



March 28, 2019

Mary L. Kendall
Inspector General
U.S. Department of the Interior
Office of the Inspector General
1849 C Street, NW – Mail Stop 4428
Washington, D.C. 20240

Dear Inspector General Kendall:

The Campaign Legal Center (“CLC”) writes to address the Memorandum issued by Interior ethics officials dated February 19, 2019.¹ The Memorandum purports to provide guidance on how to categorize agency actions involving the Central Valley Project (“CVP”) and the State Water Project (“SWP”) for purposes of ethics recusal obligations.

We believe that the Memorandum mischaracterizes the nature of the agency action, and its conclusions are inconsistent with established interpretations. The timing of the Memorandum’s release also raises concerns, including the possibility that the Memorandum was issued post-hoc in an apparent attempt to preempt allegations that Acting Secretary David Bernhardt violated ethics rules by participating in particular matters he lobbied on in the two years prior to his appointment.

¹ Memorandum from Heather C. Gottry & Edward McDonnell to Scott A. de la Vega, “Ethics Guidance on How to Categorize Issues, Decisions and/or Actions Pending at DOI and Involving the Central Valley Project and State Water Project as “Matters,” “Particular Matters of General Applicability,” or “Particular Matters Involving Specific Parties” (Feb. 19, 2019), <https://bit.ly/2U0r4mT> (“Memorandum”).

I. Background

In our complaint to your office dated February 28, 2019, we requested an investigation into Acting Secretary Bernhardt's participation in particular matters he lobbied on in the two years prior to his appointment, potentially violating his signed ethics pledge.² As Deputy Secretary, Mr. Bernhardt participated in a process that would ensure maximization of water diversion to the discrete and identifiable class of CVP and SWP water contractors through placing constraints on the application of Endangered Species Act biological opinions that govern those water projects. This is the precise subject of his lobbying for one specific water contractor, Westlands Water District, prior to joining government.

The complaint focused on Mr. Bernhardt's participation in agency actions that were necessary steps in a process already underway to evaluate alternatives for maximizing water diversion from the CVP and SWP to water contractors in California's Central Valley: a December 2017 notice of intent to prepare an environmental impact statement for analyzing proposed modifications to the operation of the CVP ("*Draft EIS NOI*"),³ and the January 2019 biological assessment that outlined potential harm to the ecosystem as a result of the proposed CVP modifications ("*2019 BA*").⁴

CLC's complaint followed a February 12, 2019 report in the *New York Times* describing Mr. Bernhardt's participation in the *Draft EIS NOI* and the resulting *2019 BA*.⁵ Despite the close connection between these matters and Mr. Bernhardt's past lobbying activities—and despite public and congressional concern about Mr. Bernhardt's relationship with his former lobbying client Westlands, the largest CVP contractor—Mr. Bernhardt reportedly received only verbal advice about his ethics obligations from an agency ethics official.⁶

² CAMPAIGN LEGAL CENTER, COMPLAINT REGARDING ACTING SECRETARY DAVID BERNHARDT (Feb. 28, 2019), <https://campaignlegal.org/sites/default/files/2019-02/2-28-19%20Bernhardt%20CLC%20Complaint%20FINAL.pdf> ("Complaint").

³ U.S. Bureau of Reclamation, Notice of Intent To Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation of the Central Valley Project and State Water Project, and Related Facilities, 82 Fed. Reg. 61789 (Dec. 29, 2017) ("*Draft EIS NOI*").

⁴ U.S. DEPT OF INTERIOR BUREAU OF RECLAMATION, REINITIATION OF CONSULTATION ON THE COORDINATED LONG-TERM OPERATION OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT AND STATE WATER PROJECT: FINAL BIOLOGICAL ASSESSMENT (2019), <https://www.usbr.gov/mp/bdo/docs/ba-final-biological-assessment.pdf> ("*2019 BA*").

⁵ Coral Davenport, *Top Leader at Interior Dept. Pushes a Policy Favoring his Former Client*, N.Y. TIMES, (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html>.

⁶ *Id.*

One week after the *New York Times* story was published, and nearly fifteen months after the conduct at issue, Interior ethics officials released the written Memorandum.⁷ Although framed as “ethics guidance” for Interior employees to assess participation in the *Draft EIS NOI* and *2019 BA*, the Memorandum was issued only *after* the *Draft EIS NOI* and *2019 BA* had both been published.

