan Lewis") filed notices of appearances in this proceeding on behalf of the Department of Energy ("DOE").<sup>1</sup> For the reasons given below, the State of Nevada respectfully moves that Morgan Lewis be disqualified because of conflicts of interest.<sup>2</sup>

**I. Jurisdiction**

Nevada is filing this motion with the Commission because the two Presiding Officer Atomic Safety and Licensing Boards appointed by the Commission appear to have jurisdiction that is too limited to grant the requested relief. The Pre-License Application Presiding Officer (PAPO) Board's jurisdiction focuses on document disputes and the Advisory Pre-License Application Presiding Officer (APAPO) Board's current authority is advisory only. However,

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<sup>1</sup> The lawyers are Donald L. Silverman, Thomas A. Schmutz, Thomas C. Poindexter, Paul J. Zaffuts, Alex S. Polonsky, and Lewis Csedrik.

<sup>2</sup> In accordance with 10 C.F.R. § 2.323(b) and Case Management Orders, counsel for Nevada (Messrs. Malsch and Fitzpatrick) certify that they made a sincere good faith effort to resolve the issues raised in this Motion by contacting counsel for DOE (Mr. Silverman and one of his partners) on April 1, 2008. DOE counsel did not agree with the motion and neither side could postulate a reasonable compromise position, and the movant's efforts to resolve the issues have been unsuccessful.

Nevada is serving both Boards with copies of its motion and Nevada would have no objection to a referral of this motion to either one for initial decision.

## **II. Introduction and Background**

As indicated, on March 24, 2008, six lawyers with the law firm of Morgan Lewis filed notices of appearances in this proceeding on behalf of DOE. Previously, no lawyer with Morgan Lewis had entered an appearance for any potential party in the Yucca Mountain NRC proceeding, either in this particular matter, which involves recommendations to the Commission with respect to the procedures to be followed in the NRC licensing hearing, or in any other matter, including pre-license application discovery disputes or issues involving the Licensing Support Network ("LSN").

However, Morgan Lewis is no stranger to Yucca Mountain. It represents several nuclear utility companies suing DOE for violation of the "Standard Contract," the contract requiring DOE to begin accepting commercial spent nuclear fuel for disposal beginning in 1998. At all times, from the commencement of this Standard Contract litigation to the present, the successful licensing of Yucca Mountain was and is the only possible way for DOE to satisfy its obligations under the Standard Contract, although as things now stand the best DOE can accomplish is delayed performance.

Morgan Lewis' engagement by DOE is the subject of a Special Report of the DOE Inspector General issued for public release today, April 3, 2008, entitled "Review of Alleged Conflicts of Interest Involving a Legal Services Contractor for the Yucca Mountain Project License Application," DOE IG-0792 (April 2, 2008) (hereinafter, the "IG Rept."), an investigation requested by Nevada's Congressional Delegation. This report is attached as Exhibit A. As the report notes, Morgan Lewis was awarded a legal services contract in September 2007 whose value exceeds \$100 million. IG Rept., Memorandum for the Secretary,

at 1. "In doing so, the Department accepted a firm with a conflict of interest." *Id.* at 2. DOE's position is that it lawfully "waived" and "mitigated" this conflict. *Id.* Nevada disagrees, because the conflict is not legally waivable, and even were it waivable, DOE has unlawfully failed to explain its departure from past determinations it made that Morgan Lewis was irreconcilably conflicted out of representing DOE in connection with Yucca Mountain licensing.

### **III. Grounds for the Motion**

As noted, Morgan Lewis currently represents over one dozen clients on matters involving DOE's Standard Contract, including litigation against DOE for breach of the Standard Contract. *Id.* This Contract, the basic terms of which are set forth in section 302 of the Nuclear Waste Policy Act, as amended ("NWPA"), obligates DOE to begin accepting commercial spent nuclear fuel for disposal beginning on or before 1998.<sup>3</sup> Morgan Lewis' disclosure statement describes these representations as entailing work that is "factually, commercially, and legally related to the Standard Contract for disposal of spent nuclear fuel, including litigation."<sup>4</sup> The IG Report concludes that this representation amounts to a clear conflict of interest with representation now being undertaken by Morgan Lewis for DOE in connection with Yucca licensing. *Id.*, Memorandum for the Secretary, at 2, IG Rept. at 4-5. Under sections 113 and 114 of the NWPA, Yucca Mountain is the only site authorized to be studied or licensed as a repository for the disposal of commercial spent nuclear fuel. In necessary effect, DOE's failure to apply for and receive a license from the NRC for a repository at Yucca Mountain is what constitutes the violation of the Standard Contract. Therefore, Morgan Lewis is not only suing one of its own clients (DOE), but it is doing so in a case related to and, in fact, inextricably intertwined with, its

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<sup>3</sup> Section 302(a)(5)(B) of the NWPA. The Standard Contract is codified at 10 C.F.R. Part 961, Subpart B.

<sup>4</sup> Morgan Lewis filed a conflicts of interest disclosure statement by letter to DOE dated September 24, 2007, attached as Exhibit B. The quote is at pp. 2-3.

current representation of that same client. And in representing DOE before the NRC, Morgan Lewis is in a position where its actions on behalf of DOE could harm the interests of its Standard Contract clients and vice versa.<sup>5</sup>

Morgan Lewis' disclosure statement concedes that "representations of the Standard Contract Clients would present potential conflicts of interest" but states a belief that these potential conflicts of interest can be "waived" simply because the representations "would not constitute representation of two parties with adverse interests in the same matter."<sup>6</sup> However, Morgan Lewis is wrong. DOE is not just a private client, pursuing a private agenda. DOE's overarching obligation is to protect the public safety and the environment. Under section 113(c)(3) of the NWPA, DOE is obligated to suspend work on Yucca Mountain, to decline to apply for an NRC license or, if necessary, withdraw an application for a construction authorization, if "at any time" it decides that Yucca Mountain is "unsuitable for development as a repository." But giving up on Yucca Mountain would be contrary to the overarching interests of its Standard Contract clients, who would be understandably upset for having paid millions of dollars to DOE for a repository at Yucca Mountain but not getting one. They are accordingly interested in having Yucca Mountain licensed and constructed as soon as possible. How would Morgan Lewis reconcile its duty of loyalty to its Standard Contract clients if, similar to what occurred at the U.S. Geological Survey, DOE e-mails were discovered suggesting serious quality

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<sup>5</sup> Because, as indicated, Morgan Lewis advises clients other than DOE on matters that are "factually, commercially, and legally related to the Standard Contract," it is possible that it is advising those clients in negotiations with DOE with respect to changes in the Standard Contract. *See, e.g.*, "Requirements Package for the Transportation, Aging and Disposal (TAD) Canister-Based Systems [for Yucca Mountain], Rev. 0" (LSN Document Number DN2002407485), where DOE states that "incentives for utility utilization of the TAD canister-based system...are anticipated to be implemented through an amendment to the Standard Contract." If so, Morgan Lewis is potentially adverse to DOE on contract modifications that affect a critical part of the Yucca Mountain repository design and safety assessment. *See also*, IG Rept. at 6.

<sup>6</sup> Exhibit B at p. 11.

assurance defects in scientific work supporting the Yucca Mountain license application, and DOE asked Morgan Lewis for advice whether the NRC should be notified and whether consideration of the affected parts of the license application should be suspended until the scientific work could be redone? Morgan Lewis' duty to its client DOE would surely require it to say "yes" to both questions, but its duty of loyalty to its Standard Contract clients may suggest otherwise.

The discussion of conflicts of interest in *LeBoeuf, Lamb, Greene & MacRae L.L.P. v. Abraham*, 347 F.3d 315 (D.C. Cir. 2003) is highly instructive. This case involved DOE's similar effort to hire another law firm, Winston & Strawn, to advise it on Yucca Mountain licensing despite that firm's representation of other nuclear clients, most particularly DOE's prime contractor for preparing the Yucca Mountain license application. The Court summarized with apparent approval the 1999 determination of DOE's Head of Contracting that a special conflict of interest provision should apply to the procurement of legal services for the licensing of Yucca Mountain. This provision, he ruled, disqualified law firms that represented plaintiffs suing DOE for violation of the Standard Contract. In rejecting a challenge to this provision by a law firm disqualified from bidding, the Head of Contracting noted that while "utilities and [DOE] both have an interest in having the [Yucca Mountain] license issued quickly," under the NWPA, DOE "serves a broader interest of protecting the environment and public health," and "[DOE's] statutory responsibilities might require action that a utility would oppose." "[T]his difference is the source of the divergence of interests...that gives rise to the various potential conflicts of interest" which "cannot be mitigated simply by imposing a firewall [within the firm] for the protection of [DOE's] confidential information." *Id.* at 318.<sup>7</sup>

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<sup>7</sup> See also, *Concap LP v. Unilever, PLC*, 350 F. Supp. 796 (N.D. Cal. 2004) (Chinese wall designed to preserve client confidentialities does not cure a breach of the duty of loyalty to a concurrent client).

The same must hold true here. Even if it is assumed, for purposes of argument, that the apparent conflict of interest is of a type that could be waived with all affected clients' informed consent if only non-governmental clients were involved, the situation is dramatically different when DOE's overriding statutory duty to protect the environment and public health is implicated. DOE's statutory obligations make the apparent conflict of interest not susceptible to waiver or mitigation.

