

**From:** [Fugh, Justina](#)  
**To:** [Wehling, Carrie](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: Recusal followup re WOTUS and Dimple/Melissa  
**Date:** Tuesday, February 02, 2021 4:07:31 PM  
**Attachments:** [image002.gif](#)

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Hi Carrie,

I was thinking about you and (b) (6) recently as I watched (in my copious amounts of free time) a few episodes of the Great British Baking Show. I recall his saying that you both enjoyed that immensely. I'm struggling with how to explain the recusal analytical process more effectively, so am copying Victoria who is going to try to make a flow chart. Let's see:

YOU ASKED: we understand it from your previous emails (thank you), they are recused from specific WOTUS cases in which they or their former employee are parties but not from *policy* deliberations about the WOTUS litigation generally or the underlying rulemaking.

JUSTINA: Not exactly. In federal ethics and bar rules, there is a distinction between "specific party matters" and "matters of general applicability." Litigation is always a specific party matter while rulemaking is nearly always a matter of general applicability. The definition of "waters of the United States" is actually just a "matter" for our ethics purposes. What I did was to write an impartiality determination to allow Melissa, as PDGC and Acting General Counsel, to make a policy decision on behalf of the Administration on a collection of cases. That decision was a policy determination that did not require her to participate personally and substantially in the underlying cases at all. She is therefore able to preserve the confidences of her former employer/client without involving herself in the specific party matters from which she is recused.

YOU ASKED: So the question we have before us is whether we can discuss the following types of issues with them – I think of these as policy issues about the litigation but want to confirm:

1. (b) (5)

JUSTINA: No, that is not a policy determination but rather a question about litigation strategy in cases from which they may be recused.

2. (b) (5)

JUSTINA: No. Again, this is a question of litigation strategy, not an overarching policy determination.

3. (b) (5)

JUSTINA: It seems to me that this discussion will still require a consideration of litigation strategy, so NO.

Fundamentally, Melissa, Dimple and Marianne must abide by their bar obligations and, in addition, Dimple and Marianne have Biden ethics pledge obligations. Once you determine that a case is on their recusal list, don't interact with them on that case. Full stop.

Justina

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**From:** Wehling, Carrie <Wehling.Carrie@epa.gov>

**Sent:** Tuesday, February 02, 2021 3:44 PM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** Recusal followup re WOTUS and Dimple/Melissa

Hi, Justina – I know you are super busy but we have a followup question (surprise!) about the scope of the recusal for Dimple and Melissa on the WOTUS litigation ( as you know we have about 20 cases pending right now). As we understand it from your previous emails (thank you), they are recused from specific WOTUS cases in which they or their former employee are parties but not from *policy* deliberations about the WOTUS litigation generally or the underlying rulemaking. So the question we have before us is whether we can discuss the following types of issues with them – I think of these as policy issues about the litigation but want to confirm: 1) (b) (5)

[REDACTED]

[REDACTED] 2) (b) (5)

[REDACTED] and 3) (b) (5)

[REDACTED]

[REDACTED] We have a “hot topics” meeting with one or both of them

on Thursday morning, so naturally, an answer before then would be helpful.

Or I can just call you to discuss – let me know your preference.

Thanks.

Carrie

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