Director

September 1, 2004

The Honorable Joseph I. Lieberman
Ranking Minority Member
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Senator Lieberman:

The Office of Government Ethics (OGE) is pleased to respond to your letter of July 23, 2004 concerning our review of a report of investigation addressing various allegations against Steven Griles, the Department of the Interior's (DOI) Deputy Secretary, issued by the DOI Inspector General. You have raised concerns about OGE's review of this matter and seek clarification regarding several matters involving the exercise of OGE's responsibilities in connection with implementation of the ethics laws.

1. Your first question concerns the circumstances under which OGE will make final determinations about misconduct of individual employees. As you know, under our decentralized Government ethics program, OGE provides overall direction and leadership to the executive branch while agencies have primary responsibility for the day-to-day administration of their own ethics programs. 5 C.F.R. § 2638.102(a). In fulfilling this leadership role, OGE makes recommendations and provides advice to agencies, Designated Agency Ethics Officials (DAEOs), and employees to ensure compliance with the ethics rules. This authority may be exercised in response to a request for assistance or upon the Director's initiative. 5 C.F.R. § 2638.502. In order to provide effective recommendations and advice regarding questions concerning how ethics rules apply, it is often necessary for OGE to conclude that certain types of conduct may violate a particular rule. Determinations concerning employee conduct in this context generally address prospective conduct.

When an employee is alleged to have violated, or is continuing to violate, an ethics rule, however, it is primarily the responsibility of that employee's agency to investigate the allegations, make findings, and take appropriate action where a violation is found. While OGE has authority to undertake formal proceedings to make findings and recommend disciplinary or corrective action in cases of individual employee misconduct, as a practical matter OGE would not resort to such formalized proceedings unless it determines that an agency has not adequately investigated a case or has failed to take appropriate corrective action.

In this case OGE initiated correspondence with DOI's ethics office in 2002 asking that DOI assess whether Mr. Griles may have violated his ethics agreement or the Standards of Ethical Conduct in light of facts raised in a newspaper report. The DOI Office of the Inspector General (OIG) subsequently undertook an investigation into a number of allegations concerning Mr. Griles' conduct. Once its investigation was complete, the DOI OIG requested that OGE provide a legal analysis of the evidence in its report of investigation. In this context OGE provided its interpretation of the evidence, but did not make formal findings. Once the Secretary of the Interior (Secretary) received the DOI OIG's report and OGE's legal analysis, it was up to her to review the matter and take appropriate action.

You ask us why, given the documented deficiencies in the ethics program at DOI, we would defer to DOI to make findings in this case. OGE must follow specific procedures in order to make formal findings concerning individual employee misconduct. OGE deferred, as contemplated in the law, to the Secretary to make the necessary findings, not to the DOI ethics office. If the Secretary had requested further assistance from this Office in applying the law to the facts, we certainly would have assisted her. Moreover, as described in our response to question 5 below, OGE was aware that the Secretary's office was taking steps to improve the DOI ethics program during this period, so there was no reason to believe that DOI could not adequately address issues arising from the matters involving Mr. Griles.

2. You also ask whether the Secretary has provided a report as required by OGE regulations at 5 C.F.R. § 2638.503(c). As explained more fully below, the Secretary has not provided such a report because she was not required to do so in the circumstances involving Mr. Griles.

In addition to having authority to conduct its own investigations of individual employee misconduct when circumstances warrant, OGE may also recommend that the head of an agency undertake an investigation when the Director has reason to believe that an employee has violated, or is violating, ethics rules. 5 U.S.C. app. § 402(f)(2)(A)(ii) and 5 C.F.R. § 2638.503. When such a recommendation is made, the head of the agency must notify OGE when the agency initiates the investigation, 5 C.F.R. § 2638.503(b), and provide a report detailing the findings of fact and any actions taken. 5 C.F.R. § 2638.503(c).