Here, a sudden new determination by DOE's Head of Contracting, dated September 26, 2007 (a mere two days after Morgan Lewis' conflicts disclosure statement) reaches a conclusion diametrically opposed to its previous determination, finding the Morgan Lewis conflict susceptible of waiver and mitigation. The new determination is attached as Exhibit C. But this new determination unaccountably fails to (1) discuss the specific conflict of interest presented in this motion; and (2) recognize, let alone distinguish, the prior contrary opinion of the Head of Contracting cited in the *LeBoeuf* case. Such agency action is arbitrary and capricious under well-established administrative law. Under applicable law, an agency's failure to adhere to its own precedents must be the product of a reasoned analysis that acknowledges and adequately justifies the change.<sup>8</sup> *See Southwestern Elec. Power Co. v. FERC*, 810

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<sup>8</sup> Although the IG Report states that "the 2007 procurement for legal services appeared to follow the conflicts of interest requirements set forth in the Federal Acquisition Regulations, the [DOE] Acquisition Regulations, and District of Columbia Bar Rules of Professional Conduct," this must be juxtaposed against the report's overarching conclusion that "we found that the procurement file and related documentation were *insufficient to provide an adequate explanation of the Department's rationale*" for its "(1) change in position ... relating to conflicts of interest for the spent nuclear fuel litigation; and (2) selection of Morgan Lewis...." IG Rept. at 4 (emphasis added). "We could not find a document or record that explained the Department's change in position on conflicts ... and none was provided to us." *Id.* Indeed, the IG Report finds other key shortcomings in the procurement process, including the lack of a fully developed "written record memorializing the key decision points underlying its procurement strategy and selection process," the lack of documentation for DOE's "comparative analysis of the proposals which formed the basis for selecting Morgan Lewis," and the lack of a "'trail' of the Department's review of [Morgan Lewis'] disclosures." Memorandum at 3. Perhaps most importantly, neither

F.2d 289, 291 (D.C. Cir. 1987); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977).

In sum, Morgan Lewis' concurrent representation of DOE and its Standard Contract clients presents a conflict of interest that cannot be waived by DOE because of DOE's overarching and potentially divergent statutory obligation to protect public health and the environment.<sup>9</sup> DOE's change in position to the contrary remains unjustified and unexplained. For the reasons expressed, Morgan Lewis should be disqualified from representing DOE in all NRC Yucca Mountain proceedings.

Respectfully submitted,

*(signed electronically)*

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the IG Report nor any other information available to Nevada establish that Morgan Lewis secured its *Standard Contract clients'* informed consent to its representation of DOE, which, in any event, would be a prerequisite to any representation here under the D.C. Code.

<sup>9</sup> Because the public resources of Nevada and the health of Nevada's citizens and employees are affected by Morgan Lewis' concurrent representation of DOE and Standard Contract clients, and because all potential parties are interested in the integrity of the NRC's impending Yucca licensing proceedings, Nevada has standing to file this motion even though it is not an affected client of Morgan Lewis. *See e.g., In re Congoleum Corp.*, 426 F.3d 675, 685-86 (3d Cir. 2005); *Essex County Jail Annex Inmates v. Treffinger*, 18 F. Supp. 418 (D.N.J. 1998).

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(High-Level Waste Repository: )  
Pre-Application Matters) )

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing State of Nevada's Motion to Disqualify the Law Firm of Morgan, Lewis & Bockius, LLP, Because of Conflicts of Interest has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (\*)).

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*(signed electronically)*  
Susan Montesi

Exhibit A

Exhibit A



## Department of Energy

Washington, DC 20585

April 2, 2008

The Honorable Harry Reid  
United States Senate  
Washington, D.C. 20510

Dear Senator Reid:

On December 5, 2007, we received a letter from you and the other members of the Nevada Congressional delegation requesting that the Department of Energy's Office of Inspector General review possible conflicts of interest relating to the Morgan, Lewis and Bockius contract on the Yucca Mountain Project.

Enclosed is a copy of our report on this matter. Please do not hesitate to contact me if I may be of further assistance.

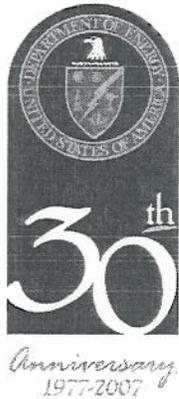
Sincerely,

A handwritten signature in blue ink that reads "Greg Friedman".

Gregory H. Friedman  
Inspector General

Enclosure





U.S. Department of Energy  
Office of Inspector General  
Office of Audit Services

# Special Report

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Review of Alleged Conflicts of Interest  
Involving a Legal Services Contractor for  
the Yucca Mountain Project License  
Application

DOE/IG-0792

April 2008



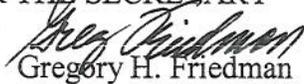
## Department of Energy

Washington, DC 20585

April 2, 2008

MEMORANDUM FOR THE SECRETARY

FROM:

  
Gregory H. Friedman  
Inspector General

SUBJECT:

INFORMATION: Special Report on "Review of Alleged Conflicts of Interest Involving a Legal Services Contractor for the Yucca Mountain Project License Application"

### INTRODUCTION

In September 2007, the Department of Energy awarded a legal services contract to the law firm of Morgan, Lewis, and Bockius LLP (Morgan Lewis). The firm was to assist the Department in preparing a license application for the Yucca Mountain repository, the site selected for the disposal of the Nation's spent nuclear fuel and high-level nuclear waste. The agency awarded the contract using an informal process that was "other than competitive" to evaluate different law firms, rather than the more formalized competitive process set out in the Competition in Contracting Act. Prior to the award of the contract, in April 2007, the Department notified Congress of its intent to follow the informal process. The notification was pursuant to 41 U.S.C. Section 253(c)(7), and the Department included its justification that proceeding in this manner was necessary in the public interest. Following an expedited process, the Department awarded a contract to Morgan Lewis, with a five-year performance period and a five-year option period. The total value of the contract is over \$100 million.

In December 2007, the State of Nevada's congressional delegation requested that the Office of Inspector General review potential conflicts of interest related to the contract with Morgan Lewis. The delegation's concerns focused on three primary areas. First, Morgan Lewis represented commercial utilities that had filed lawsuits against the Government regarding the acceptance and disposal of commercial spent nuclear fuel. Second, the firm performed lobbying activities on behalf of the nuclear industry trade association, the Nuclear Energy Institute (NEI). Lastly, the delegation noted that the Department had hired Morgan Lewis in 2001 to evaluate the "safety conscious work environment" at Yucca Mountain; and, that the firm may have "looked past critical flaws" in the Department's quality assurance program. Further, the delegation was concerned that Morgan Lewis could now be placed in a position of reviewing its own prior work.

Previously, in November 2001, the Office of Inspector General addressed similar issues related to a prior legal services contractor in a report entitled *Review of Alleged Conflicts of Interest Involving a Legal Services Contract for the Yucca Mountain Project* (DOE/IG-I01IG001). Given the current and past concerns, we conducted an examination of the Department's award and administration of the 2007 contract in support of the Yucca Mountain license application.



## RESULTS OF FACT FINDING REVIEW

Presented below is our analysis of the issues raised by the delegation, as well as our observations regarding the Department's documentation of key decision points in awarding the 2007 legal services contract.

### Representation of Utilities

The Department selected Morgan Lewis, a firm which represented utilities in the spent nuclear fuel litigation against the Government. In so doing, the Department accepted a firm with a conflict of interest. However, the agency's selection of Morgan Lewis was inconsistent with the Department's position in 1999, when it excluded firms with this conflict from participating in a similar contract. The Department's view on this change was that in 2007, its needs could only be met by firms with extensive Nuclear Regulatory Commission licensing expertise, and it determined that "any alternative law firm with [this expertise] would have similar potential conflict issues."

In accordance with applicable regulations, the Department provided a waiver of the conflict of interest, and it incorporated a mitigation plan into the contract. Agency officials determined that the plan would mitigate any legal ethics conflict and/or any organizational conflict of interest to the "maximum extent practicable."

Overall, the 2007 procurement for legal services appeared to follow the conflicts of interest requirements set forth in the Federal Acquisition Regulations, Department of Energy Acquisition Regulations, and District of Columbia Bar Rules of Professional Conduct. We also found that the firm had implemented the mitigation plan in accordance with the contract requirements.

### Representation of Nuclear Industry

Morgan Lewis disclosed work for NEI. Specifically, Morgan Lewis disclosed to the Department that it had periodically advised the NEI on "matters involving the Nuclear Waste Policy Act, spent nuclear fuel, high-level waste, and other related matters; however, such work over the past twelve months [preceding the contract award] has not related factually, commercially or legally to the Yucca Mountain Repository licensing." Independent of the firm's disclosure, our review showed that the firm terminated its lobbying activities for NEI in 2002, five years prior to the award of the current contract.

### 2001 Report on Safety Conscious Work Environment

The law firm's 2001 work was critical of the safety conscious work environment in existence at Yucca Mountain at that time. Morgan Lewis' report included recommendations to further strengthen the program. In our discussions with Department officials, they stated that the quality assurance program for the Yucca Mountain Program had evolved significantly since 2001. We noted that the current program had been

recently reviewed by an independent party and was found to be consistent with standard nuclear industry practices. Further, the officials asserted that Morgan Lewis would not be reviewing its 2001 work under the scope of the 2007 contract.

### Documentation of Key Decision Points

We found, in conducting our review, that the Department had not fully developed a written record memorializing the key decision points underlying its procurement strategy and selection process. Given the controversial nature of the Yucca Mountain Project; the history of allegations concerning conflicts of interest; and, the likely public scrutiny of any Yucca Mountain Project legal services contract, we found the absence of such documentation disturbing. Had a full written record of the Department's decision process been developed, it would have been of great assistance in conducting this review. Of far greater importance, it may well have anticipated many of the concerns that have been raised regarding the contract with Morgan Lewis.

The absence of a clear record relating to the following matters was of particular concern:

- Agency officials did not document their rationale for the apparent shift in procurement strategy and approach to addressing conflicts of interest relative to the Department's 1999 position. In our view, the procurement record should have addressed this important question.
- The Department did not document its comparative analysis of the proposals which formed the basis for selecting Morgan Lewis in 2007. A comparative analysis would have assessed statements of qualifications and potential conflicts of interest. This was especially important because our review showed that one of the firms invited to submit statements of qualifications did not have a conflict of interest relating to the spent nuclear fuel litigation. Officials stated that the firm in question did not have sufficient available resources (attorneys with NRC licensing experience) to apply to the contract. We noted that the record on this matter was not documented.

In addition, Morgan Lewis disclosed other activities relating to its work for NEI. Department officials held follow-up discussions with Morgan Lewis to more fully develop the disclosures. As a result of these discussions, the firm modified its disclosures prior to the award of the contract and provided additional clarification of its work on behalf of NEI. However, the procurement file did not contain a "trail" of the Department's review of the disclosures. Such a document would have allowed us to determine if the Department adequately addressed whether the disclosed issues presented a conflict of interest and, if so, whether they had been effectively mitigated.

