

**2011 NATIONAL GOVERNMENT  
ETHICS CONFERENCE**

*Orlando, Florida*

**Panel Session Materials**

*Building a Team Oriented Conflict Management  
System for Advisory Committee Members*

**Panel Members**

*Robert Flaak, GSA  
John Szabo, NRC  
Vince Salamone, OGE*

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## **CASE STUDY FACTS**

### **1. New Agency:** Agency for Renewable Energy Sources (ARES)

The United States is experiencing a sustained period of high gasoline and heating oil prices. These high prices have created a public outcry that the “old energy” companies are manipulating energy prices because of their monopoly on energy supplies. Good Government groups have also criticized the Government for not doing enough to promote “new energy.”

To address criticism of U.S. domestic energy policy and violence at gas stations, Congress created a new agency whose sole focus is to help the nation diversify its energy portfolio and help address national energy supply shortages. ARES will promote and help expand the use of various renewable energy sources. You are the new DAEO for ARES whose motto is ***“Tomorrow’s Energy Today.”***

### **2. Forming New Advisory Committees:**

The Director of ARES will be creating at least two advisory committees to help the agency accomplish its national energy promotion and expansion mission (some have called ARES’ mission as the “New Manhattan Project” and others have dubbed it the “New Deal” on Energy).

ARES’ organic statute provides for the creation of these two committees:

- (1) *Advisory Committee for Compliance with Energy Efficiency Standards (ACCEES).*
- (2) *Renewable Energy Advisory Panel – (statute only authorizes REAP’s creation).*

### **3. Information on Two Prospective Committee Members:**

Meet **Johnny Solaris** (Prospective Member #1) & **Robert Wendmills** (Prospective Member #2).

The new Director of ARES has asked both #1 & #2 to serve on these advisory committees. While visiting ARES, both #1 & #2 show up at your office. They were sent to you by the CMO. Your CMO is concerned about possible ethics and conflicts issues they might have once they begin their work on the committee. You’ve told the CMO that you want to have the opportunity to meet with persons who will be providing the agency any type of advisory or technical services.

#1 & #2 have been asked to provide their advice and views on matters involving the energy industry, including new ways to enhance potential energy supplies. They will be providing only temporary services. They may be expected to meet periodically as well as do some administrative and preparatory reading work at home.

#1 Has extensive knowledge and expertise of energy exploration, development, and distribution.

#1 Has served in both Federal and State Governments and has provided some consulting services, but he is not and has never been a lobbyist registered under the Lobbying Disclosure Act.

#1 Will be paid for his services including travel expenses and per diem.

#1 REAP staff recommended his name as a possible member and he is a professor at the University of Southern California with impeccable energy credentials; he founded a non-profit group and serves as a Board member of the Energy for Tomorrow Institute.

#1 The Agency may ask #1 to speak at the United Nations at "Global Energy Needs II Session."

#2 Has knowledge of the energy industry, including ways of financing "new energy" development.

#2 Was recommended by some energy companies.

#2 Will not receive pay for his services, but will receive travel reimbursement.

#2 Does private energy consulting and has stock in several venture capital companies.

#2 Has served as a spokesperson for "clean energy groups" at energy forums held nationwide.

## **LIST OF RESOURCE MATERIALS**

### **DAEOgrams**

- **"Guidance on Waivers under 18 U.S.C. § 208(b), Authorizations Under 5 C.F.R. § 2635.502(d), and Waivers of Requirements under Agency Supplemental Regulations"** - April 22, 2010, DO-10-005
- **"New OLC Opinion on the Emoluments Clause and Service on Advisory Boards"** - August 6, 2007, DO-07-024
- **"Counting Days of Service for Special Government Employees"** - January 19, 2007, DO-07-002
- **"Federal Advisory Committee Appointments"**- August 12, 2005 - DO-05-12
- **"SGEs and Representatives on Federal Advisory Committees"** - July 19, 2004 - DO-04-022
- **"Financial Disclosure Reporting Requirements for Special Government Employees"** - October 23, 2003, DO-03-021
- **"Summary of Ethical Requirements Applicable to Special Government Employees"** - February 15, 2000, DO-00-003

### **OGE informal Advisory Opinions**

- 82 x 22 (member designation)
- 84 x 04 (counting of days)
- 90 x 05 (volunteers)
- 93 x 14 (representative status)
- 00 x 07 (not arbiter of employee status)
- 07 x 04 (waivers)
- 07 x 9 (personal services contracts)