II. The Memorandum

In our view, the Memorandum incorrectly concludes that neither the deliberations leading up to the *Draft EIS NOI* nor the Interior process that resulted in Reclamation’s *2019 BA* was a “particular matter” and, therefore, that neither required recusal under the ethics pledge.

As our complaint explains, Mr. Bernhardt is a former registered lobbyist who is subject to a lobbying-related restriction under the ethics pledge he signed.⁸ Specifically, he is barred for two years from participating in any particular matter on which he lobbied within the two years before the date of his appointment or participating in the specific issue area in which that particular matter falls. A threshold question, therefore, is whether the *Draft EIS NOI* or *2019 BA* were aspects of a particular matter or fell within the specific issue area on which Mr. Bernhardt lobbied.

The Memorandum fails to address this threshold question. Its conclusions are inconsistent with established interpretations of “particular matter” and appear to mischaracterize the nature of the overall agency action. The analysis fails to consider whether government actions focused on maximizing water diversion to the discrete and identifiable class of CVP and SWP contractors are particular matters. Instead, the Memorandum separately examines the *Draft EIS NOI* and the *2019 BA* in isolation, and concludes that neither is a “particular matter.”

The Office of Government Ethics (“OGE”) has explained that the term “particular matter” includes any matter that involves “deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete

⁷ Memorandum, *supra* note 1. On February 28, 2019, after CLC submitted its complaint describing the potential ethics violations implicated by Mr. Bernhardt’s conduct, the Memorandum was made public by the *Washington Post*. Juliet Eilperin, *Ethics watchdog, Democratic senators call for probe of Interior chief Bernhardt’s work on water policy*, WASH. POST (Feb. 28, 2019), <https://www.washingtonpost.com/climate-environment/2019/02/28/ethics-watchdog-democratic-senators-call-probe-interior-chief-bernhardts-work-water-policy/>.

⁸ See Complaint, *supra* note 2.

and identifiable class of persons.”⁹ For example, OGE has stated that recommendations concerning specific limits on commercial use of a particular facility would be a particular matter, inasmuch as the recommendation would be “sufficiently focused on the interests of a discrete and identifiable class of persons (i.e., the users of that particular facility).”¹⁰

Likewise, the matter in which Mr. Bernhardt participated was a particular matter because it was similarly focused on the interests of a discrete and identifiable class of persons: CVP contractors, including his former lobbying client. At the time, CVP had 270 water contractors, and SWP had 29 suppliers, all of whom were located within the bounded geographic area of California’s Central Valley and distinctly affected by the operation of these federal water projects.¹¹ Mr. Bernhardt participated in agency efforts to maximize water diversion to CVP contractors, and the *Draft EIS NOI* and the *2019 BA* were necessary aspects of that particular matter.

The Memorandum itself makes clear that Section VIII of the *Draft EIS NOI* is directed in particular toward CVP and SWP water users and power customers and affected tribes, which should reasonably be viewed as a discrete and identifiable group.¹² The fact that the *Draft EIS NOI* also serves to advise and obtain information from other agencies and the public more broadly does not change the fact that it is directed towards a discrete and identifiable class of persons.

As with the *Draft EIS NOI* and *2019 BA*, OGE has emphasized that, “It is well-understood that ‘[m]uch of the work with respect to a particular matter is accomplished before the matter reaches its final stage.’”¹³ OGE has

⁹ “Particular Matter Involving Specific Parties,” “Particular Matter,” and “Matter,” U.S. OFFICE OF GOV’T ETHICS, DAEOgram DO-06-029, 5-10 (2006), <https://bit.ly/2SvO78f> (“DAEOgram DO-06-029”).

¹⁰ Letter from OGE to an Agency Ethics Advisor (OGE Legal Adv. 00x4) 2 (Apr. 11, 2000), [https://www.oge.gov/web/oge.nsf/All%20Advisories/5D8F3A5E2099736385257E96005FBDE9/\\$FILE/5b09b92cc460475ea56698c5ebacfcfc2.pdf](https://www.oge.gov/web/oge.nsf/All%20Advisories/5D8F3A5E2099736385257E96005FBDE9/$FILE/5b09b92cc460475ea56698c5ebacfcfc2.pdf) (“[I]f the [oversight] group were to consider matters that distinctly affect the interests of specific groups or persons, then these matters may be ‘particular matters.’ For example, the oversight group may consider or make recommendations on specific ways of limiting commercial use of a particular facility [in the area]. This type of matter would more than likely involve a ‘particular matter’ since it would appear to be sufficiently focused on the interests of a discrete and identifiable class of persons (i.e., the users of that particular facility).”).