Department officials stated that no such documentation was required and asserted that the decision to award the 2007 contract to Morgan Lewis was based on its need for legal services from a firm with extensive NRC licensing expertise and that this need was documented in the procurement file. Department officials also informed us that while

they did not prepare a comparative analysis of law firms, there was extensive consideration in the selection of the law firm. Finally, officials stated that there was no indication of an inaccuracy in Morgan Lewis' disclosures of its work on behalf of NEI.

In our view, the public interest would have been better served had the Department done more to document the key decision points relating to this procurement.

A detailed discussion of our general observations, as well as the issues raised by the delegation is included in the body of the attached report.

Attachment

cc: Acting Deputy Secretary  
Under Secretary of Energy  
Director, Office of Civilian Radioactive Waste Management  
General Counsel  
Chief of Staff

**SPECIAL REPORT ON REVIEW OF ALLEGED CONFLICTS OF INTEREST INVOLVING A LEGAL SERVICES CONTRACTOR FOR THE YUCCA MOUNTAIN PROJECT LICENSE APPLICATION**

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## CONFLICTS OF INTEREST

### **BACKGROUND**

Under the Nuclear Waste Policy Act, the Department of Energy (Department) is responsible for providing a repository for high-level radioactive waste and spent nuclear fuel. As part of this effort, the Department is required to prepare and submit a license application to the Nuclear Regulatory Commission (NRC) for the construction and operation of the high-level waste repository at Yucca Mountain. Further, the Act mandated a contractual relationship between commercial utilities and the Department whereby the utilities pay for the cost of spent nuclear fuel disposal while the Federal Government provides disposal services in a manner protective of the public health and environment.

In September 2007, the Department awarded a legal services contract to a law firm, Morgan, Lewis, and Bockius LLP (Morgan Lewis), in connection with the Yucca Mountain Project. Morgan Lewis is to assist in preparing the license application to be submitted to the NRC. The Department awarded the contract using an informal process that was "other than competitive" to evaluate different law firms, rather than the more formalized competitive process set forth in the Competition in Contracting Act. Prior to the award of the contract, the Department notified Congress in April 2007 of its intent to follow the informal process. The notification was pursuant to 41 U.S.C. Section 253(c)(7), and included the Department's determination and findings that proceeding in this manner was necessary in the public interest.

As part of the pre-award requirements, Morgan Lewis disclosed potential conflicts of interest due to its representation of commercial utilities in the spent nuclear fuel litigation. The litigation related to cases filed by utilities against the Government for its partial breach of contract regarding the disposal of spent nuclear fuel. While many of these cases had been resolved, others were still pending resolution.

### **PROCUREMENT STRATEGY**

A primary concern raised by the State of Nevada's congressional delegation was that the 2007 procurement did not follow the conflict of interest restrictions contained in the Department's 1999 legal services procurement for the Yucca Mountain Project. To address this concern, we examined the conflicts of interest strategy used by the Department in awarding the three legal services contracts since 1999.

We found that for each of these three contracts, the Department used a distinct approach to address potential conflicts of interest, specifically with regards to those firms that had represented commercial utilities in the spent nuclear fuel litigation against the Government. In 1999, the Department excluded firms with such conflicts from participating in the procurement. In 2003, the Department invited firms, some of which represented utilities in the spent nuclear fuel litigation, to participate in the procurement. Ultimately, the agency decided to award the contract to a firm that did not represent

utilities in the spent nuclear fuel litigation, based, in part, on conflict of interest concerns. In 2007, the Department hired Morgan Lewis, despite the firm's representation of utilities in the spent nuclear fuel litigation.

### 1999 Procurement

The Department issued a request for proposal in 1999 for a legal services contractor for the Yucca Mountain Project. After conducting market research, which showed that there were several large firms with litigation and NRC experience available to perform the work, the Department issued its solicitation. The solicitation included the following "special organizational conflict of interest" provision:

A firm will be deemed to have organizational conflicts of interest if the firm has represented in the last five years, or is currently representing parties in litigation, either administrative or judicial, against the Department of Energy involving the Standard Contract for Disposal of Spent Nuclear Fuel.

The Department concluded that responses from firms with these conflicts would be considered "non-responsive and eliminated from competition." The Department memorialized its decision to include the special organizational conflict of interest provision. Specifically, the contract file contained a memorandum which included the following information:

- A law firm whose loyalties lie with the utility companies might urge a less thorough process that could conclude earlier, when the Department's best interests lie with a careful approach that may indeed take longer and be a more expensive process;
- Lawyers for the utilities might seek discovery from the Department and its licensing support contractor, thus seeking discovery from themselves; and,
- The Department should not place itself in the position of being challenged by third parties based on the license application being improperly influenced, directly or indirectly, by interests of the utility companies that were party to the litigation.

An excluded law firm protested the terms of the solicitation as unduly restrictive. In response, a Departmental Head of Contracting Activity (HCA) upheld the special organizational conflict of interest provision and denied the protest. The HCA stated that although the utilities and the Department both had an interest in having the license for the Yucca Mountain repository issued quickly, the Department also served a broader interest of protecting the environment and public health. According to the decision, this difference created "a divergence in interests between the utilities and the DOE that gives rise to the various potential conflicts of interest."

The Department's position was that it "is not willing to consider mitigation measures that will not completely obviate the conflict when there are other parties available to perform

the work"; and further, that this conflict could not be mitigated "simply by imposing a firewall" for the protection of the agency's confidential information. The HCA, in his decision, further stated that:

. . . It must be recognized that this is a highly charged issue and thus one in which the public's perception should be taken into account. Given the public health and safety and environmental concerns about the repository, DOE cannot afford a public perception that its licensing decisions regarding the repository were influenced by a firm that owes loyalties to the nuclear utilities. Thus, after consideration, DOE retained the [organizational conflict of interest] provision that excludes those firms that are or recently were engaged in the [spent nuclear fuel] litigation against the DOE.

During the course of the contract performance period, the law firm selected for the 1999 procurement faced allegations of possible conflict of interest disclosure violations. In response to the concerns raised, the Office of Inspector General initiated an inquiry of the allegations, and issued a report on November 13, 2001. On November 29, 2001, the Department and the firm mutually agreed to discontinue the contract.

### 2003 Procurement

The Department modified its approach to awarding and handling potential conflicts of interest related to the spent nuclear fuel litigation in its 2003 procurement. It awarded the \$63 million contract using an "other than competitive" procurement process. The Department notified Congress of its intent to follow this process pursuant to 41 U.S.C. Section 253(c)(7). The agency conducted market research and identified 18 prospective law firms with litigation and NRC experience that could be considered for the contract. The Department invited these firms, some of which represented utilities in the spent nuclear fuel litigation, and others which did not, to participate. The respondents were required to disclose any potential conflicts of interest. Department officials informed us that they required firms involved in the spent nuclear fuel litigation to provide written information and attend meetings relating exclusively to conflicts before determining that it would be permissible to consider such firms.

As part of the selection process, the Department considered firms with complex administrative litigation experience and NRC expertise. Since the NRC had not licensed a new reactor for over 30 years, the Department did not consider a firm's NRC licensing experience as a prerequisite for the contract – even though NRC experience was a criteria in the preceding (1999) and subsequent (2007) legal services contracts. Ultimately, the agency selected a law firm with extensive litigation experience, but one that did not have conflicts of interest related to the spent nuclear fuel litigation. During our review, Department officials indicated that they had considered the absence of such a conflict a key factor in their selection of the firm.

## 2007 Procurement

In 2007, the Department determined that, given the scope and magnitude of the legal work associated with the Yucca Mountain Project, it required the services of an additional law firm with recent NRC licensing experience to focus exclusively on its license application. Following the same process as in 2003, the Department used the informal, "other than competitive" procurement approach to evaluate different law firms for this contract. As an initial step in its procurement, the Department performed research and identified law firms with NRC expertise and recent experience with contested NRC proceedings, as well as litigation experience. According to Department officials, they could only identify three law firms with these qualifications. The Department held meetings with firms to explore in more detail, experience, expertise, workload capabilities, and conflict of interest concerns.

Ultimately, the Department hired Morgan Lewis, despite the firm's representation of utilities in the spent nuclear fuel litigation. Officials informed us that, for the 2007 procurement, the need for specialized legal services (a firm with NRC licensing expertise) and the resulting limited pool of available firms with such expertise led to the acceptance and mitigation of the conflict of interest related to representation of utilities in the spent nuclear fuel litigation. The HCA determined that Morgan Lewis proposed a "comprehensive mitigation plan that would mitigate any conflict to the maximum extent practicable." Further, "in an abundance of caution," officials granted a waiver under the applicable Federal Acquisition Regulations (FAR) provisions of any organizational conflict of interest relating to Morgan Lewis' representation of utilities in the spent nuclear fuel litigation. Officials also consented to representation under the District of Columbia Bar Rules of Professional Conduct.

### Change in Approach and Basis for Contractor Selection

We attempted to obtain a better understanding of key decision points underlying the Department's 2007 procurement strategy and selection process. Specifically, we attempted to determine the Department's rationale for its: (1) change in position from 1999 to 2003 and 2007 relating to conflicts of interest for the spent nuclear fuel litigation; and, (2) selection of Morgan Lewis (based on a comparative analysis) for the 2007 legal services contract. With reference to both points, we found that the procurement file and related documentation were insufficient to provide an adequate explanation of the Department's rationale on these matters.

We could not find a document or record that explained the Department's change in position on conflicts of interest between 1999, 2003 and 2007, and none was provided to us. Specifically, as part of its 2007 procurement, the Department did not address the three critical factors (see page 2 of this report) that were raised in its 1999 decision to include the special organizational conflict of interest provision as part of its procurement strategy. Department officials told us that they did not develop a written record that documented this process, and they stated that there is no requirement to document the rationale for the different approaches. Officials stated that they thoroughly considered conflicts of interest issues in 2003 and again in 2007. Given the significant controversy

surrounding the project and allegations concerning conflicts of interest, in our judgment, agency officials should have fully documented the relevance, importance, and applicability of these factors as they related to the current procurement.