### **OGE Regulations**

- 5 C.F.R. Part 2640.301 et. seq. (individual waivers)
- 5 C.F.R. § 2640.203(g)(3) (SGE employment exemption)

### **Other Sources:**

- 5 U.S.C. app. II § 2 (definition of “advisory committee”)
- 5 U.S.C. § 2104 (definition of officer)
- 5 U.S.C. § 2105 (definition of employee)
- 18 U.S.C. 202(a) (definition of special Government employee)
- OLC Op. 12-9-93 (status of members)
- OLC Op. 5-8-02 (application of conflict of interest laws to appointees)
- OGE Ethics Program Review Guidelines for SGEs, (see Section IX, p. 40-45)
- House Lobbyist Disclosure Database:  
<http://disclosures.house.gov/ld/ldsearch.aspx>
- Senate Lobbyist Disclosure Database:  
<http://soprweb.senate.gov/index.cfm?event=choosefields>

- “Application of the Emoluments Clause to a Member of the President’s Council on Bioethics” (March 9, 2005):  
[http://www.justice.gov/olc/2005/050309\\_emoluments\\_clause.pdf](http://www.justice.gov/olc/2005/050309_emoluments_clause.pdf)
- “Application of the Emoluments Clause to a Member of Federal Bureau of Investigation Director’s Advisory Board (June 15, 2007):  
[http://www.justice.gov/olc/2007/fbi\\_advisory\\_board\\_opinion\\_061507.pdf](http://www.justice.gov/olc/2007/fbi_advisory_board_opinion_061507.pdf)
- “Financial Interest of Nonprofit Organizations” (January 11, 2006):  
<http://www.justice.gov/olc/11106nonprofitboards.pdf>

**Appointment Authorities:**

<p><b>Details:</b></p> <ul style="list-style-type: none"> <li>■ 31 U.S.C. § 1535</li> <li>■ 5 U.S.C. § 3341</li> <li>■ 5 C.F.R. §300.301</li> </ul>	<p><b>Intergovernmental Personnel Act:</b></p> <ul style="list-style-type: none"> <li>■ 5 U.S.C. Chapter 33, Subchapter VI</li> <li>■ 5 C.F.R. Part 334</li> </ul>	<p><b>Volunteers:</b></p> <ul style="list-style-type: none"> <li>■ 31 U.S.C. § 1342</li> <li>■ 5 U.S.C. § 3111</li> <li>■ 5 C.F.R. Part 308</li> </ul>
<p><b>Experts and Consultants:</b></p> <ul style="list-style-type: none"> <li>■ 5 U.S.C. § 3109</li> <li>■ 5 C.F.R. Part 304</li> </ul>	<p><b>Personal Services Contract:</b></p> <ul style="list-style-type: none"> <li>■ 48 C.F.R. 37.104</li> </ul>	<p><b>RESERVED</b></p>

**Training for SGEs**

- OGE Online training module for SGEs on ethics rules\*\*
- To Serve with Honor, A Guide on the Ethics rules That Apply to Advisory Committee Members Serving As Special Government Employees, OGE, March 2008\*\*

**References for FACA**

- The Federal Advisory Committee Act (FACA) - 5 U.S.C. App, P.L. 92-463  
<http://www.gsa.gov/portal/category/21244>
- FACA Implementing Regulations - 41 CFR 102-3  
<http://www.gsa.gov/portal/category/21244>
- FACA Information  
[www.eFACA.gov](http://www.eFACA.gov)

- FACA Database or Shared Management System  
[www.gsa.gov/facadatabase](http://www.gsa.gov/facadatabase)
- Guidance on Preparing Advisory Committee Charters  
<http://www.gsa.gov/portal/category/21243>
- GSA Guidance on Use of Lobbyists on Advisory Committees  
<http://www.gsa.gov/portal/category/21243>

**\*\*Note:** OGE Regulations, DAEOgrams or Legal Advisories, Informal Advisory Opinions, and OGE Program Review Guidelines are all available on OGE's Website at [www.oge.gov](http://www.oge.gov). Due to the launch of OGE's new website after the printing of this packet, we could not provide you the new website addresses of the OGE materials listed above.

### **Invitation Letter to a Prospective Member (SGE Status)**

Mr. Johnny Solaris  
University of Southern California  
12 Pacific Ocean Drive  
Pasadena, CA 90095

Dear Mr. Solaris:

I am writing to invite you to serve as a **[Special Government Employee (SGE)]** member of the Renewable Energy Advisory Panel (REAP) for a one-year term beginning September 12, 2011. I am enclosing a copy of the Board's charter for your information.