¹¹ See Memorandum, *supra* note 1, at 3.

¹² *Id.* at 9.

¹³ Letter from Marilyn L. Glynn, Gen. Counsel, OGE, to a Designated Agency Ethics Official (OGE Legal Adv. 06x8) 2 (Aug. 23, 2006) (quoting 2 Op. O.L.C. 313, 315 (1978)), [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/37EC2F518ACCAAAA85257E96005FB7D/\\$FILE/06x8.pdf](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/37EC2F518ACCAAAA85257E96005FB7D/$FILE/06x8.pdf) (“OGE Legal Adv. 06x8”).

also advised that even informal, preliminary discussions can constitute a particular matter. The term particular matter “cover[s] the crucial step of laying the groundwork for regulatory change focused on an industry, particularly where specific changes have already been discussed within the agency.”¹⁴ For this reason, the Memorandum’s conclusion that neither the *Draft EIS NOI* nor the *2019 BA* are “particular matters” because they did not focus on a discrete and identifiable class of persons¹⁵ is insupportable. They were aspects of Interior’s water maximization project, which was a particular matter and in which Mr. Bernhardt participated.

As the Memorandum acknowledges, both the *Draft EIS NOI* and *2019 BA* are legally mandated steps that the agency must undertake in order to proceed with its project, which has as one aim maximizing water diversion to the discrete and identifiable class of CVP and SWP contractors.¹⁶

In other words, the *Draft EIS NOI* and *2019 BA* are a result of, and intertwined with, the agency decision to maximize water diversion to the discrete and identifiable class of CVP and SWP contractors. The Memorandum errs by considering the *Draft EIS NOI* and *2019 BA* in isolation. The Memorandum emphasizes that the *Draft EIS NOI* and *2019 BA* consider whether factors other than water diversion to the discrete and

¹⁴ *Id.*

¹⁵ Memorandum, *supra* note 1, at 9 (“[T]he deliberations and discussions leading up to the publication of the *Draft EIS NOI* and the potential impact of the EIS itself was not focused on the interests of a discrete and identifiable class of persons and, accordingly, it should not be categorized as a ‘particular matter’ but rather as a ‘matter’ . . .”), 10 (“These discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons.”), 13 (“[T]he *2019 BA* is not focused on a probable particularized impact on discrete and identifiable parties. . . . [T]he DOI’s work on the *2019 BA* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons.”). OGE has stated that particular matters of general applicability are narrowly focused on a discrete and identifiable class of persons. DAEOgram DO-06-029, *supra* note 9, 5-10.

¹⁶ Memorandum, *supra* note 1, at 11-12. Biological assessments by definition evaluate the potential broad effects of a *specific* agency action on wide and diverse sets of interests. *See id.* at 13. Biological assessments are necessary steps for implementing an agency actions that modify water flows, and the evaluation of the wide-ranging effects of a given action are mandated by the regulations governing biological assessments. 50 C.F.R. § 402.12(f) (2019). The purpose of a biological assessment is to assess all implications of a proposed agency action that may have an effect on endangered species and their habitats. 50 C.F.R. § 402.12(a) (2019).

identifiable parties might affect endangered or protected species. Yet Interior’s development of these documents was a legally-mandated part of its water maximization efforts: the entire endeavor is to determine whether an agency action can move forward as planned without disrupting endangered species and critical habitats.

Analogously, OGE has explained that regulatory changes focused on a discrete and identifiable class of persons is a particular matter and that even informal conversations “laying the groundwork” for those regulatory changes are part of the same particular matter. Thus, the relevant consideration is the focus of the overarching water maximization effort and not the focus of individual component parts of that matter.