OGE did not request that the Secretary conduct an investigation into matters involving Mr. Griles. In this case, we did correspond with the DOI ethics office regarding an article in the newspaper that raised an issue as to whether Mr. Griles may have violated his ethics agreement by contacting an EPA official regarding certain environmental impact statements, and requested that that office provide an assessment of the situation. After the DOI ethics office responded, we sought further clarification of several factual issues. DOI determined that in order to respond to our request for clarification, they would request that the OIG investigate the matter further. The resulting Inspector General report provides evidence concerning this matter as well as several other matters raised with the OIG by others, including your office. Under the circumstances, there would have been no reason for us to ask the Secretary to initiate another investigation.

3. You ask about OGE's authority to recommend or order disciplinary or corrective action. Under the Ethics in Government Act, OGE may recommend that the head of an agency take disciplinary action against an individual employee, or, in the case of ongoing misconduct, order corrective action, after it has made a finding. 5 U.S.C. app. § 402(f)(2)(A)(iii) and (iv).

In circumstances where OGE determines that an agency has improperly interpreted an ethics provision or improperly applied an ethics provision to the facts of a case, we may provide advice and recommendations necessary to ensure compliance with the rules. 5 C.F.R. § 2638.503(d)(4). In this case, based on her public statement, we understand that Secretary Norton discussed Mr. Griles' conduct with him and he acknowledged that he should have used better judgment. Given the limited range of

penalties available for a Presidential appointee and the fact that the conduct did not recur, no further action on our part was called for.

4. You ask us to address issues relating to Mr. Griles' ethics agreement specifically and OGE's role in overseeing implementation of ethics agreements generally. You also ask about the availability of a severance agreement in connection with review of Mr. Griles' nominee financial disclosure report. These issues are addressed separately, below.

The Ethics Agreement. With regard to Mr. Griles specifically, I would like to clear up an apparent misunderstanding about the scope of Mr. Griles' disqualifications. In his ethics agreement and memoranda documenting his agreement, as relevant here, Mr. Griles promised not to participate in any particular matter involving specific parties in which --

> 1) a former client is, or represents, a party for a period of one year from his appointment as Deputy Secretary; and,
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> 2) National and/or NES, Inc. (National) is, or represents, a party until two years after he receives a final severance payment, or approximately 2007.

With respect to his disqualification from matters involving former clients, it is worth noting that Mr. Griles' disqualification is broader than normally required for similarly situated appointees. Generally, new appointees promise not to participate in particular matters involving their former clients for whom they provided services within the *last 12 months*. Depending on when the appointee last provided services to a former client, this disqualification may last for up to one year after the appointee enters into Federal service. Therefore, such disqualifications usually do not cover former clients for whom the appointee last provided services more than one year prior to entering Federal service. In the ordinary case, it should not be difficult for the appointee to identify a complete list of former clients. Indeed, former clients for whom the appointee provided services that resulted in income exceeding $5,000 over a two-year period prior to their appointment are required to be reported in Schedule D, Part II of the nominee financial disclosure form.

Mr. Griles' disqualification is unusually broad in that it appears to require recusal from all former clients, *regardless of when Mr. Griles last performed services for them,* during the first year of Federal service. As a practical matter, we agree it may be extremely difficult for an appointee with this kind of disqualification to provide a comprehensive list of all former clients, especially for an appointee with an extensive and long career in private consulting -- records and memories simply may not be accurate or complete enough. However, Mr. Griles' disqualification is not typical and we do not believe it will be necessary for most appointees to reconstruct a client list covering an entire career in private consulting. In the future, OGE will carefully consider whether similarly broad disqualifications are desirable.

With respect to Mr. Griles' disqualification from matters involving National, pursuant to his ethics agreement, and consistent with the applicable rules, Mr. Griles is disqualified from matters involving National. He is not disqualified from matters involving each of National's current clients unless the client is also a former client of Mr. Griles or represented by National in the matter. For example, if ABC Corporation, which was not a former client of Mr. Griles, has a matter pending before the DOI, Mr. Griles is not prohibited from participating in that matter simply because ABC Corporation is a current National client - the disqualification would only apply if ABC is being represented *in that matter* by National.

Therefore, the relevant question in determining whether Mr. Griles violated his ethics agreement with regard to the second disqualification noted above is not whether a matter involves one or more of National's current clients, but whether the entity involved is being represented by National in that matter.

