

ETHICS INTERPRETATION EI-1995-008
ISSUED JULY 13, 1995

The Ethics Commission [the "Commission"], in regular meeting, addressed your request for an ethics interpretation. You have asked:

May a member of an Oklahoma agency, board or commission vote on rules that directly affect a company or business he represents as a consultant where he or the company may personally benefit from passage or defeat of the rule?

FACTS

You have provided the Commission the following facts:

1. The Hazardous Waste Advisory Council ["HWAC"] is a governmental entity which establishes rules and regulations governing hazardous waste management in the State of Oklahoma. After determining which rules should be considered, HWAC votes on whether to send such rules to the Department of Environmental Quality for final approval. Even though HWAC only "recommends", the votes of its members control what issues are considered by the regulatory agency.
2. Save The Cimarron, Inc. ["STC"] is a grassroots environmental organization based in Enid, Oklahoma. The organization has requested a rule change that must go before the HWAC and be approved by that body in order to be considered by the Department of Environmental Quality.
3. The controversial issue involves determining exclusionary citing criteria for disposal of hazardous waste in a 100-year flood plain. STC's proposed amendment to the existing rule is as follows:

No permit shall hereafter be granted for a new or expansion of an existing hazardous waste disposal site proposed to be located within a one-hundred year flood plain.

4. The rationale for the STC rule request is:
 - a. A floodplain could be adversely affected by newly created expansion to the same degree that the floodplain could be affected by "new" construction;
 - b. On February 5, 1981, EPA stated its opinion that all landfills will eventually leak by saying that "...Manmade permeable materials that might be used for liners or covers are subject to eventual deterioration and although this might not occur for 10, 20, or more years, it eventually occurs and, when it does, leachate will migrate out of the facility." (Federal Register, Pg. 11128.)

- c. The active operation period of a hazardous waste disposal site is minuscule compared to decades of changing weather patterns over geologic time. Therefore, the floodplain must be protected for future generations since hazardous waste, once deposited, is unlikely to be able to be removed.
- d. Even if floodplain insurance would be available for a hazardous waste site in a floodplain, the State of Oklahoma would have no guarantee that the amount would cover the damages, and no guarantee that the insurance would not be canceled due to unforeseen problems with the waste company or the insurance company.
- e. The Hazardous Waste Management Service ["HWMS"] has no objection to the language regarding the expansion of a hazardous waste disposal site into the 100-year flood plain", as stated by the HWMS in a discussion of "Proposed Rules to be discussed at the January 6, 1994 Council Meeting."
- f. The proposed rule amendment will be of minimal cost to the State of Oklahoma, that cost being related to clerical work involved as with other rule changes. It would cost more, however, if the HWMS decides to do a cost analysis on what it would take to clean-up a floodplain area and surrounding waters of the State should a flood occur in a hazardous waste site that expanded into a floodplain.

STC is not calling for such a cost analysis since it is clear that the cost of such a clean-up would be astronomical.

Reason for interest:

STC believes that the above stated rationale is applicable to the expansion of any hazardous waste disposal site in the State which expands into a floodplain.

Of particular concern is the USPCI Lone Mountain site in Major County which has been slowly expanding northward towards the Cimarron River. If the company has no plans to expand into the floodplain, then it would seem logical that they would not object to a rule change that would not affect their operations.

In Cell 5 at the site, which was once touted as "state of the art", the leak into the groundwater from deposited liquid waste has not been cleaned up yet. Monitoring wells showed problems in 1989. Now, newer cells, which have plastic liners and do not even have liquid waste deposited, are being watched for possible leakage.

The point is that expansion of the site into the Cimarron River floodplain could pose future problems not only above the ground, but also below the ground.

5. **J. Scott Nicholson** ["Nicholson"], the Chairman of HWAC, is the former plant manager of the Laidlaw/USPCI Lone Mountain Hazardous Waste Facility near the Cimarron River in Major County. Nicholson now has a private consulting firm in Enid. He is an active consultant for USPCI. It is believed that his consulting firm earns more than 2% of its income from USPCI and earns in excess of \$5,000 per year from this source. The 100-year flood plain issue directly affects the Lone Mountain Facility, and Nicholson's vote could be critical in deciding the acceptance or rejection of the proposed rule change.

These facts have been put before the HWAC in a rule request. While the public member in question has participated in deliberations in this matter and his stated his opposition to the rule amendment request, the issue will not come up for a vote until the August meeting.

ANALYSIS

The Constitutional Ethics Rules [Section 257:1-1-1 et seq. of the Rules of the Ethics Commission, 74 O.S.Supp. 1994, Ch. 62, App., as amended] govern this issue. The pertinent provision reads as follows:

Votes, deliberations, and discussions by public members

(a) A public member shall not participate in the discussion on, vote on, influence, or attempt to influence an official action of the governmental entity the public member serves on if the public member or a member of the immediate family of the public member *or a business or entity with which the public member or a member of the immediate family of the public member is associated, has:*

- (1) a pecuniary interest in; or
- (2) *a reasonably foreseeable benefit from;*

the matter under consideration by the governmental entity of which the public member is a member. A reasonably foreseeable benefit includes detriment to a business competitor of the public member, to a business competitor of a member of the immediate family of a public member or to a business competitor of a business or entity with which the public member or a member of the immediate family of the public member is associated. The public member's abstention must be recorded in the governmental entity's minutes.

(b) A public member may participate in the discussion on, vote on, or influence or attempt to influence an official action if the only pecuniary interest or reasonably foreseeable benefit that may accrue to the public member or a member of the immediate family of a public member or business or entity with which the public member or member of the immediate family of the public member is associated is *incidental to the public member's, immediate family member's or business or entity's position, or which*

accrues to the public member, immediate family member or business or entity as a member of a profession, occupation, or large class, whichever is applicable, to no significantly greater extent than the pecuniary interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

257:20-1-8

[emphasis added]

"Associated", as used in the rule, is a defined term. It means:

"Associated", when used with reference to an entity, includes an entity in which an individual or a member of his or her immediate family is a director, officer, fiduciary, trustee, agent, or partner, or owns or controls, in the aggregate, at least two percent (2%) or a value of five thousand dollars (\$5,000) of the outstanding equity.

257:1-1-2

Based on evidence you have furnished, the Commission does not see that the member in question is associated, in terms of the constitutional rules' definition.

But, beyond this, if the public member, through his wholly owned consulting firm, is associated with a business that stands to profit by a decision before the governmental entity the member serves, the issue is whether the benefit is peculiar to the public member or the business with which he or she is associated. If, on the other hand, the reasonably foreseeable benefit of this member's vote inures to all other members of a large class, there would be no violation of the rule.

In the instant situation, there is no information concerning the number of flood plains in Oklahoma having an existing hazardous waste disposal site. The Commission thus has no way of determining whether the public member's vote could be reasonably foreseen to accrue to all other members of a large class. Absent additional facts, the Commission cannot render an ethics interpretation on this question.

CONCLUSION

It is, therefore, the ruling of the Ethics Commission, as voted on at its meeting on July 13, 1995, that absent additional facts, the Commission cannot determine whether the public member may participate in the discussion on, vote on, or influence or attempt to influence an official action of the agency, board or commission he serves since the Commission has no way of knowing whether the only pecuniary interest or reasonably foreseeable benefit that may accrue to the public member is incidental to the public member, or whether it accrues to the public member as a member of a large class to no significantly greater extent than the pecuniary interest or potential benefit could reasonably be foreseen to accrue to all other members of the large class.

Please be advised that ethics interpretations by law will be published by this Commission without identifying petitioners.