The water maximization effort proposed here focused on a discrete and identifiable class of water contractors, and the *Draft EIS NOI* and *2019 BA* were part of that particular matter. If *informal* conversations “laying the groundwork” for regulatory changes focused on an industry constitute a particular matter, then these *formal* agency actions that are *legally required* to lay the groundwork for regulatory changes affecting a discrete and identifiable class of water contractors also constitute a particular matter.¹⁷

The Memorandum implies that because the water projects are big, complex, and serve multiple purposes, and because the *Draft EIS NOI* and *2019 BA* take into account many factors, they therefore cannot be particular matters. But that analysis misapplies the particularity requirement. Whether a matter is a “particular matter” turns on whether it focuses on the interests of a discrete and identifiable class of persons.¹⁸ Even complex agency actions related to a “massive” water project that take into consideration a broad range of interests can be particular, if, as here, the action is *focused* on the interests of a discrete and identifiable class.

The Memorandum heavily relies on *Van Ee v. EPA*, 202 F.3d 296 (D.C. Cir. 2000), for its analysis of whether these actions constitute particular matters. The *Van Ee* decision clarified how particularized the focus of a decision or action must be for it to qualify as a particular matter for purposes of 18 U.S.C. § 205, which employs the same term, “particular matter,” as the ethics pledge. The *Van Ee* court held that whether an administrative proceeding is a particular matter is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding.¹⁹ The court emphasized that the proceedings at issue lacked the

¹⁷ OGE Legal Adv. 06x8, *supra* note 13.

¹⁸ DAEOgram DO-06-029, *supra* note 9, at 8; *see also* 5 C.F.R. § 2635.402(b)(3) (2019).

¹⁹ *Van Ee v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000).

particularity required because they did not focus on discrete and identifiable persons.

But Interior officials make the same mistake in their Memorandum that EPA officials made in the *Van Ee* case—a mistake that the court rejected. The court in *Van Ee* said that EPA erred in its advice to Van Ee because EPA’s particular matter analysis “hinged on the specific nature of comments that Van Ee sought to make and their possible relationship to aspects of the decision that might ultimately affect specific groups or individuals, rather than upon the *overall focus of the proceeding itself*.”²⁰ Here, the “focus of the decision[] to be made”²¹ is the maximization of water diversion to a discrete and identifiable class of water contractors; the *Draft EIS NOI* and *2019 BA* are necessary steps towards that decision. The ultimate decision of whether to proceed with this agency action, of which the *Draft EIS NOI* and *2019 BA* are a part, is focused on a discrete and identifiable class of persons—contractors that have a stake in how water is diverted from the two California water projects.

The Memorandum ignores that a specific group of water contractors rely on water diversion from the CVP and SWP to operate, and their interests are ultimately affected by these agency actions. The *Draft EIS NOI* and *2019 BA* are not part of a “broad” policy directed at the interest of a “large and diverse” group of people—they are crucial and legally-mandated parts of an agency action that affects two water projects serving a limited group of contractors in one specific geographic region, California’s Central Valley. The distinct effect on the contractors is made clear by the fact that through this process, Reclamation wants to “maximize water deliveries and optimize marketable power generation.”²² The group of persons who has the most immediate stake in this process is the group of persons who uses these water projects: water contractors that need the water in the CVP and SWP reservoirs to deliver to clients. This is the discrete and identifiable class that interacts with the government in this particular matter.

III. Effect of the Memorandum

The Memorandum may have been aimed at retroactively excusing Mr. Bernhardt’s participation in the *Draft EIS NOI* and *2019 BA*, but its impact could reach further and have unintended consequences.

For example, if, as the Memorandum concludes, neither the *Draft EIS NOI* nor the *2019 BA* are particular matters, then other ethics restrictions

²⁰ *Id.* (emphasis added).

²¹ *Id.*

²² *Draft EIS NOI*, *supra* note 3.

also wouldn't apply. An Interior employee who owns a large farm that contracts with the CVP, and whose profitability is directly tied to water diversion from the CVP, would be allowed to participate in these matters that are legally-mandated steps towards the goal of maximizing water diversion to CVP contractors—despite the fact that the outcome would have a direct and predictable impact on his personal financial interest. This is because if neither the *Draft EIS NOI* nor the *2019 BA* are particular matters, then 18 U.S.C. § 208 would not prohibit such an employee from setting into motion a *Draft EIS NOI* nor from participating in the *2019 BA*.

Given the recent complaints submitted to your office, the resolution of which may turn on how “particular matter” is defined, we ask that you take the above into consideration.

Respectfully submitted,

_____/s/_____
Brendan M. Fischer
Director, Federal Reform

_____/s/_____
Delaney N. Marsco
Ethics Counsel

cc: Emory A. Rounds III
Director
U.S. Office of Government Ethics