Regarding OGE's role in overseeing implementation of ethics agreements generally, a nominee who has executed an ethics agreement in connection with the confirmation process usually has up to three months from his Senate confirmation to provide evidence of compliance with the agreement. See 5 C.F.R. § 2634.802(b). Within this three-month period, the DAEO at the appointee's agency must receive evidence that the appointee has taken the steps necessary to meet his obligations under the ethics agreement, such as a written statement that the item the appointee promised to divest has been sold; a written

confirmation that promised resignations have occurred; and a copy of the appointee's recusal document identifying the matters from which he will be recused and describing the recusal screening process. See 5 U.S.C. app. § 110 and 5 C.F.R. § 2634.804. Thereafter, the enforcement of ongoing obligations, such as disqualifications that extend over all or part of an appointee's tenure in office, is the primary responsibility of the appointee and his agency.

Enclosed for your information is guidance OGE issued on June 1, 2004 concerning "Effective Screening Arrangements for Recusal Obligations."[1] The purpose of this memorandum is to provide detailed information and recommendations on how agencies can effectively carry out their responsibilities relating to compliance with, and enforcement of, ongoing recusal obligations of agency officials.

The Severance Agreement. The particular argument of the Government you inquire about and the pertinent part of the ensuing District Court decision in *Defenders of Wildlife v. Dep't of the Interior*, 314 F. Supp. 2d 1 (D.D.C. 2004), focused on the application of Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), and the case law concerning privileged or confidential commercial or financial information submitted by a person to the Government. DOI had withheld certain draft severance agreements sought by the FOIA requesters that Mr. Griles' former employer had submitted for review after assurance of confidential treatment to the extent appropriate under the FOIA.

Different standards for withholding sensitive commercial or financial information apply under FOIA Exemption 4 depending on whether a person is required to submit the information or whether the person submits it "voluntarily." *Compare National Parks & Conservation Authority v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (applying a withholding standard of substantial competitive harm or impairment of the Government's ability to collect necessary information in the future for information a person is required to submit to the Government by regulation,

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[1] U.S. Office of Government Ethics, *Memorandum dated June 1, 2004, from Marilyn L. Glynn, Acting Director, to Designated Agency Ethics Officials, General Counsels and Inspectors General Regarding Effective Screening Arrangements for Recusal Obligations*, at 3. ("OGE's 2004 Recusal Memorandum")

subpoena or otherwise as a condition of dealing with or obtaining a benefit from the Government) *with Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*) (applying a withholding standard of whether the submitter would customarily disclose to the public the information provided to the Government in the absence of an exercised requirement by an agency that the information be submitted).

Title I of the Ethics in Government Act, 5 U.S.C. app., title I; the implementing OGE regulations, codified at 5 C.F.R. part 2634; and Schedule C, Part II, of the Executive Branch Personnel Public Financial Disclosure Report form (SF 278) require the reporting of specific information on the status and terms, parties and date of agreements involving continuing payments from, and various other agreements and arrangements with, former private employers. The actual underlying agreement, however, is not required to be submitted to the Government nor attached to the form. Under the ethics laws and regulations, the Government does not have subpoena power or other compulsive enforcement authority to require the submission of a severance agreement, or drafts thereof by a nominee or private business. Rather, any refusal to provide further information about the agreement on the report form deemed necessary to permit complete conflict of interest analysis and resolution could lead to a report not being cleared by OGE and the agency concerned.

In addition, particularly in situations involving nominees and other incoming appointees, timing considerations can mean that report review and certification take place before any severance agreement is finalized. In searching for records responsive to the underlying FOIA requests in the *Defenders of Wildlife* case, neither OGE nor DOI located a copy of the final severance agreement in their files, though as noted DOI did review and retain some drafts thereof. The District Court found those drafts to have been properly withheld under FOIA exemption 4 pursuant to the *Critical Mass* "voluntariness" standard. *Defenders of Wildlife*, 314 F. Supp. 2d at 15-18.