As a **[n SGE]** member of the committee, you will be asked to share your **[best independent]** judgment on issues related to energy exploration, development, and distribution focusing on alternative energy sources and diversification. The Committee's first meeting will be held in Washington, DC, on October 16, 2011. A copy of the meeting agenda will be forwarded to you in the near future. As a **[n] [SGE]** member, you will receive compensation from ARES, including reimbursement for travel and per diem, in lieu of subsistence, when travel is required.

Upon receipt of your acceptance, you will be asked to complete personnel forms, which will be sent under separate cover and require your immediate attention. You will be required to complete a confidential financial disclosure report (OGE Form 450). **[As an SGE, you will be subject to Federal ethics rules and requirements. For your information, we have enclosed a copy of a short booklet discussing the application of these ethics rules to SGEs.]**

I trust you will find it possible to accept this invitation, and give us the benefit of your **experience with** and viewpoints on important national energy issues that will be considered by this committee. You may indicate your acceptance or declination by signing and returning the enclosed Acknowledgement of Invitation by mail or facsimile at the following address by September 26, 2011:

Mr. Joe Hitrogrin  
Designated Federal Official  
Energy Policy Division  
Agency for Renewable Energy Sources  
1000 Sunshine Street, NW – Room 1221B  
Washington, DC 20405  
Fax: (202) 501-1007

Thank you for your assistance in this matter. Should you have any questions, please feel free to contact Mr. Hitrogrin at (202) 208-4462. Upon learning of your acceptance, Mr. Hitrogrin will contact you concerning the logistics for the Committee's inaugural session.

Sincerely,

Sarah Geodermal  
Director  
Agency for Renewable Energy Sources

2 Enclosures [**OGE 450 Form, SGE Booklet**]



## Invitation Letter to a Prospective Member (Representative)

September 12, 2011

Robert Wendmills  
Alternative Energy Advisors, LLC  
125 K Street, Suite 500  
Washington, DC 20405

Dear Mr. Wendmills:

I am writing to invite you to serve as a **[Representative]** member on the Agency for Renewable Energy Sources' Renewable Energy Advisory Panel (REAP) for a one year term beginning on September 12, 2011. I am enclosing a copy of the REAP's charter for your information.

As a **[Representative]** member of REAP, you will be asked to represent the alternative energy industry's viewpoints **[on energy exploration, development, and distribution focusing on alternative energy sources and diversification]** and help REAP in developing advice and recommendations for ARES' consideration. The first meeting will be held at October 16, 2011. A copy of the agenda will be shortly forwarded to you. **[Representative]** members will not receive compensation from ARES, but will receive reimbursement for travel and per diem, in lieu of subsistence. **[As a representative member, you will generally not be subject to any Federal ethics rules applicable to SGE-members of REAP.]**

I trust you will find it possible to accept this invitation and give us the benefit of **[the renewable energy industry's]** viewpoints on the important issues that will be considered by REAP. You may indicate your acceptance or declination by signing and returning the enclosed Acknowledgement of Invitation by mail or facsimile at the following address by September 26, 2011:

Mr. Joe Hitrogin  
Designated Federal Official  
Energy Policy Division  
Agency for Renewable Energy Sources  
1000 Sunshine Street, NW – Room 1221B  
Washington, DC 20405  
Fax: (202) 501-1007

Upon receipt of your acceptance, Mr. Hitrogin will contact you concerning the logistics for REAP's inaugural session. Any questions you have may be directed to Mr. Hitrogin.

Sincerely,  
Sarah Geodermal  
Director  
Agency for Renewable Energy Sources

Enclosure

September 1, 2011

MEMORANDUM TO: Johnny Solaris

FROM: John L. Szabo  
Ethics Counselor  
Office of the General Counsel

SUBJECT: REVIEW OF FINANCIAL DISCLOSURE REPORT

I reviewed the confidential financial disclosure report (OGE Form 450) that you signed on July 1, 2011, as a new member of the Renewable Energy Advisory Panel (REAP).

On the basis of this review, I signed the report, subject to the condition that you not personally and substantially participate, as a REAP member, in any particular Government matter that will directly and predictably affect the financial interest of the Energy for Tomorrow Institute (ETI), unless you obtain in advance a waiver, pursuant to 18 U.S.C. § 208(b)(3).