We also did not find a record of the Department's comparative analysis that formed the basis for the selection of Morgan Lewis. Such a record would have been helpful given that our independent review of publicly available information showed that one of the firms invited to meet with Department officials to discuss their capabilities and proposed approach to the Yucca Mountain licensing representation did not have a conflict of interest related to the spent nuclear fuel litigation. This was confusing since the waiver granted by the HCA stated that "any alternative law firm with NRC licensing expertise would have similar potential conflict issues." Officials stated that the firm in question was not considered an alternative law firm because it had significantly fewer attorneys with NRC licensing experience than the Department was seeking. The Department's selection of Morgan Lewis was presented in a "Chronology" to the file. Nonetheless, in our view, the absence of a documented comparative analysis that formed the basis of selection was problematic. The lack of documentation appeared to result from the Department's use of the "other than competitive" procurement process.

## **CONFLICT OF INTEREST REGULATIONS AND RULES**

The Department's contractual awards for legal services are subject to the organizational conflict of interest provisions contained in the FAR, subpart 9.5, and in the Department of Energy's Acquisition Regulations (DEAR), subparts 909.5 and 952. According to the regulations, an organizational conflict of interest exists when a contractor's other activities or relationships render the contractor unable or potentially unable, to render impartial assistance, advice, or objectivity to the Government.

### Procurement Regulations

The regulations require that the Department analyze a planned procurement to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. Specifically, the DEAR requires an apparent successful bidder to provide: "a statement of any past (within the past 12 months), present, or currently planned financial, contractual, organization, or other interests relating to the performance of the statement of work."

If an apparent successful bidder discloses a potential conflict of interest, the contracting officer must seek to "avoid, neutralize, or mitigate significant potential conflicts before contract award." The contract must be awarded to the apparent successful offeror unless it is determined that a conflict of interest exists that cannot be avoided or mitigated. The regulations require that the contracting officer exercise "common sense, good judgment, and sound discretion" in deciding whether a significant potential conflict exists and, if so, develop an appropriate means for resolving the conflict. If the contracting officer finds that the contract award is in the best interest of the Government, notwithstanding the conflict of interest, the contracting officer can request a waiver of the conflict of interest to the agency head or designee.

## Rules of Legal Ethics

The attorneys working under the Department's contract are also subject to Rule 1.7, District of Columbia Bar Rules of Professional Conduct, since they were licensed in the District of Columbia. This rule prohibits a lawyer from representing another client with respect to a matter if: (1) the client's position is adverse to another client's position in the same matter, even though that client is unrepresented or represented by a different lawyer on that matter; (2) such representation will be or may be adversely affected by representation of another client; or (3) representation of another client will be or may be adversely affected by such representation. Under the rules, this conflict can be waived after each potentially affected client is provided with full disclosure of the conflict and the potential adverse consequences of such representation and provides consent. However, a conflict cannot be waived if it involved representing adverse positions in the "same matter."

### **APPLICATION OF REQUIREMENTS**

The 2007 procurement for legal services related to the Yucca Mountain license application appeared to follow the conflicts of interest requirements set forth in the FAR, DEAR, and District of Columbia Bar Rules of Professional Conduct.

In accordance with the FAR and DEAR, the Department required Morgan Lewis to make certain pre-award disclosures regarding potential conflicts of interest arising out of their work. Specifically, the instructions included identifying, among others, the following potential conflicts:

- Representing a plaintiff in the spent nuclear fuel litigation pending in the United States Court of Federal Claims;
- Representing any entity that could potentially benefit economically or otherwise as a result of licensing or failure to license a repository at Yucca Mountain; and,
- Representing any entity that could be potentially injured economically or otherwise as a result of licensing a repository at Yucca Mountain.

Morgan Lewis provided additional disclosures, prior to the award of the contract, some of which extended beyond the required 12-month period.

As part of the acquisition process, the contracting officer required Morgan Lewis to provide a plan to avoid or mitigate organizational conflicts of interest. The contracting officer determined that the plan was comprehensive and would "mitigate any conflict to the maximum extent practicable." Further, in accordance with the FAR, the contracting officer requested a waiver of the organizational conflict of interest related to the firm's representation of clients in the spent nuclear fuel litigation. According to the contracting officer, a strong plan of disclosure, informed consent, and a comprehensive mitigation plan provided adequate mitigation of any conflict arising out of the firm's representation of utilities in the spent nuclear fuel litigation.

Further, on September 26, 2007, "in an abundance of caution," the HCA granted the contracting officer's request for a waiver of any organizational conflict of interest relating to the firm's "representation of the identified entities in the [spent nuclear fuel] litigation and/or litigation unrelated to the Yucca Mountain repository wherein [the firm] represents entities in matters that are adverse to the Department." The HCA, in making his decision, stated that:

Due to the critical need for the legal services involving expertise in NRC licensing to assist the Department in the Yucca Mountain licensing proceeding, it is in the best interest of the United States to award this contract even if an organizational conflict of interest existed. Moreover, the Department determined that Morgan Lewis was the best choice to represent the Department in the Yucca Mountain licensing proceeding. Furthermore, any alternative law firm with NRC licensing expertise would have similar potential conflict issues, and Morgan Lewis has proposed a strong mitigation plan.

The Department also consented to Morgan Lewis' legal representation of the agency under the District of Columbia Rules of Professional Conduct. Regarding the matters that involved the spent nuclear fuel litigation, the Department granted a waiver based on its view that:

The overlap of subject matter (disposition of spent nuclear fuel) for the [spent nuclear fuel] litigation requires [Morgan Lewis] to undertake significant action to provide DOE with sufficient assurance that the conflict will not affect the quality of DOE's representation or the protection of DOE's interests. [Morgan Lewis] has agreed to undertake a comprehensive "Organizational Conflict of Interest Avoidance/Mitigation Plan" (mitigation plan) concerning the [spent nuclear fuel] litigation to ensure that the interests of DOE in each matter are protected.

The Department determined that if implemented as described, the plan would mitigate any adverse effect to the agency in either the spent nuclear fuel litigation or the license proceedings before the NRC.

## **IMPLEMENTATION OF MITIGATION PLAN**

The Department incorporated Morgan Lewis' mitigation plan into the contract. Overall, the mitigation plan provided that the firm would "implement screening procedures to ensure personnel working on the [spent nuclear fuel] claims will be completely screened off from access to any information related to licensing of the repository, and vice versa." Specifically, the mitigation plan included three mechanisms related to screening. First, the plan stipulated that selected teams of lawyers and support staff would work on the Department's contract, and a separate group of personnel would work on the spent nuclear fuel litigation. Second, the plan required that the file rooms for the Department's contract would be physically separated from the firm's other work. Finally, the plan provided that separate "security groups" would be established within the firm's computer network that would restrict access to documents related to the Department's contract.

As part of our review, we performed a site visit to Morgan Lewis' Washington, D.C., office in January 2008. We interviewed key personnel and observed the firm's implementation of its mitigation plan in effect as of that date.

#### Personnel Screening

We observed Morgan Lewis' screening procedures between the personnel assigned to the Department's contract and personnel assigned to the spent nuclear fuel litigation. Overall, we noted that personnel working on the Department's contract were separated, both by organizational assignment and physical location, from the personnel working on the spent nuclear fuel litigation. We raised questions regarding the mitigation plan's screening of "lawyers and support staff." The firm's representatives acknowledged that administrative support staff had not been included in the screening and were, in some instances, shared among the segregated working groups. Subsequent to our site visit, the firm's representative informed us that the mitigation plan related to the separation of personnel was updated to include administrative staff.

#### Access to Documents

Further, during our site visit, we noted that the documents related to the Department's contract were stored in a separately designated and secured room. The documents were labeled:

Important Note: This file may not be viewed by [attorneys assigned to the spent nuclear fuel litigation] or any other members of the firm's professional or support staffs assigned to work on behalf of [the firm's spent nuclear fuel clients] in connection with claims against the United States Department of Energy involving the disposal of spent nuclear fuel....

#### Access to Electronic Documents

Finally, we observed Morgan Lewis' screening mechanism for access to electronic documents. Specifically, documents related to the Department's contract were withheld from the firm's "public" database and were placed in a "private" section of the database. As of December 2007, a separate "security group" was created within the firm's computer network that allowed access to documents related to the Department's contract only to specified personnel authorized to work on those respective matters. For demonstration purposes, a Morgan Lewis staff member who was not assigned to the Department's contract attempted to gain access to the files, and the system did not reveal any records related to the firm's work on the Department's contract.

### **WORK FOR THE NUCLEAR ENERGY INSTITUTE**

The Nevada delegation also raised a concern that Morgan Lewis had a potential conflict of interest as a result of its work for the Nuclear Energy Institute (NEI). The NEI is a nuclear energy industry trade group, and its members include commercial utilities with

spent nuclear fuel destined for Yucca Mountain. The NEI, with member participation, also develops policy on key legislative and regulatory issues affecting the nuclear industry.

To address a specific concern regarding Morgan Lewis' lobbying activities for NEI, we reviewed the U.S. Senate Lobby Disclosure Act database and the U.S. House of Representatives Lobbying Disclosure Filing Search as of January 23, 2008. An examination of these sources indicated that Morgan Lewis terminated its registration as a lobbyist for the NEI on July 9, 2002.

Morgan Lewis disclosed to the Department that it had periodically advised the NEI on "matters involving the Nuclear Waste Policy Act, spent nuclear fuel, high-level waste, and other related matters." Nonetheless, the firm asserted that "such work over the twelve months [preceding the contract award] has not related factually, commercially or legally to the Yucca Mountain Repository licensing." The firm also reported in its disclosures that it was a member of the NEI.

To address possible conflicts of interest, the firm's pre-award disclosure and the subsequent contract stated that the firm "will not perform any work, including being a registered lobbyist, where such work for any organization or individual directly involves matters factually, commercially, or legally related to the Yucca Mountain Repository licensing."

We questioned responsible Department officials on this subject. Department officials informed us that prior to the award of the contract, they held follow-up discussions with Morgan Lewis to more fully develop the disclosures. As a result of these discussions, the firm modified its disclosures, and provided additional clarification of its work on behalf of NEI. Department officials informed us that, based on their discussions with Morgan Lewis, they did not view the firm's work for NEI as a conflict, and therefore did not seek a plan of mitigation or waiver.

However, the procurement file did not contain a "trail" of the Department's review of the disclosures. Such a document would have allowed us to determine if the Department adequately addressed whether the disclosed issues presented a conflict of interest and, if so, whether they had been effectively mitigated.

