

4. Overview of Ethical Considerations

OVERVIEW OF ETHICAL CONSIDERATIONS

September 26, 2008

by Kristina L. Bielenberg, (former Staff Attorney and Ethics Officer), updated by
Melanie Kehne (NRB Associate General Counsel and Ethics Officer – 828-3305)

I. Executive Code of Ethics - E.O. No. 10-03, Title 3 Appendix

(formerly E.O. No. 8-91, Executive Code of Ethics) (Attachment A)

- A. **Applicability.** The Executive Code applies to all appointees, including NRB members and alternates, Commission members and alternates, and exempt employees. You will note that some provisions of the Code apply to all Appointees, and others apply only to Full-Time Appointees. The only Full-Time Appointee at the NRB is the Chair.

- B. **Conflict of Interest.** An Appointee must recuse himself or herself if he or she has a conflict of interest, “until such time as the conflict is resolved.” E.O. No. 10-03, Section III., A., Rule 2. A “Conflict of Interest” means “a significant interest, of an Appointee or such an interest, known to the Appointee, of a member of his or her immediate family or household or of a business associate, in the outcome of any particular matter pending before the Appointee or his or her Public Body. “Conflict of Interest” does not include any interest that (i) is no greater than that of other persons generally affected by the outcome of the matter; or (ii) has been disclosed and found not to be significant.” E.O. No. 10-03, Section I.(C). Note: Disclosure and waiver may be possible, depending on the nature and degree of the conflict.

- C. **Appearance of Conflict of Interest.** Recusal or disqualification is required if an Appointee has an appearance of a conflict of interest, “until such time as the conflict is resolved.” E.O. No. 10-03, Section III., A., Rule 2. An “Appearance of a Conflict of Interest” means “the impression that a reasonable person might have, after full disclosure of the facts, that an Appointee’s judgment might be significantly influenced by outside interests, even though there is no actual conflict of interest.” E.O. No. 10-03, Section I.(B). Note: If there is an apparent conflict that will not influence the Appointee, he or she may disclose that on the record and give parties an opportunity to object or waive objection.

- D. **Other Prohibitions.** Taking any official action that materially advances the interest of any entity (except the State) with which the Appointee is seeking employment; while in state employment, soliciting or receiving any payment, gift, or favor based on any understanding that it may influence

an official action or from any private interest seeking to obtain contractual or other business or financial relations with the Act 250 program, etc.; disclosing confidential or privileged information in connection with service to the NRB to any private entity; trading in stock or transacting other private business based upon information obtained by the Appointee through his or her work on behalf of the NRB. E.O. No. 10-03, Section III., A., Rules 5, 6, 7, 8, 9.

E. General Conduct Requirements.– E.O. 10-03, Section II A.

The Executive Code also requires that appointees:

[A]void any action or circumstances, whether or not specifically prohibited by this code, which might result in:

- (1) Undermining his or her independence or impartiality or action;
- (2) Taking official action on the basis of unfair considerations;
- (3) Giving preferential treatment to any private interest on the basis of unfair considerations;
- (4) [Giving preferential treatment to a household or family member]
- (5) Using public office for the advancement of personal interest;
- (6) Using public office to secure special privileges or exemptions; or
- (7) Affecting adversely the confidence of the public in the integrity of state government.

E.O. 10-03, Section II(A). These provisions might require an Appointee's recusal even if there is no conflict of interest or appearance of a conflict.

II. Ex Parte Contact

In considering an Act 250 application, District Environmental Commission must limit its review to information that is on the record. 3 V.S.A. § 813. "Ex parte" refers to information or communications that are not part of the record that all parties can respond to. District Environmental Commissioners "shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate." *Id.* This ensures that every party has the opportunity to respond to all the evidence, and helps protect confidentiality, discussed below. In practical effect, this prohibition means that you cannot consider anything you heard, saw or learned from outside the record in deciding what is before you. If the parties are

not addressing an issue you want addressed, talk to your coordinator – there are ways of getting evidence on the record. It may be a simple matter of asking a witness a question to get something on the record. But the law prohibits Commission members from doing outside research, including internet research, site visits, and especially talking to anyone outside the hearing.

This prohibition applies to all aspects of the Act 250 application, including any preliminary issues or motions. The only applicable exception to this provision is that you may discuss the case with the district coordinator and NRB staff.

III. Confidentiality

This is another reason never to discuss a pending case with anyone other than your coordinator or other NRB staff. The duty of confidentiality also applies to things you discussed in deliberations with your district coordinator or other Commission members.

- A. **Executive Code.** The Executive Code prohibits an Appointee from disclosing “any confidential or privileged information obtained while in state employ.” E.O. 10-03, Section III(A)(8). This includes information that comes up during executive or deliberative session, or is attorney work product or attorney-client privileged.
- B. **Open Meeting Law.** Items discussed in executive session are not open to the public. 1 V.S.A. § 313(a). Also, any quasi-judicial deliberations are confidential and are expressly exempted from the Open Meeting Law requirements. 1 V.S.A. § 312(e).

IV. Basic Principles For Quasi-Judicial Officers

- A. **Vermont Constitution.** Vermont Constitution, Ch. I, Art. 6: “That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.”
- B. **Presumption of Integrity.** There is a presumption of honesty and integrity afforded to individuals designated to serve as administrative adjudicators; a party seeking disqualification of an administrative adjudicator has the burden of overcoming this presumption. See *Barker v. Ripley*, 921 F.Supp. 1213 (D.Vt.1996); *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228 (1990).

Where party made no showing of actual bias, did not appeal from denial of a motion to disqualify, and presented no grounds on which to overcome presumption of honesty of administrative adjudicator, his due process claim was rejected by reviewing court. *Brody v. Barasch*, 155 Vt. 103 (1990).