Although a final severance agreement might at times be voluntarily provided by a nominee, submission of such a document would not be needed for conflict of interest analysis in most cases. Providing adequate descriptive information about an official's severance arrangement could be all that is required

to accomplish the dual purposes of financial disclosure and conflict of interest review and resolution under the Ethics Act and the OGE regulations. See sections 102(a)(7) and 106 of the Ethics Act, 5 U.S.C. app. §§ 102(a)(7) & 106, and 5 C.F.R. §§ 2634.306 & 2634.605 of OGE's regulations thereunder.

Upon review by OGE and agency ethics officials, additional information, including further details of a severance or other covered agreement with a former private employer, may sometimes be needed to assure proper reporting and fashioning of an appropriate ethics agreement, including recusal, divestiture and other undertakings, to avoid any conflicts between the nominee's private financial interests and forthcoming public duties under the conflict of interest laws and ethics regulations. We have not experienced a problem with obtaining any such additional information, or underlying documentation, upon request even in the absence of compulsory means. As noted, DOI did in fact obtain and review drafts of the incoming Deputy Secretary's severance agreement in the instant case.

As discussed previously, both OGE and the agencies have a role in ensuring that Government officials comply with their ethics agreements. In the case of a severance arrangement, the resignation from the private employment would be tracked, and any continuing pay-outs provided for would be reviewed by the agency concerned, and by OGE in the case of most Presidential appointees confirmed by the Senate, as reported on subsequent annual SF 278 reports. This compliance checking would not normally require access to an underlying agreement.

Given these processes for review of nominee reports and of compliance with ethics agreement undertakings, corrective action is not needed, nor would it necessarily lead to better compliance with any Government requests for additional information.

5. You ask about OGE reviews of DOI's ethics program and the nature of assistance OGE has provided to DOI regarding their ethics program.

As we noted in our March 12 letter, OGE concurs in the recommendations made by the DOI OIG in its report of investigation concerning the DOI ethics program. The DOI OIG touches on many concerns OGE has discussed with DOI on several occasions over the past several years.

OGE did not provide a copy of the March 12 letter directly to the DOI ethics office upon its issuance. Our role in this case was to provide advice to DOI OIG in connection with a specific report of investigation. We do not believe it would have been appropriate for us to provide copies of the letter, independent of the report, to others inside or outside the DOI before the OIG had an opportunity to review it. We understood from the OIG that the Secretary would receive a copy of our analysis with the report. We believe this was appropriate under the circumstances. In any event, much of our concern about the DOI ethics program stemmed from the fact that ethics advice was being given by DOI attorneys who were not part of DOI's ethics office. We had previously discussed these concerns with the DOI ethics office and the Secretary's office.

With regard to your specific question concerning program reviews since lifting the 1997 Notice of Deficiency, OGE has reviewed DOI's ethics programs two times. In 2000, we reviewed the ethics program in three DOI components: the Fish and Wildlife Service (FWS), Minerals Management Service (MMS), and the Bureau of Indian Affairs (BIA). We did not review the Departmental ethics office or the Office of the Secretary because the DOI OIG was performing a review at that time. We made two recommendations concerning FWS' ethics program, and 13 recommendations concerning the BIA ethics program. In November 2002, OGE performed a single issue review of advisory committees across several departments and agencies, including DOI.

Additionally, OGE's Director, Deputy Director, and General Counsel have met with the DOI IG and the Secretary's Chief of Staff and Deputy Chief of Staff to discuss concerns about the adequacy of ethics advice being rendered at DOI in light of a lack of communication and coordination between the ethics office and the Solicitor's Office, as noted above. DOI agreed to our recommendation that the ethics program be moved to the Solicitor's Office. Over the course of 2003, DOI briefed OGE periodically on their progress until the reorganization occurred in late 2003.

Currently, OGE has scheduled a review of DOI's ethics program to begin in November 2004. This review will focus specifically on the Office of the Secretary, the Minerals Management Service, the Bureau of Reclamation, and the U.S. Geological Survey. OGE will take this opportunity to review and

evaluate new internal controls put in place by the Secretary to ensure that ethics and recusal agreements are being enforced.

6. You ask whether OGE received any instructions concerning disclosure of the March 12 letter. OGE received no instructions from anyone regarding disclosure of this letter. We did agree that the OIG could disclose this letter to the Secretary as part of its report. We also agreed that the OIG would refer requests for public disclosure of the March 12 letter back to our Office. We understand the DOI Office of Public Affairs began releasing copies of the letter to the public in the afternoon of March 12.

