



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

MAR - 5 2009

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Ethics Determination Regarding Participation in Coal Mining Issues

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

TO: Lisa P. Jackson
Administrator

You have asked OGC whether you may participate in particular matters regarding coal and hard rock mining, including specific party issues related to mountain top removal and a recent 4th Circuit decision, and the "Stream Buffer Zone" rule and litigation. You do not own coal mining interests directly, but do own stock in Bank of America, a financial services company that has a demonstrated corporate policy against providing services to companies engaged in mountain top removal.

Under the terms of your January 6, 2009, ethics agreement, you agreed that you would not participate personally and substantially in any particular matter that has a direct and predictable financial effect on your financial interests unless you first obtained a written waiver pursuant to 18 U.S.C. § 208(b)(1) or qualified for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2). To avoid potential conflicts of interest, you agreed to divest within ninety days of your confirmation of the Bank of America (B of A) stock that you and your husband own. You have not yet been able to meet this requirement, so have asked for specific advice from the Office of General Counsel (OGC) as to whether you may participate personally and substantially in certain coal mining issues.

To make this determination, OGC must first examine whether there is direct and predictable financial effect between your ownership interest and the particular matter in which you wish to participate. If there is a nexus, then OGC must examine whether any regulatory exemption level applies. Finally, OGC must consider whether any other ethics restrictions apply.

Financial Conflict of Interest

As a federal employee, you cannot participate personally and substantially in any particular matter that has a direct and predictable financial effect on your financial interests. 18 U.S.C. § 208. OGC, in consultation with the Office of Government Ethics (OGE), carefully considered whether there is a direct and predictable effect between an Agency decision on mountain top removal and your ownership interest in B of A, which is, among other things, a financial services company.

We considered that B of A financially supports alternatives to mountain top mining. In fact, it has made a corporate decision to “phase out financing of companies whose predominant method of extracting coal is through mountain top removal.” As a result, B of A has taken steps to cease providing financial assurance to several of the top coal mining operations in the United States. Coal extractors that use mountain top removal must turn to other entities for financial services. We determined that a corporate policy to deny services to certain coal extractors but not others does not, in and of itself, constitute a direct and predictable financial effect. Therefore, you may participate in a particular matter involving mountain top removal because you are not personally invested in the discrete and identifiable class that is directly affected by any Agency decision, such as the coal mining companies themselves.

Regulatory Exemption

Please note that even if OGC had determined that there was a direct and predictable effect, and therefore a financial conflict of interest under 18 U.S.C. § 208, you nevertheless qualify for a regulatory exemption. At the time that you signed your ethics agreement, you reported that the total value of your B of A (and formerly Merrill Lynch) stock exceeded \$50,000. However, since that time, the market value of your stock has decreased significantly. The current value of your common stock is approximately \$8500, while the value of your preferred stock is approximately \$2700. The total value of your stock, as of March 4, 2009, is approximately \$11,200.

Given these values, you qualify for the *de minimis* exemption for participation in particular matters of general applicability. OGE’s regulatory exemption at 5 C.F.R. § 2640.202(c) permits participation if your ownership interest is less than \$25,000 in any one entity, and less than \$50,000 in all affected entities. In fact, you also qualify for the *de minimis* exemption for participation in particular matters involving specific parties because your ownership interest is less than \$15,000. 5 C.F.R. § 2640.202(a).

Additional Ethics Determination

We note that B of A is your husband’s employer and, as such, his salary from B of A is also imputed to you under 18 U.S.C. § 208. To determine whether his employment presents a disqualifying financial interest, OGC examined whether there is a close causal link between the particular matters involving coal mining in which you seek to participate and the real possibility of a gain or loss to the financial interest as a result of

your participation. OGC has determined that your participation in coal mining issues will not have any effect on the willingness or ability of B of A to pay your husband's salary nor to continue his employment. Therefore, we conclude that his employment with B of A does not preclude you from participating in coal mining issues.

Conclusion

You may participate personally and substantially in coal mining issues. I will put a copy of this determination in your file. Please contact me if you have any further questions.