This determination is based on 18 U.S.C. § 208(a), which prohibits special Government employees, such as REAP members, from participating in a particular matter which will have a direct and predictable affect on their financial interest or the financial interest of their spouse; minor children; any organization they serve as officer, director, trustee, general partner, or employee; or any person with whom they are negotiating with or have an arrangement concerning future employment, unless they receive an advance waiver, pursuant to 18 U.S.C. § 208(b)(3). Under Management Directive 6.3, a member of REAP can receive this waiver from the Director of the Agency for Renewable Energy Sources (ARES), if the Director determines, after consultation with an ethics counselor in the Office of the General Counsel (OGC), that the need for the member's services outweighs the potential for a conflict of interest.

You reported that your Individual Retirement Account (IRA) contains stock issued by the General Electric Company (GE), which has subsidiaries and major investments in the energy field. You also reported owning the Vanguard Energy Investment Fund, which is an energy sector mutual fund. Unless you receive a waiver pursuant to 18 U.S.C. § 208(b)(3), you should not participate personally and substantially in any particular Government matter that directly and predictably affects the financial interest of GE if your GE stock exceeds \$15,000 in value. However, you may participate in matters of general applicability affecting GE, if the value of your interest does not exceed \$25,000. If the value of your Vanguard Energy Investment Fund exceeds \$50,000, you should not participate personally and substantially in any particular matter that you know directly and predictably affects the financial interest of any holding in the fund invested in the energy sector, unless you receive a waiver.

With respect to your employer, the University of Southern California (USC), you are allowed, as an advisory committee member, to participate personally and substantially in any particular matter of general applicability affecting USC that does not have a special and distinct effect on you or USC, other than as part of a class. 5 C.F.R. § 2640.203(g). However, you should not

participate in any particular matter involving parties (such as a contract or grant) that will directly and predictably affect the financial interests of USC, unless you obtain in advance a waiver, pursuant to 18 U.S.C. § 208(b)(3).

Because your spouse is employed by the Americans for Energy Independence, a position for which she receives a fixed salary, you should not participate personally and substantially in any particular matter that you know will have a direct and predictable effect on your spouse's compensation or employment. You should also not participate personally and substantially in any particular matters involving specific parties in which the Americans for Energy Independence is a party or represents a party, unless you are authorized in advance by the Director, Office of Research, ARES, after consultation with an OGC ethics counselor, pursuant to 5 C.F.R. § 2635.502(d). You stated that, for the duration of your service on REAP, your spouse has agreed not to communicate to ARES on behalf of her employer.

Moreover, you should not participate personally and substantially in any particular matter involving specific parties if Constellation Energy Corporation is a party or represents a party, for a period of one year from the date you last provided consulting services to Constellation Energy, unless you are authorized in advance, pursuant to 5 C.F.R. § 2635.502(d). Unless you first receive an authorization pursuant to 5 C.F.R. § 2635.502(d), you should not participate personally and substantially in any particular matter involving specific parties in which the Sierra Club is a party or represents a party, for a period of one year after you last provided service to the Sierra Club.

Finally, prior to a committee meeting, you should apprise Mr. Joseph Hitrogin, the Designated Federal Official for REAP, of any changes to the assets or positions listed on your financial disclosure report. Please feel free to contact me if you have any questions regarding this advice or any of the laws or regulations on conflicts of interest.

cc: Sarah Geodermal, Director, ARES  
Marvin M. Holder, Director, Office of Research, ARES  
Joseph C. McGregor, Chairman, REAP  
Joseph Hitrogin, DFO, REAP

September 12, 2011

TO: Johnny Solaris  
Member, Renewable Energy Advisory Panel  
Agency for Renewable Energy Sources

FROM: Sarah Geodermal  
Director  
Agency for Renewable Energy Sources

RE: CONFLICT OF INTEREST WAIVER UNDER 18 U.S.C. § 208(b)(3)

This memorandum grants you a limited waiver from the provisions of the Federal financial conflict of interest law, 18 U.S.C. § 208, regarding your participation as a member of the Renewable Energy Advisory Panel (REAP), an advisory committee established under the Federal Advisory Committee Act.

Section 208(a) prohibits Government employees, including special Government employees (SGE), from participating personally and substantially in a particular matter which will have a direct and predictable affect on their financial interest or the financial interest of certain organizations with which they are affiliated (including their employers) and other persons whose interests are imputed to them, such as their spouse, minor children, or general partners.