#### **PRIOR WORK – SAFETY CONSCIOUS WORK ENVIRONMENT**

Concerns related to Morgan Lewis' prior work for the Department in 2001 were also raised. The concerns were that the firm potentially:

- Looked past critical flaws in the Department's quality assurance program;
- Targeted a quality assurance official, who was subsequently dismissed; and,
- Was placed in a position of choosing between protecting itself, and ensuring that the Department's quality assurance deficiencies have been adequately addressed.

To address these issues, we:

- Compared Morgan Lewis' 2001 scope of work with the 2007 scope of work;
- Reviewed Morgan Lewis' 2001 report on the Safety Conscious Work Environment;
- Reviewed the U.S. Department of Labor's (Labor) decision on the termination of a quality assurance senior official;
- Reviewed the NRC's license application requirements for a quality assurance program; and,
- Reviewed recent reports on the Department's quality assurance program.

#### 2001 Report – Safety Conscious Work Environment

Our review of the prior work showed that Morgan Lewis was critical of the safety conscious work environment in existence at Yucca Mountain at that time and its report included recommendations for improvement. According to the 2001 scope of work, the Department retained Morgan Lewis to, in part, assess and make recommendations regarding its contractor's safety conscious work environment. The firm used the NRC's policy statement *Freedom of Employees in the Nuclear Industry to Raise Concerns Without Fear of Retaliation*, May 14, 1996, and nuclear industry safety conscious work environment guidelines to perform its review. The NRC defined a safety conscious work environment as one in which employees feel free to raise safety concerns, both to the management and to the NRC, without fear of retaliation.

Morgan Lewis presented the results of its work in the document *Safety Conscious Work Environment Final Report*, dated August 28, 2001. According to the report, senior contractor management allowed an unhealthy safety conscious work environment within the quality assurance organization and did not initiate an integrated, broader effort to create a uniform set of expectations for the safety conscious work environment throughout the project. The report further disclosed that past attempts to enhance the work environment were ineffective and eroded employee confidence in management's ability to make meaningful changes necessary to create a safety conscious work environment consistent with NRC expectations. The report made a number of recommendations to assist management in undertaking the initiative and setting the tone for a safety conscious work environment.

#### Dismissal of A Quality Assurance Official

An analysis of Morgan Lewis' 2001 report and related documentation showed that the review addressed the role and activities of a quality assurance official working for a contractor on the Yucca Mountain Project. Specifically, the Department tasked Morgan Lewis to investigate certain allegations related to actions taken by a quality assurance official. In addition to its findings on the overall safety conscious work environment, Morgan Lewis found that this official had abused his authority in a number of respects.

According to the report, interviews with employees disclosed that the official had retaliated against an individual, and that this abuse contributed to the safety conscious work environment's problems. Following the report's release, the senior official was terminated.

#### Department of Labor Decision

The terminated employee protested the termination and appealed the decision to the Department of Labor. The Labor regional administrator was critical that the employer based the termination on the Morgan Lewis report and stated that the report had:

Insufficient verifiable and credible evidence in it to conclude that it is not more than a sophisticated recitation of anonymous charges designed to provide pretextual reasons to support an already decided upon course of action to terminate [the employee].

The regional administrator found that the termination violated the employee's protected activities under the Energy Reorganization Act. In addition, the regional administrator stated that the: (1) employer did not complete an independent onsite investigation, (2) employee was not provided a final copy of the report, or (3) employee was not provided an opportunity to rebut the charges or appeal the termination.

#### Status of Quality Assurance Program

During our review, officials noted that there had been significant evolution of the quality assurance program for the Yucca Mountain Project since 2001, and the current program had been reviewed by independent parties and was found to be generally competent. We reviewed the record of reports on the quality assurance program for Yucca Mountain. As far back as 2005, the Office of Inspector General reported on quality assurance challenges at the project (see Appendix 2). However, according to the Government Accountability Office, as of 2007, the Department made progress in implementing the quality assurance recommendations made in its March 2006 report. The report cautioned that some of the recommendations would take several years to resolve. Further, an October 2007 review performed by a contractor noted that the Department's quality assurance program saw significant improvements and successes in correcting historical quality-related problems. The results of the review deemed the existing quality assurance program as being implemented consistent with standard nuclear industry practices.

#### Consideration of 2001 Work

Morgan Lewis included its 2001 work in its pre-award disclosures for the 2007 contract. We interviewed Department officials regarding the firm's 2001 work, and officials stated that the quality of the firm's work was acceptable. According to Department officials, Morgan Lewis will not be placed in a position of defending or protecting its prior work as part of its current contract requirements.

## APPENDIX 1

### OBJECTIVE, SCOPE, AND METHODOLOGY

#### **OBJECTIVE**

The objective of our review was to examine the Department of Energy's (Department) award and administration of its September 2007 contract for legal services with Morgan, Lewis, and Bockius LLP (Morgan Lewis).

#### **SCOPE**

The review was performed from December 2007 through March 2008 at the Department's Headquarters in Washington, D.C. In particular, the review examined the procurement of the contract and the internal controls established by the Department and Morgan Lewis to mitigate conflicts of interest.

#### **METHODOLOGY**

To assess the Department's award and administration of its September 2007 contract for legal services, we:

- Compared the Department's procurement strategy for its 1999 and 2003 legal services contracts with the procurement strategy for the 2007 contract;
- Determined the applicable laws and regulations related to organizational conflicts of interest;
- Reviewed the procurement files for the 2007 contract;
- Reviewed Morgan Lewis' plan for mitigating potential conflicts of interest;
- Performed a site visit to Morgan Lewis' Washington, D.C., office and interviewed key personnel and observed aspects of the implementation of the mitigation plan as of January 2008;
- Analyzed invoices of time charges submitted to the Department as of November 26, 2007;
- Reviewed Morgan Lewis' disclosures related to its work for the Nuclear Energy Institute;
- Searched the U.S. Senate Lobby Disclosure Act database and the United States House of Representatives Lobbying Disclosure Filing Search and determined Morgan Lewis' status as a lobbyist for the Nuclear Energy Institute;

- Reviewed Morgan Lewis' 2001 work for the Department and compared it to the 2007 scope of work; and,
- Interviewed Department officials from the Office of General Counsel, Office of Procurement and Assistance Management, and the Office of Civilian Radioactive Waste Management.

## APPENDIX 2

### PRIOR REPORTS

#### Office of Inspector General

- *Review of Alleged Conflicts of Interest Involving a Legal Services Contract for the Yucca Mountain Project* (DOE/IG-I01IG001, November 2001). The review found that a legal services contractor contemporaneously served as a registered lobbyist for the Nuclear Energy Institute while under contract for legal services for the Yucca Mountain Project and failed to disclose these lobbying activities to the Department of Energy (Department). The Office of Inspector General recommended an evaluation and determination as to whether the legal services contractor violated the terms of its contract or otherwise acted in a manner not in keeping with its professional ethical standards to the Department.
- *Quality Assurance Weaknesses in the Review of Yucca Mountain Electronic Mail for Relevancy to the Licensing Process* (DOE/IG-0708, November 2005). The review identified potential quality assurance issues that had not been entered into the Corrective Action Program. The Nuclear Regulatory Commission (NRC) process for granting a license for the repository required that the Department publicly disclose on a website all documents, including e-mails, relevant to the process. The review found that the process for examining the archived e-mails did not fully assure that quality assurance issues were promptly identified, investigated, reported and resolved. The Office of Inspector General recommended that the Department expand its quality assurance-related search effort to include a more comprehensive review of the archived e-mails.
- *The Office of Civilian Radioactive Waste Management's Corrective Action Program* (DOE/IG-0736, August 2006). The Corrective Action Program was not effectively managing and resolving conditions adverse to quality at the Yucca Mountain Project. Specifically, over 100 potential conditions were not being managed in the Corrective Action Program system, but should have been. Also, more than half of the most significant planned corrective actions had not been implemented in a timely manner. Finally, the report noted that conditions continued to recur even after management reported that appropriate corrective actions had been taken. Corrective Action Program officials did not always support employee participation in the process; make needed improvements to the system and procedures; review the effectiveness of corrective actions; and, utilize the system's trend analysis capabilities to identify repeat occurrences and generic issues. The Office of Inspector General made several recommendations to further assist management in ensuring that the Corrective Action Program meets its goals.
- *Investigation of Allegations Involving False Statements and False Claims at the Yucca Mountain Project* (DOE/IG Case No. I05LV002, April 25, 2006). The Office of Inspector General initiated a criminal investigation focusing on potential falsification of research data pertaining to computer modeling of "net water

infiltration" of the Yucca Mountain repository and false representation of compliance with Yucca Mountain's Quality Assurance requirements. The United States Attorney's office declined to pursue prosecution. Nonetheless, the actions of those involved – which have been described by observers as irresponsible and reckless – have had the effect of undermining public confidence in the quality of the science of the Yucca Mountain Project. Department of Energy program officials informed us that the Department initiated steps to remediate or replace certain work of the Geological Survey. This will be a costly, time-consuming process with significant impact on the Yucca Mountain Project. Yet, we believe that it is an unavoidable step if quality assurance concerns emanating from the e-mail episode are to be satisfactorily addressed.

#### Government Accountability Office

- *Yucca Mountain – DOE Has Improved Its Quality Assurance Program, but Whether Its Application for a NRC License Will Be High Quality is Unclear* (August 2007, GAO-07-1010). The Government Accountability Office (GAO) reported that the Department set the June 30, 2008 date for filing a repository license application with the NRC. However, it is unclear as to whether DOE's license application would be of sufficient quality to enable NRC to conduct a timely review. The GAO report also noted that the Department had made progress in resolving the quality assurance recommendations and challenges identified in its March 2006 report, including taking several important actions to change the organizational culture. No recommendations were made in this report.
- *Yucca Mountain – Quality Assurance at DOE's Planned Nuclear Waste Repository Needs Increased Management Attention* (March 2006, GAO-06-313). The GAO reported that the Department continued to face substantial quality assurance problems and other challenges that could further delay the license application process. In the report, GAO cited ineffective management tools in addressing these challenges. GAO recommended that the Department: reassess the coverage of their quality assurance management tools to ensure effective monitoring of issues, incorporate project wide trend analysis, establish quality guidelines for trend evaluations, develop consistent performance indicators, and, focus on the significance of monitored conditions.
- *Yucca Mountain – Persistent Quality Assurance Problems Could Delay Repository Licensing and Operation* (April 2004, GAO-04-460). GAO identified lingering quality problems with data, models, and software and continuing management weaknesses. The Department developed a corrective action plan in 2002 to fix recurring problems with the data; however, GAO found that the plan lacked objective measurements and time frames for determining success. GAO recommended the Department revise the performance goals in the 2002 action plan to include quantifiable measures of the performance expected and time frames for achieving and maintaining this expected level of performance. Further, GAO recommended that the Department close the 2002 plan once sufficient evidence shows that the recurring quality assurance problems and management weaknesses that are causing them have been successfully corrected.

