



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

SEP 17 2009

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

SUBJECT: Impartiality Determination – Final Rule Revising the Ozone National Ambient Air Quality Standards

FROM: Patricia K. Hirsch *Patricia K. Hirsch*  
Designated Agency Ethics Official  
and Principal Deputy General Counsel

TO: Lisa P. Jackson  
Administrator

You have asked if you can be permitted to participate in reconsideration of the final rule revising the national ambient air quality standards (NAAQS) for ozone, which this Agency issued in March 2008. Soon after this rule was issued, several States, including New Jersey, petitioned EPA to revise the rule. This litigation related to the March 2008 ozone NAAQS rule is still pending. You therefore also ask if you may participate, if necessary, in that litigation.

As you know, you have a “covered relationship” with the State of New Jersey pursuant to 5 C.F.R. § 2635.502(b)(iv) and have agreed to take appropriate steps to avoid an appearance of a loss of impartiality in the performance of your official EPA duties that pertain to particular matters involving specific parties. Government-wide ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee’s participation outweighs concern that a reasonable person may question the “integrity of the agency’s programs and operations.” 5 C.F.R. § 2635.502(d). These factors 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) the 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.

I must first determine whether the reconsideration of the March 2008 ozone NAAQS is a particular matter involving specific parties, thereby triggering the impartiality provisions. The ozone NAAQS standards apply broadly across a wide spectrum, and do not involve any isolatable transaction or set of facts related to a specific party. Therefore, neither the standards themselves nor any reconsideration of the standards presents a specific party matter. You may participate in the reconsideration of the decision.

With regard to the lawsuit, which is a specific party issue, I have carefully considered the six factors that are listed in 5 C.F.R. § 2635.502(d). I have considered the fact that this particular matter involves not just the state of New Jersey but other states as well, and that it involves a nation-wide regulation that is not limited in application to New Jersey or any other single state.

After reviewing all the factors, I have concluded that the interest of the United States Government in your participation in this particular matter would outweigh any concerns about your impartiality. Given the numbers of parties participating in this matter and the national impact of the regulations at issue, I also conclude a reasonable person would have very little concern over the integrity of EPA actions in light of any prior involvement by you on behalf of New Jersey. Therefore, you may participate in discussions and meetings related to the litigation, even though the State of New Jersey is a named specific party. In accordance with your ethics agreement, we understand that you will not participate in any other particular matter that involves the State of New Jersey (or any other of your covered relationships) unless and until you first consult with the Office of General Counsel and obtain a written determination such as this one pursuant to 5 C.F.R. § 2635.502(d).

Please feel free to contact me or Justina Fugh, Senior Counsel for Ethics, if you have any further questions. I can be reached at [hirsch.pat@epa.gov](mailto:hirsch.pat@epa.gov) or (202) 564-5462; Justina can be reached at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or at (202) 564-1786.