



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

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the South Coast Air Quality Management District

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

TO: Philip Fine
Principal Deputy Associate Administrator for Policy

As the Principal Deputy Associate Administrator for the Office of Policy of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the South Coast Air Quality Management Division. Within the last year, prior to being selected for this position, you served as the Deputy Executive Officer for the Planning, Rule Development & Area Sources Division of the South Coast Air Quality Management District (South Coast AQMD).

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state and local government is excluded under the definition of "former employer."¹ Therefore the Ethics Pledge does not apply to your District employment. Federal ethics rules, however, do not contain a similar exclusion for state or local government, so those rules do apply to your prior employment with the South Coast AQMD.

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." You have a "covered relationship" with the South Coast AQMD under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the South Coast AQMD terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the South Coast AQMD 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).

¹ *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

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 we take into consideration 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.

In reviewing these factors, I have concluded that the interest of the United States Government in your participation outweighs any concerns about your impartiality, and I am authorizing you to participate as Principal Deputy Associate Administrator for the Office of Policy in particular matters that involve the South Coast AQMD with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with South Coast AQMD. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2015, you have served as the Deputy Executive Officer for the Planning, Rule Development & Area Sources Division of the South Coast AQMD. In this role, you oversaw all activities for the Division, including development of State Implementation Plans and Air Quality Management Plans, strategies and regulations for air pollution control, meteorology and forecasting, air quality evaluation, air toxics risk assessment, emissions inventories, socioeconomic analyses, transportation programs, and enforcement for area sources. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the South Coast AQMD. 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 contribution plan and a defined benefit plan with the South Coast AQMD. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the District's ability or willingness to honor its contractual obligations with respect to your state retirement

interests. But pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflicts of interest statute. *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 Principal Deputy Associate Administrator for the Office of Policy, will be in any position to affect the District's ability or willingness to pay these benefits to its retirees.

Nature and importance of the employee's role – As the Principal Deputy Associate Administrator for Policy, you serve as a key advisor to the Associate Administrator and work with your EPA colleagues to support Agency priorities and enhance decision-making. Among other things, the Office of Policy provides expertise for regulatory policy and management, community revitalization, climate adaptation, environmental justice, environmental permitting, and stakeholder engagement. As the Principal Deputy Associate Administrator, you are expected to communicate freely with states and localities.

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

Difficulty of reassigning the matter to another employee – Your participation as Principal Deputy Associate Administrator for Policy in such matters will be of importance to the Associate 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 the South Coast AQMD, but not on the very same specific party matters on which you worked on personally and substantially while employed by the South Coast AQMD. With respect to any particular matters involving District as a specific party and in which you previously participated personally and substantially, you have voluntarily agreed, pursuant to our advice, not to participate at all for the duration of your EPA tenure. If the Agency determines that 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 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 the South Coast AQMD with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves the District 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 confer with OGC/Ethics 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: Victoria Arroyo, Associate Administrator for Policy
Helena Wooden-Aguilar, Deputy Associate Administrator