## CUSTOMER RESPONSE FORM

The Office of Inspector General has a continuing interest in improving the usefulness of its products. We wish to make our reports as responsive as possible to our customers' requirements, and, therefore, ask that you consider sharing your thoughts with us. On the back of this form, you may suggest improvements to enhance the effectiveness of future reports. Please include answers to the following questions if they are applicable to you:

1. What additional background information about the selection, scheduling, scope, or procedures of the review would have been helpful to the reader in understanding this report?
2. What additional information related to findings and recommendations could have been included in the report to assist management in implementing corrective actions?
3. What format, stylistic, or organizational changes might have made this report's overall message more clear to the reader?
4. What additional actions could the Office of Inspector General have taken on the issues discussed in this report which would have been helpful?
5. Please include your name and telephone number so that we may contact you should we have any questions about your comments.

Name \_\_\_\_\_ Date \_\_\_\_\_

Telephone \_\_\_\_\_ Organization \_\_\_\_\_

When you have completed this form, you may telefax it to the Office of Inspector General at (202) 586-0948, or you may mail it to:

Office of Inspector General (IG-1)  
Department of Energy  
Washington, DC 20585

ATTN: Customer Relations

If you wish to discuss this report or your comments with a staff member of the Office of Inspector General, please contact Judy Garland-Smith (202) 586-7828.

The Office of Inspector General wants to make the distribution of its reports as customer friendly and cost effective as possible. Therefore, this report will be available electronically through the Internet at the following address:

U.S. Department of Energy Office of Inspector General Home Page  
<http://www.ig.doe.gov>

Your comments would be appreciated and can be provided on the Customer Response Form attached to the report.

Exhibit B

Exhibit B

✓ [

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Washington, DC 20004  
Tel: 202.739.3000  
Fax: 202.739.3001  
www.morganlewis.com

Morgan Lewis  
COUNSELORS AT LAW

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Contains Commercial and Financial  
Information of Morgan Lewis that is  
Exempt from Disclosure, Pursuant to  
10 CFR § 1004.11

←

September 24, 2007

Attachment to section J of DE-AC01-07GC30822

Contracting Officer Representative  
U.S. Department of Energy  
Headquarters Procurement  
Services Divisions B (MA-642.1)  
1000 Independence Avenue, S.W.  
Washington, DC 20585-1615

Attention: DE-AC01-07GC30822

Re: (1) Organizational Conflict of Interest (OCI) Avoidance/Mitigation Plan Concerning Legal Assistance to the Department of Energy (DOE) Pursuant to Contract No. DE AC01-07GC30822; and (2) Response to Pre-Award Disclosure Requirements

The above-referenced contract requires that Morgan Lewis make certain pre-award disclosures, in accordance with section H.25, to update such disclosures within 15 days of contract award, and provide a plan to avoid or mitigate organizational conflicts of interest (Plan). This letter provides such a disclosure and Plan.

**A. Pre-award Disclosures in Accordance With Section H. 25A**

This provides Morgan Lewis' response to section H. 25A. "Pre-Award Disclosure Requirements" in contract DE-AC01-07GC30822. Morgan Lewis is able to render impartial assistance and advice to the Government, its objectivity in performing the contract work is not impaired, and it does not have an unfair competitive advantage by reason of any past (within the past twelve months), present, or currently planned financial, contractual, organizational, or other interests relating to the performance of the statement of work. In support of this statement, and as requested, Morgan Lewis is providing information on all current, planned (if any) and past (within the past twelve months) representations as required under section H. 25A. DOE's requested areas of disclosure and Morgan Lewis' responses are provided below:

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U.S. Department of Energy  
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1. Any work it has performed within the last twelve months, or is performing for any organization or individual where such work involves matters factually, commercially or legally related to the Yucca Mountain repository licensing.

Morgan Lewis has periodically advised numerous clients, including the Nuclear Energy Institute, in the past on matters involving the Nuclear Waste Policy Act, spent nuclear fuel, high-level waste and other related matters; however, such work over the past twelve months has not related factually, commercially or legally to the Yucca Mountain Repository licensing.

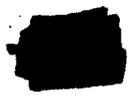
In 2001, Morgan Lewis did provide legal services to DOE related to allegations involving the quality assurance program at Yucca Mountain under Contract No. DE-AC08-01RW12154.

Morgan Lewis has no current or planned representations of other clients involving Yucca Mountain Repository licensing and, if selected, Morgan Lewis will not accept such representations.

2. Any work it has performed within the last twelve months, or is performing for any organization or individual where such work is factually, commercially or legally related to the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (10 C.F.R. 961).

Morgan Lewis currently performs work that is factually, commercially and legally related to the standard contract for disposal of spent nuclear fuel, including litigation, in connection with spent nuclear fuel disposal claims against DOE, for the following clients (the "Standard Contract Clients"):

- a. Arizona Public Service Company
- b. Constellation Energy Group and affiliates
- c. Dominion Resources and affiliates
- d. [ ]
- e. Entergy and affiliates
- f. [ ]
- g. FirstEnergy Corp. and affiliates
- h. General Atomic Company
- i. General Electric Company
- j. Interstate Power & Light
- k. Portland General Electric Co
- l. Progress Energy and affiliates
- m. Southern California Edison Company
- n. [ ]



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The interests of DOE and the interests of the Standard Contract Clients set forth above are not adverse with respect to the licensing of a high-level waste repository at Yucca Mountain, and Morgan Lewis will continue to provide legal advice to the Standard Contract Clients on all matters that are factually, commercially or legally related to the Standard Contract for disposal of spent nuclear fuel and high-level radioactive waste, including litigation.

Morgan Lewis also will advise clients pursuing applications for new nuclear plants relative to the standard contract, as well as other financial incentive programs under the Energy Policy Act of 2005 that are administered by the DOE. Any potential conflict of interest has been satisfied through mutual disclosures, waivers and consents further addressed in this letter.

3. Any work (including but not limited to any pending action, litigation or otherwise) it has performed within the last twelve months, or is performing for any organization or individual, where such work involves matters (i) potentially adverse to DOE; or (ii) in which the DOE otherwise has a significant interest of which the contractor should reasonably be expected to know or of which DOE has disclosed to the Contractor. This would include, but is not limited to, matters involving the Nuclear Waste Policy Act, or the management, storage, transportation or disposal of spent nuclear fuel, high-level waste, waste from reprocessing spent nuclear fuel, Greater Than Class C waste, or any other waste that DOE has disclosed to the Contractor may potentially be disposed in a geologic repository developed under the Nuclear Waste Policy Act.

Morgan Lewis represents or has represented within the last twelve months, the following clients on matters unrelated to Yucca Mountain Repository Licensing, but where it has performed work which involves matters that are potentially adverse to DOE, or in which DOE may have a significant interest, i.e. an "affected party."

<u>Client</u>	<u>Matter</u>	<u>Status</u>
1.	Sole source procurement for decontamination and decommissioning of gaseous diffusion plants	- Open
2.	its decommissioning; DOE Global Nuclear Energy Partnership and proposed	- Open

uranium enrichment  
facility

- 3. - False Claims Act litigation in the U.S. District Court for the Eastern District of Arkansas - Open
- 4. - Advice on potential loan guarantee applications for an advanced nuclear reactor and for pollution control equipment - Open
- 5. - NRC combined operating license advice; advice on cooperative agreement with DOE - Open
- 6. - DOE OI investigation; potential acquisition of DOE-owned depleted uranium tails - Open
- 7. - Intellectual property matters; design certification - Open
- 8. - Advice regarding an application to DOE for a specific authorization pursuant to 10 CFR Part 810 - Open
- 9. - Advice regarding an application to DOE for a grant, pursuant to - Open

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10 CFR Part 600

- 10. - Advice regarding an application for a patent waiver, pursuant to 10 CFR Part 784 - Open
- 11. - Advice regarding preparation of responses to DOE requests for proposals and expressions of interest concerning DOE contracts and programs; advice concerning issues arising under existing DOE contracts and subcontracts - Open
- 12. - Advice concerning matters arising under the Price Anderson Amendments Act and other issues concerning performance of DOE contracts - Open
- 13. - Advice concerning preparation of DOE requests for proposals. Advice concerning performance of DOE contracts and subcontracts.
- 14. - Advice concerning applicability of general/specific authorizations pursuant



		to 10 CFR Part 810.	
15.	-	DOE consents to intellectual property (IP) waivers; advice on SECA solicitation	Open
16.	-	Advice on reimbursement from DOE for [redacted] New York clean-up costs	Closed
17.	-	Advice on GNEP	Closed
18.	-	Advice on 10 CFR Part 851 implementation	Closed
19.	-	Advice concerning DOE's Advanced Inverter and Energy Management System Funding Opportunity Announcement	Open

We represent or have represented various other clients in matters in which DOE is not adverse but is considered to be an affected party. The types of matters in which we represent such clients include, among other things, labor and employment matters, employee discrimination claims under Section 211 of the Energy Reorganization Act, employee benefits issues, regulatory or contractual advice to DOE Contractors, NRC Licensing Advice, and Litigation.

**Additional Clients Where DOE  
 Was Affected Party in the Last 12 Months**

<u>Client</u>	<u>Matter</u>	<u>Status</u>
1.	- Labor and Employment Matters	- Open
2.	- NRC Licensing	- Open

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3.	- Labor and Employment matters	- Open
4.	- NRC Combined Operating License Advice	- Open
5.	- ISFSI Contract [ ]	- Open
6.	- Price Anderson Advice [ ]	- Closed
7.	- Standby support delay risk insurance program for new nuclear plants	- Open
8.	- Advice on Technology and E-commerce matters	- Open
9.	- Labor and Employment matters	- Open
10.	- Advice regarding DOE's Part 810 Rules	-

4. Any pending litigation in which it is representing any organization or individual (I) in which DOE is a named party, a disclosed real party in interest, or a participant, or (II) in which the DOE otherwise has a significant interest of which the Contractor should reasonably be expected to know or of which DOE has made a disclosure to the Contractor.