Under 18 U.S.C. § 208(b)(3), an employee's appointing official may grant a waiver of this prohibition to an SGE serving on a Federal advisory committee, such as REAP, when the individual has made full disclosure of the financial interests at issue and when the need for the individual's services outweighs the potential for a conflict of interest. Pursuant to Management Directive 6.3, I have been delegated the authority to grant individual waivers under 18 U.S.C. § 208(b)(3) to members serving on REAP, after consultation with an ethics counselor in the Office of the General Counsel (OGC).

The REAP advises the Agency for Renewable Energy Sources (ARES) on matters of energy exploration, development, and distribution, focusing on alternative energy sources and diversification. You were appointed to REAP because of your extensive knowledge and more than three decades of expertise in energy, including fossil fuels, nuclear, solar, and wind power. Your involvement in the field of energy includes active participation in prominent environmental organizations and more than two hundred scientific journal articles that you authored. You have received the 2009 Bailey Award for Environmental Excellence from the National Academy of Science and were recognized by Science magazine as one of the ten most significant leaders in alternative energy. The agency committee, that reviewed applications for membership on REAP, noted that it would be difficult to find someone else who has the same background and expertise that is needed for this panel.

The financial disclosure report you submitted lists your membership on the board of directors for the Energy for Tomorrow Institute (ETI), which receives research grants from ARES. Although you receive no compensation for your service on the ETI board nor receive any compensation from any ARES grants to the ETI, the financial interest of the ETI is imputed to you under 18 U.S.C. § 208.

Under 18 U.S.C. § 208(a), a Federal employee may not participate in any particular matter affecting his or her financial interest, unless the employee receives a waiver. This limited waiver permits you to participate personally and substantially in any particular matter of general applicability that would affect the financial interest of the ETI, based on the following considerations:

(1) The Government has a particularly strong need for your services in light of your extensive experience, insights, and knowledge. REAP members are selected not only for their specialized knowledge, but also for their diversity, composed of persons who have different technical, scientific, technological, or other perspectives. This diversity ensures that no one member is in a position to determine policy in favor of one affected interest, which serves as a restraint against real or apparent threats to REAP's objectivity.

(2) It is expected that, in carrying out its mission, REAP will focus largely, if not exclusively, on general policy matters. In general, considerations of broad policy options that are directed to the interests of a large and diverse group of persons do not create a conflict under 18 U.S.C. § 208. However, committee discussions and deliberations may also involve particular matters of general applicability (e.g., regulations, legislation, guidelines, etc.). It is well recognized that particular matters of general applicability pose less risk of a conflict of interest as they do not have a unique or special affect upon the interests or legal rights and responsibilities of a specific person or organization.

(3) Federal advisory committees, like REAP, are necessarily composed of persons who are associated with those academic and industry sectors that are the primary subject of a committee's work. Consequently, it is expected that persons qualified to serve on REAP will have interests, financial and otherwise, in its work. This includes not only employment interests, but also investment interests, as experience has shown that experts frequently acquire securities through their employment or as a result of familiarity with the programs of other similar companies or industry sectors. That a member may have a financial interest that may be affected is simply unavoidable in view of the work and membership of REAP.

(4) The Office of Government Ethics has issued certain regulatory exemptions to the conflict of interest statute, such as an exemption permitting special Government employees (SGE) serving on advisory committees to participate in particular matters of general applicability in certain cases when the SGE's financial interests consist of their non-Federal employment interests (5 C.F.R. § 2640.203(g)), as well as other regulatory

exemptions for certain securities and other financial interests that may also be applicable and allow an SGE's participation in certain particular matters.

Accordingly, based on my review of your financial interests, as well as other pertinent information, including the knowledge and expertise you provide to REAP, I have determined, after consultation with an OGC ethics counselor, that the need for your service on REAP outweighs the potential for a conflict of interest created by the financial interest from your membership on the board of the ETI.

Therefore, I hereby issue you a waiver to allow your participation as a REAP member in matters of general applicability that could have a direct and predictable effect on you or ETI, provided that the proposed matter would not have a special or distinct effect on you or ETI, other than as part of a class. This waiver does not extend to your participation in any particular matters involving parties that affect the ETI, such as a contract, license, or grant.

The OGC, after consulting with the Office of Government Ethics, has no objection to the issuance of this waiver.

cc: Marvin M. Holder, Director, Office of Research ARES  
Joseph C. McGregor, Chairman, REAP  
Joseph Hitrogin, DFO, REAP  
John L. Szabo, Ethics Counselor, OGC



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