7. You ask us to clarify our application of the rule concerning use of public office for private gain to the facts in the OIG's report about Mr. Griles' involvement in a dinner party hosted by Marc Himmelstein, Mr. Griles' former business associate. We did not intend in our letter to suggest that Mr. Griles could not be found to have engaged in conduct involving the use of public office for his own private gain, especially if the agency were to develop sufficient evidence of such personal gain.

Mr. Griles' personal financial interest in his former employer is really limited only to those matters that would directly and predictably affect the ability or willingness of his former employer to honor its contractual obligations to him, and we think it might be difficult to establish that any contacts made by Mr. Himmelstein at the party in question would have, or even appear to have, such an effect. Because it would be unnecessary to prove such personal gain, we thought that discussion of this subject would needlessly distract from the more palpable connections to Mr. Himmelstein's interests as a lobbyist.

8. You ask us to address OGE's analysis of the facts presented in the report about Mr. Griles' contacts with an EPA official concerning certain environmental impact statements (EISs) that had been prepared in connection with a resource management plan for the Powder River Basin in Montana and Wyoming. This is the issue about which we originally contacted the DOI ethics office in 2002 after press reports raised concerns about Mr. Griles' participation in the matter. The question raised was whether, by contacting an EPA official regarding the timing of the release of two EISs, Mr. Griles

improperly participated in a particular matter involving specific parties that involved his former employer and several of his former clients.

We believe that, given the factual and legal complexity of this issue, reasonable minds could disagree about whether Mr. Griles should have initiated contact with EPA on this matter. Resource management plans, and the EISs developed in connection with them, are often broad in scope, affecting the interests of a broad and diverse universe of people and entities. With respect to the resource management plan at issue here, however, there were component parts which were clearly particular matters involving specific parties, evidenced by the fact that several interested companies, including companies represented by Mr. Griles' former employer and a number of his former clients, agreed to pay for one of the required EISs.

As we stated in our March 12 letter, had we been asked for guidance prior to Mr. Griles' participation in this matter, we would have advised him not to contact the EPA official. However, in hindsight, and given the views of DOI on this issue, we do not believe it would be productive for us to make specific determinations about Mr. Griles' participation. This is especially true in light of the fact that shortly after initiating the communication with EPA, Mr. Griles contacted an attorney in the DOI Solicitor's Office seeking advice about whether he had violated his ethics agreement by contacting EPA. The ultimate outcome of a series of conversations concerning this matter was a subsequent written recusal dated May 8, 2002 clarifying that Mr. Griles was recused from participating in the EISs developed in connection with the resource development plan for the Powder River Basin. In other words, although reasonable minds could disagree about the nature of the matter at issue and whether it was proper for Mr. Griles to participate, once concerns were raised about his participation he acted promptly to address those concerns by issuing a recusal statement that erred on the side of caution. We have no other information that would suggest that he did not abide by that recusal.

9. You ask us two questions suggesting you are concerned about the appropriateness of Mr. Griles assigning James Cason, the Associate Deputy Secretary, to handle matters from which Mr. Griles is recused. You mention three specific instances where Mr. Cason acted in matters concerning a former client of Mr. Griles, including two instances where Mr. Cason participated

in the APTI contracts and one instance where an employee states that she reported to Mr. Cason regarding a matter involving offshore oil and gas leases after Mr. Griles recused himself from the matter.

With regard to the APTI matters, the report of investigation does not indicate that Mr. Cason was assigned to work on these matters as a result of Mr. Griles' disqualification. It appears that these matters came to Mr. Cason directly and were not referred to him by Mr. Griles' screener or otherwise as a result of Mr. Griles' disqualification from matters involving former clients. Therefore, it does not appear that Mr. Cason was acting as Mr. Griles' alternate in these matters.

Additionally, the fact that Mr. Griles is disqualified from participating in specific matters does not mean that all subordinate employees in his office also must be disqualified from the same specific matters. If the disqualifications of senior Government officials were construed this broadly, it would be difficult for any qualified individual to serve in a senior Government position effectively.