In *Kalodner v. Bodman*, Civ. No. 06-818 (D.D.C.), Morgan Lewis represented four co-defendants: Public Service Electric and Gas Co., Florida Power Corp., Eastman Chemical Co., and General Motors. The plaintiff sought a "common fund" attorney fee from DOE or, if barred from collecting it from DOE, from a putative defendant class of recipients of refunds collected by DOE from producers and resellers of crude oil on the basis of violations of crude oil price regulations in

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effect from August 1973 through January 1981. There were also separate lawsuits against DOE, Civ. No. 03-1991 and the putative class, Civ. No. 04-152, seeking the same remedy. The matter has been settled, an Order Approving Settlement has been issued by Judge Collyer, and stipulations of dismissal have been executed and will be filed upon DOE's payment of the settlement amount to Kalodner and final refund checks to refund recipients including our clients.

5. Any work it has performed within the last twelve months or is performing for any agency, subdivision or other instrumentality of the State of Nevada, the City of Las Vegas, any county or locality in Nevada or Inyo County, California or any affected Indian tribe as defined in the Nuclear Waste Policy Act. DOE has provided Contractor with a current list of affected Indian tribes within the meaning of the Nuclear Waste Policy Act and shall update such list from time to time as appropriate.

Morgan Lewis has no such past or current representations.

6. Any work it has performed within the last twelve months or is performing for any management and operating or management and integration contractor of the DOE, as identified by DOE and communicated to the Contractor.

Morgan Lewis represents several DOE management and operating or management and integration contractors, typically on labor and employment, discrimination claims under Section 211 of the Energy Reorganization Act of 1974, or nuclear regulatory or licensing matters. None of these representations are adverse to DOE and none relate to licensing a repository at Yucca Mountain. These representations are summarized in response to Section A.3 herein.

7. Any work, not included in items 1-6, it has performed within the last twelve months or is performing that it believes in good faith and after reasonable investigation could be considered an apparent, potential or actual organizational conflict of interest.

Morgan Lewis is currently aware of no such apparent, potential or actual organizational conflicts of interest.

In addition to the foregoing disclosures in accordance with Section H.25, Morgan Lewis desires to disclose its memberships in the following energy-related organizations: (1) Nuclear Energy Institute; (2) U.S. Energy Association; (3) World Nuclear Association (membership was terminated at the end of 2006); (4) DOE Contractor Attorneys Association, (5) Energy Facilities Contractors Group; (6) The Edison Electric Institute (EEI); and (7) The Nuclear Sub-Committee of the Utilities, Transportation and Communications Section, of the American Bar Association.

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**Morgan Lewis**  
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**B. Organizational Conflict of Interest (OCI) Avoidance/Mitigation Plan**

This OCI Avoidance/Mitigation Plan addresses any potential conflicts of interest or appearances of a conflict of interest that the firm or any of its professionals would have with working under contract to DOE. As set forth in section A, above, DOE has identified matters that potentially pose issues.

In this OCI avoidance/mitigation plan, we first outline our general approach to conflicts, recite how we have addressed conflicts with DOE in our past representations of the Department, and provide the basis for our conclusion that we have no disqualifying conflict. Next, we identify those potential waivable conflicts under each category listed in section H. 25, provide our explanation as to why each is not disqualifying, and propose measures to mitigate each conflict.

We actively manage potential conflicts of interest through extensive due diligence reviews, disclosures, informed waivers, and the implementation of screening procedures between teams of lawyers and support staff, if necessary or appropriate. Many of our clients understand that, if they wish to retain knowledgeable and experienced lawyers with special expertise in a particular industry, they may need to waive potential conflicts of interest resulting from existing representations of other clients in that industry on unrelated matters. We have developed procedures which enable our clients to grant such waivers with assurance that their confidences will be maintained and that they will receive the finest professional services available.

Morgan Lewis maintains a Conflicts Avoidance Database to assist in the identification of potential conflicts of interest. We will not represent a client with an interest that may be adverse to that of another client unless both clients have consented to the proposed representation. We utilize a centrally-managed process for new business intake, in which potential conflicts of interest are identified, disclosed, and resolved prior to proceeding with a new representation. Written engagement letters confirm the disclosures and provide prospective waivers and the resolution of conflicts of interest. In addition, as added assurance, Morgan Lewis requires approval by a designated partner before new matters are accepted related to certain designated industries or certain types of matters. The firm has a Standing Committee on Conflicts and Professional Responsibility whose members provide advice and counsel about the application of applicable ethical standards and precedents to resolve issues that are identified during our due diligence reviews.

Some potential conflicts of interest are such that a waiver would not suffice to resolve the potential conflict and the representation may not be undertaken, but other potential conflicts of interest can be resolved by waivers. A conflict would not be waivable if it involved representing adverse positions in the same matter (*see* Rule 1.7(a) D.C. Rules of Professional Conduct.)

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Morgan Lewis does not represent any clients that would give rise to unwaivable conflicts of interest from the perspective of the proposed representation of DOE in the licensing of a repository at Yucca Mountain. Morgan Lewis does represent clients in matters where the interests of our clients are adverse to the interest of DOE, or adverse to the interests of the United States. However, each of these potential conflicts of interest is waivable because the firm is not representing any other client in connection with a matter related to licensing of a repository at Yucca Mountain (*see* Rule 1.7(b)). Consequently, each of these potential conflicts may be resolved through disclosure, reciprocal waivers, and as an extra safeguard, screening procedures. This approach has been accepted in the past by DOE and other agencies of the U.S. Government which Morgan Lewis is currently representing or has represented in the past. With effectively all Morgan Lewis clients which Morgan Lewis represents in matters adverse to DOE, there are in place with those clients prospective waivers permitting Morgan Lewis to represent DOE in unrelated matters. In addition, Morgan Lewis will obtain from each such client confirming waiver letters in the form attached. With respect to future representations of new clients in matters that are adverse to DOE but substantially unrelated to the licensing of a repository at Yucca Mountain, Morgan Lewis will obtain similar waivers as a condition for undertaking such representations.

Consistent with this process, we have an established record of working for DOE and its contractors. In 2001, we were retained by DOE to investigate allegations related to the Yucca Mountain quality assurance organization and to advise on the overall safety-conscious work environment at Yucca Mountain. In 2002, we were retained by DOE to provide training at the Hanford site on the creation and maintenance of a safety-conscious work environment. More recently, we were retained by DOE to represent the agency in a contested NRC hearing on an export license application for plutonium to be used to fabricate MOX fuel lead test assemblies. In addition, we have worked with various DOE contractors on NRC and non-NRC issues, including

We have worked with DOE and these other clients to resolve potential conflicts of interest in each matter. We believe that the experience we have gained through these representations have strengthened our sensitivity to DOE's need that we effectively manage professional ethics issues.

In contemplation of being retained, we have worked with DOE to fully identify, disclose, and assess all of the current Morgan Lewis clients that are involved in pending matters where the interests of our other clients may be potentially adverse to DOE. The following discussion proposes actions to resolve the conflicts identified in section A of this letter; specifically during the term of this contract with DOE:

- Morgan Lewis will not perform any work, including being a registered lobbyist, where such work for any organization or individual directly involves matters factually, commercially or legally related to the Yucca Mountain Repository licensing.

**Contracting Officer Representative  
U.S. Department of Energy  
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- **Morgan Lewis will continue to perform work related to the Standard Contract Clients as set forth in section A.2 of this letter, but will establish an ethical screen as to such matters between those lawyers working on standard contract matters and those lawyers working under the subject DOE contract as set forth in Attachment A.**
- **Morgan Lewis will not perform any legal services for any agency, subdivision or instrumentality of the State of Nevada, City of Las Vegas, or other entity listed in Section A.5 above.**

**As previously discussed, representations of the Standard Contract Clients would present potential conflicts of interest; however, the potential conflicts can be waived because the representations would not constitute representation of two parties with adverse interests in the same matter. The forum for these representations is the U.S. Court of Federal Claims, rather than the NRC, which will be the forum for the licensing of the Yucca Mountain facility. While all of the Standard Contract Clients fully support DOE's efforts to license the repository, Morgan Lewis would not represent the interests of these companies in the NRC licensing proceeding for the repository. Moreover, the subject matter in the licensing proceeding will be substantially different from the contractual obligations and damages issues that will be considered in the proceedings in the U.S. Court of Federal Claims. Accordingly, Morgan Lewis proposes to resolve these potential conflicts of interests through disclosure, reciprocal waivers of the potential conflicts of interest, and confidentiality commitments to each client.**

**As an extra safeguard, Morgan Lewis will implement screening procedures to ensure that the personnel working on the Standard Contract claims will be completely screened off from access to any information related to licensing of the repository, and vice-versa. Morgan Lewis has routinely used these types of arrangements to resolve similar conflicts in the past and is highly confident that the nuclear energy clients we are representing on these claims will agree to such arrangements here and waive any potential conflicts. The sample internal screening memorandum that we would propose to promulgate within the firm is contained in Attachment A.**

**Morgan Lewis does not currently represent a plaintiff in litigation against the DOE other than as described above in section A. Morgan Lewis does represent various plaintiffs in litigation against the United States. However, these representations will not present a conflict of interest with the DOE because of the recognized ethical standard that representation of one U.S. Government agency does not preclude the representation of clients with interests adverse to other U.S. Government agencies.**

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In summary, we believe that all potentially adverse representations are unrelated to the proposed licensing of the Yucca Mountain Repository, and therefore may be waived. Morgan Lewis proposes that these potential conflicts be resolved through disclosure and reciprocal waivers as described above.

