



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

April 21, 2022

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the New Jersey Department of Environmental Protection

FROM: Justina Fugh
Alternate Designated Agency Ethics Official and Director, Ethics Office

TO: Olivia C. Glenn
Chief of Staff and Senior Advisor for Equity
Region 2

As Chief of Staff and Senior Advisor for Equity for Region 2 of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the New Jersey Department of Environmental Protection (NJ DEP). Prior to being selected for this Administratively Determined (AD) appointment, you served as Deputy Commissioner of Environmental Justice and Equity for NJ DEP.

As an AD appointment, you are not required to sign President Biden's Ethics Pledge because this type of appointment falls outside the definition of "appointee" set forth at Executive Order 13989 at Section 2(b).¹ However, what remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." Upon assuming the position of Chief of Staff and Senior Advisor for Equity, you will have a "covered relationship" with NJ DEP pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year after you resigned from NJ DEP, absent an impartiality determination from an EPA ethics official, you cannot participate in any specific party matter in which NJ DEP is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration

¹ *See* Office of Government Ethics advisories LA-21-05 (2/23/21) and LA-21-07 (6/9/21), which apply the previous OGE advisories: "Who Must Sign the Ethics Pledge?" DO-09-010 (3/16/10); and "Signing the Ethics Pledge," DO-090-005 (2/10/09).

are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

As Chief of Staff and Senior Advisor for Equity, you serve as a key advisor to the Regional Administrator in all aspects under her purview. You will be asked to participate in discussions and meetings related to particular matters that affect New Jersey. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Chief of Staff and Senior Advisor for Equity in particular matters that involve NJ DEP, provided that you recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with NJ DEP. That said, you do not recall having participated in any such specific party matters. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2020, you have worked at NJ DEP as the Deputy Commissioner of Environmental Justice and Equity. From 2018-2020, you led NJ DEP's Division of Parks and Forestry as its Director and managed its 450,000 acres of natural and historic resources. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for NJ DEP. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – I understand that you have a defined benefit plan with the State of New Jersey. Although you have a financial conflict of interest pursuant to 18 U.S.C. § 208, it is not disqualifying. See 5 C.F.R. §§ 2640.201(c)(1)(ii) and 2640.201(c)(2). In EPA's experience, it is unlikely you as the Chief of Staff will be in any position to affect the State's ability or willingness to pay benefits to its retirees.

Nature and importance of the employee's role – As Chief of Staff and Senior Advisor for Equity for Region 2, New Jersey constitutes a significant portion of your portfolio since your area of responsibility covers New York, Puerto Rico, the U.S. Virgin Islands, eight Indian Nations, and New Jersey. In your role, you are expected to communicate freely with states, including New Jersey.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you did not participate personally and substantially for NJ DEP that will rise to your level or attention, merit your participation and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as Chief of Staff and Senior Advisor for Equity in such matters will be of importance to the Regional Administrator, and therefore in the Agency’s interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve NJ DEP, but not on the very same specific party matters on which you worked on personally and substantially while employed by NJ DEP. If, however EPA determines it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you, your Regional Administrator or Regional Counsel may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency’s interest in your participation outweighs any impartiality concern.

While I have issued you this determination to interact with NJ DEP with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves NJ DEP as a specific party. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to consult with OGC/Ethics or your Regional Counsel should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at fugh.justina@epa.gov or (202) 564-1786.

cc: Lisa F. Garcia, Regional Administrator, Region 2
Walter Mugdan, Deputy Regional Administrator, Region 2
Paul Simon, Acting Regional Counsel, Region 2
Eduardo Gonzalez, Regional Ethics Counsel, Region 2