With respect to the general issue of whether Mr. Cason was an appropriate designee for matters from which Mr. Griles is recused, your letter suggests that you are concerned that Mr. Cason may not be impartial because he is a "principal aide" to Mr. Griles and derives authority directly from him. OGE does not generally second-guess determinations made by agencies concerning the selection of an individual to serve as a designee for an official who has an ongoing disqualification. In recent guidance on this subject we stated that:

> One issue that arises in this regard is whether a matter can be referred for action or assignment up or down the chain of command from the employee with the recusal obligation. In general, we believe it is a better practice not to refer matters to the employee's immediate subordinate if there is any indication that the subordinate may not be truly independent. For example, the perceived loyalty of a special assistant who has been working for many years with a recused appointee may create an appearance

> concern if he is chosen to handle matters in which the official is barred from participating. It is critical that the person acting in lieu of the official is, and is perceived to be, able to exercise independent judgment on the covered matter. Accordingly, the screening arrangement should require that covered matters are referred to someone who has actual and apparent authority to act on the matter.[2]

As indicated in this guidance, an agency must balance the appearance that a subordinate may not be impartial in matters from which the superior is recused, against the need to assign someone with sufficient authority to act in the matter. Therefore, OGE's guidance does not recommend an absolute bar on assigning immediate subordinates to tasks from which the principal is recused. Rather, it cautions agencies to be concerned where the circumstances might give rise to an appearance that the subordinate is not truly independent. We are not aware of any circumstances, such as a long prior working relationship, that would draw Mr. Cason's independence into question when assigned to work on matters from which Mr. Griles is recused. Nor is there evidence in the report of investigation showing that such circumstances exist.

Finally, you point out that guidance this Office issued in 1999 specifically notes that "supervision of subordinates working on a matter may be personal and substantial participation [in a particular matter] requiring recusal." We did not mean by this that general supervision of an employee could be construed as personal and substantial participation in a matter. Rather, we were referring to specific and active supervision of a subordinate on a matter from which the official is recused. The report of investigation does not indicate that Mr. Griles directly supervised, or otherwise communicated with, Mr. Cason regarding the matters you raise in your letter.

10. You ask us to clarify the analysis in our March 12 letter concerning actions taken by Mr. Griles' Special Assistant relating to the APTI contracts. It is our understanding that

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[2] "OGE's 2004 Recusal Memorandum"

Mr. Griles and his Special Assistant worked together for many years prior to Mr. Griles' appointment as Deputy Secretary. We are concerned generally about whether this longstanding relationship may create the appearance that the Special Assistant cannot act impartially in certain matters given this relationship. Our intent in raising this concern was not to judge incidents that occurred in the past, but to caution that this history and relationship should be taken into consideration in the future when analyzing appearance issues with regard to National and Mr. Griles' former clients, at least until Mr. Griles' recusal period expires.

With respect to past conduct, Mr. Griles' Special Assistant was not required by regulations to be recused from anything. Rather, she was required to consider whether a reasonable person would question her impartiality if she worked on a matter involving specific parties in which her former employer was, or represented, a party for a period of one year after she left her former employment. The evidence in the report of investigation does not support a conclusion that the Special Assistant violated the rules in connection with the APTI contract because the only evidence that she did participate in a matter in which her former employer had an interest was the memo dated more than one year after she left their employment.

11. You have asked about what, if any, communications our Office has had with the White House regarding this matter. As Acting Director and General Counsel of OGE, I placed a courtesy telephone call to the Deputy Counsel to the President David G. Leitch on or about March 11, 2004, to inform him of our impending letter that was sent on March 12, 2004 to the Inspector General of DOI. During that call, I briefly summarized the main points addressed in our letter. Afterwards, I did not hear back from anyone at the White House concerning the matter. There has been no other communication by OGE staff and the White House or the Executive Office of the President on matters relating to Mr. Griles.

I hope this responds to your concerns. If you would like to discuss this matter further, please feel free to contact me again.

Sincerely,

Marilyn L. Glynn
Acting Director

Enclosure