Sincerely,

[ ]

Attachments: As stated

**Proposed Screening Memorandum**

**TO:** Energy Practice Group  
Litigation Practice Group

**FROM:** Firm Conflicts and Professional  
Responsibility Committee  
Energy Practice Group  
Litigation Practice Group

**DATE:** \_\_\_\_\_

**SUBJECT:** Yucca Mountain Representation

This is to advise all Morgan Lewis attorneys, paralegals, and other employees in the Energy Practice Group and selected attorneys, paralegals and other employees in the Litigation Practice Group about the screening arrangements which have been established with respect to our potential representation of the United States Department of Energy (DOE) in connection with the proposed Spent Nuclear Fuel (SNF) and High-Level Radioactive Waste (HLW) Repository at Yucca Mountain, Nevada (the "Yucca Mountain Representation"). This representation will include the licensing proceedings before the United States Nuclear Regulatory Commission (NRC) for the SNF/HLW Repository and other proceedings related to the SNF/HLW Repository. The attorneys currently representing other nuclear energy clients of the firm ("the "Standard Contract Clients") in connection with claims against DOE involving the disposal of SNF pursuant to the Standard Contracts entered into under the Nuclear Waste Policy Act (the "SNF Claims") are being screened from any participation, including advice, consultation, or discussion of any sort, in the Yucca Mountain Representation. Conversely, the attorneys who will be representing DOE on the Yucca Mountain Representation are being screened from any participation in the SNF Claims.

The attorneys who will be representing DOE on the Yucca Mountain Representation, including

have been directed not to discuss this matter with any personnel involved in the SNF Claims for the Standard Contract Clients and not to disclose any

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confidential information obtained from DOE to any other firm personnel working on the SNF Claims. Similar directions have been provided to the personnel representing the Standard Contract Clients on the SNF Claims, including

with respect to restrictions on discussions with, and disclosures to, personnel who will be representing DOE on the Yucca Mountain Representation.

A sticker containing the following notice will be placed in a prominent location in the file rooms and on the file cabinets containing DOE files relating to the Yucca Mountain Representation:

**NOTICE**

These files contain or may contain material relevant to the representation of the Department of Energy (DOE) on the Yucca Mountain Spent Nuclear Fuel (SNF) and High Level Waste (HLW) Repository. These files are being screened from all personnel representing the Standard Contract Clients of the firm on matters related to SNF Claims against DOE. No firm personnel, legal or otherwise, who are working on matters related to such SNF Claims against DOE are permitted to review, copy, or otherwise have any access to the documents contained in these files.

A sticker containing the following notice will also be placed in a prominent location in the file rooms and on the file cabinets containing files of Other Nuclear Clients relating to the SNF Claims.

**NOTICE**

These files contain or may contain material relevant to Spent Nuclear Fuel (SNF) Claims against the Department of Energy (DOE) on behalf of the Standard Contract Clients of the firm. These files are being screened from all personnel representing DOE on the Yucca Mountain SNF and HLW Repository. No firm personnel, legal or otherwise, who are working on the Yucca Mountain Representation are permitted to review, copy, or otherwise have any access to the documents contained in these files.

Separate "security groups" are being created within the Firm's computer network that allow access to documents related to these respective matters only to specified personnel authorized to work on these matters. Documents related to these matters will be withheld from the Work

**Product Retrieval System databases of the Energy Section and the Litigation Section until such time as these matters are concluded.**

**The Responsible Attorneys and Attorneys in Charge of each matter covered by these screening arrangements shall provide a copy of this memorandum to each attorney or paralegal assigned to work on the Yucca Mountain Representation for DOE or SNF Claims for the Standard Contract Clients.**

**Anyone with any questions concerning these screening arrangements or the applicability of these arrangements with respect to a particular individual or matter should contact Tom Reinert immediately.**

**Draft Waiver Letter to  
Nuclear Energy Clients with High-Level Waste Claims**

[NAME]  
[ADDRESS]

Re: Proposed Yucca Mountain Representation

Dear \_\_\_\_\_:

As we discussed in our recent telephone conversation, Morgan, Lewis & Bockius LLP (Morgan Lewis) has been selected by the United States Department of Energy (DOE) to provide legal services to DOE in connection with the licensing proceedings for the proposed Spent Nuclear Fuel (SNF) and High-Level Radioactive Waste (HLW) Repository at Yucca Mountain, Nevada before the United States Nuclear Regulatory Commission (NRC) and other administrative and judicial proceedings related to the SNF and HLW Repository (the "Yucca Mountain Representation").

As you know, Morgan Lewis is currently advising or representing a number of nuclear energy companies, including [Client Name], (collectively the "Standard Contract Clients") in connection with claims against the United States arising out of the Standard Contracts for the disposal of SNF which DOE entered into with these companies under the Nuclear Waste Policy Act (the "SNF Claims").

The interests of DOE and our Standard Contract Clients are clearly not adverse with respect to the licensing of the SNF and HLW Repository because the nuclear industry fully supports this project. Moreover, the proposed Yucca Mountain Representation and the SNF Claims involve different issues in disputes between different parties before different tribunals. Morgan Lewis is confident that the representation of DOE on the Yucca Mountain Representation will not impair our ability to exercise our independent professional judgment on behalf of both DOE and our Standard Contract Clients, and fulfill our other professional responsibilities to both DOE and our Standard Contract Clients. Accordingly, we have concluded that we may proceed with the proposed Yucca Mountain Representation, provided that DOE and all of our Standard Contract Clients, including [Client Name], consent to this representation under the arrangements described below.

Morgan Lewis will not use or disclose any sensitive, proprietary, or confidential information of a non-public nature which we receive from our representation of DOE on the Yucca Mountain Representation in any way in connection with the representation of any of our Standard Contract Clients on the SNF Claims. Conversely, Morgan Lewis will not use or disclose any sensitive, proprietary, or confidential information of a non-public nature which we receive from our

representation of any of our Standard Contract Clients on the SNF Claims in any way in connection with our representation of DOE on the Yucca Mountain Representation.

Morgan Lewis will also adopt comprehensive internal screening procedures to ensure that (a) the attorneys and other personnel involved in the representation of DOE on the Yucca Mountain Representation will be screened from any participation (including advice, consultation, or discussion of any sort) in the representation of our Standard Contract Clients on the SNF Claims and access to any documents or files (including electronic files) related to the SNF Claims, and (b) the attorneys and other personnel involved in the representation of our Standard Contract Clients on the SNF Claims will be similarly screened from participation in the Yucca Mountain Representation and access to documents and files related to the Yucca Mountain Representation.

Finally, you agree that Morgan Lewis can, without the prior consent of the DOE and the Standard Contract Client involved, undertake any future representation in which the interests of DOE and such Standard Contract Clients may be adverse, as long as such representation is substantially related to one of the existing or proposed representations described herein, essentially a continuation of such representation, or is unrelated to the licensing of the repository at Yucca Mountain.

In order to proceed with the proposed representation of DOE on the Yucca Mountain Representation, we need to confirm that both DOE and our Standard Contract Clients have been fully informed with respect to potential conflicts and that DOE and all of our Standard Contract Clients have consented to our representation of DOE under the arrangements described above. I would therefore appreciate it if you would confirm [Client Name]'s consent to these arrangements by signing this letter and the enclosed duplicate originals in the space provided below and returning two signed copies to me in the enclosed self-addressed, postage-prepaid envelope.

We greatly appreciate your cooperation and willingness to allow Morgan Lewis to undertake this extremely important representation on behalf of DOE on this basis.

Sincerely yours,

\_\_\_\_\_

Acknowledged and Agreed to:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Company: \_\_\_\_\_  
Date: \_\_\_\_\_

1-WA/2829782.1

Exhibit C

Exhibit C



**Department of Energy**  
Washington, DC 20585

**WAIVER UNDER FAR 9.503**

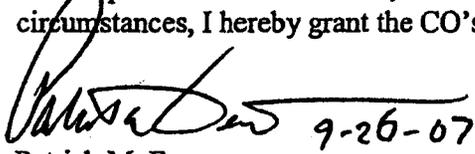
The Department of Energy (DOE) plans to hire Morgan, Lewis & Bockius, LLP (ML) to provide legal services with respect to the licensing of the proposed Yucca Mountain repository (the "Yucca Mountain licensing proceeding"). ML currently represents certain utilities in lawsuits against DOE relating to the failure of DOE to begin acceptance by 1998 of spent nuclear fuel at the Yucca Mountain repository under the Standard Contract for Disposal of Spent Nuclear Fuel (the "Standard Contract litigation").

The Contracting Officer (CO) in charge of this procurement has determined that retention of ML would give rise to a conflict of interest for purposes of the Organizational Conflicts of Interest (OCI) provisions of the Federal Acquisition Regulation (FAR) and DOE Acquisition Regulation (DEAR). To a much lesser extent, there are other matters wherein ML represents clients in matters that have no connection to Yucca Mountain but are adverse to DOE or the U.S. Government. The DOE Office of General Counsel (GC) has advised that this situation, particularly the Standard Contract litigation, would give rise to a conflict regarding professional legal ethics under the DC Rules of Professional Conduct. GC has also advised that any legal ethical conflict is waivable; GC will provide a waiver on that issue that will be added to the Contract File.

ML has proposed, however, a comprehensive mitigation plan that would mitigate any conflict to the maximum extent practical. After examining the disclosure of potential conflicts and the mitigation plan submitted by ML, GC has concluded that the mitigation plan should mitigate any legal ethics conflict and/or any OCI to the maximum extent practicable. The CO has agreed with that conclusion.

Although finding that any OCI is adequately mitigated, in an abundance of caution, the CO requested a waiver under FAR 9.504 of any OCI relating to ML's representation of the Department in the Yucca Mountain licensing proceeding caused by ML's representation of the identified entities in the Standard Contract litigation and/or litigation unrelated to the Yucca Mountain repository wherein ML represents entities in matters that are adverse to the Department.

Due to the critical need for legal services involving expertise in NRC licensing to assist the Department in the Yucca Mountain licensing proceeding, it is in the best interest of the United States to award this contract even if an OCI existed. Moreover, the Department has determined that ML is the best choice to represent the Department in the Yucca Mountain licensing proceeding. Furthermore, any alternative law firm with NRC licensing expertise would have similar potential conflict issues, and ML has proposed a strong mitigation plan. Under the circumstances, I hereby grant the CO's request for waiver pursuant to FAR 9.503.



9-26-07

Patrick M. Ferraro  
Head of Contracting Activity