Presumption may be overcome by actual evidence of bias or partiality. Evidence of bias could include prior public statements in opposition to the specific project subject to Act 250 review. Evidence of bias would not include general statements by a Commission member concerning his or her preferred approach to environmental protection or his or her prior service on a zoning board which denied the applicant local permit approval for another, unrelated project.

V. Judicial Disqualification - 12 V.S.A. § 61 (Attachment B)

This law applies to judges and has been held to apply to Environmental Board members. It probably applies to Commission members and may provide some guidance for Appointees generally.

A. Relational Conflicts

1. Familial conflicts; disqualification of adjudicator is required if he is related to a party that is a natural person “within the fourth degree of consanguinity or affinity.” – Example: Your first cousin is an applicant for an Act 250 permit on appeal to the

2. Institutional conflicts; disqualification of adjudicator is required if he is related to a person, “within the fourth degree of consanguinity or affinity,” who is an officer, director, trustee or agent of a “corporation” that is a party. – Example: Your mother is on the Board of Directors of a non-profit corporation that has party status in an Act 250 permit appealed to the Board.

See In re: State Aid Highway No. 1, Peru, VT, 133 Vt. 4 (1974): Pursuant to 12 V.S.A. § 61, a member of the Environmental Board should have disqualified herself from proceeding in which VNRC was a party when that member also was a current member of the governing board of VNRC.

3. Representational conflicts; disqualification of adjudicator is required if she has “been retained or acted as an attorney or counsel” in a “cause or matter”

that is now before the adjudicator for decision; also, adjudicator may not subsequently serve as an attorney or counsel in a cause in which she has acted in a quasi-judicial capacity. -- Example: Attorney member of the District Commission represented developer in preparation of subdivision application for District Commission review; that attorney was subsequently appointed a member of the District Commission. Disqualification in any Act 250 appeal is required. Note: While 12 V.S.A. § 61 specifically applies to representational conflicts involving attorneys, others who serve in a representative capacity (engineers, wetlands consultants, architects, etc.), should be sensitive to potential disqualifying relationships and interests resulting from services provided to clients who may have projects subject to Act 250 jurisdiction.

B. “Interested in the event of such cause or matter;” disqualification of adjudicator is required depending on the degree of “interest.” – Example: Commission member is an investor in a project subject to Act 250 review; disqualification is required. But Commission member whose *only* relationship to a utility that is an applicant for an Act 250 permit is his receipt of residential electric service from that utility does not have a disqualifying interest in connection with the utility’s Act 250 application.

Also see, In re: State Aid Highway No. 1, Peru, VT, 133 Vt. 4 (1974): Pursuant to 12 V.S.A. § 61, the Chair of the Environmental Board, who was a contributor to VNRC, should have disqualified himself in a proceeding in which VNRC was a party “if his contributions, or feelings generally, were sufficient to give him an interest in the event.”

Note: The Supreme Court suggested that had the Environmental Board followed a practice similar to that recommended by the American Bar Association for disclosures and waivers, the Chair of the Board might have been allowed to participate in this proceeding. Under this process, the parties could agree in writing, independently of the Board member’s participation, that that member’s relationship with VNRC was immaterial or his financial interest insubstantial so as to not require his disqualification. Chairs may make disclosures and obtains waivers “on the record” at prehearing conferences or if none, at the hearing, to address the Court’s concerns.

VI. Other Provisions which do NOT apply but which may provide guidance:

A. Code of Judicial Conduct, A.O. No. 10; In re Crushed Rock, 150 Vt. 613 (1988). Note: Attorney members of a Commission should consult

provisions that apply to Continuing Part-Time Judges for guidance.

- B. Vermont Rules of Professional Conduct (effective September 1, 1999).
Note: Although provisions do not apply to lay Commission members, attorney members should familiarize themselves with provisions that relate to conduct of attorneys holding government office, in particular, those relating to conflict of interest, successive government and private employment, etc.

VII. Disclosure Protocol

- A. Consult with the Natural Resources Board Chair, and/or the Ethics Officer if you have the slightest doubt about whether you should recuse yourself or at least make disclosures of any potentially disqualifying relationship, interest, or bias. We're here to help.
- B. If you do not voluntarily decide to recuse yourself, your Commission Chair can make any necessary disclosures (or allow you to do so). If there are any objections to your participation, she will decide whether a schedule should be established for filing motions for disqualification and/or requests for further disclosures.
- C. If no objections to your participation are raised, you may participate on the matter at issue. If parties affirmatively waive any conflicts of interest, you may serve on the case. If objections of merit are raised, you will need to decide whether to recuse yourself based on the advice of the Chair and the Board's Ethics Officer. If objections of merit are raised, you may need to recuse yourself, so please consult the Chair and/or the Board's Ethics Officer.
- D. If you become aware of any facts during the course of any proceeding that suggest you should recuse yourself because of a disqualifying relationship, interest, or bias, please immediately alert your Commission Chair.

VIII. Transfer to Disinterested District Commission

In order to preserve impartiality and promote fairness, if a commission member is personally involved in a case, the matter will be transferred to another District Commission. This protocol is increasingly important in situations where the commission member attains party status; however, even so-called "behind-the-scenes" advocacy is grounds for transfer. Similarly, in situations where a conflict of interest or other form of disqualification affects multiple commission members to the extent that the procedural requirements of quorum cannot be met, the matter will be transferred to another District Commission. In these scenarios, the existence of commission member involvement is

not the triggering event for transfer, but rather the need for procedural consistency.

(Attachment A)

Executive Code of Ethics
September 26, 2008

STATE OF VERMONT Executive Department

EXECUTIVE ORDER [Executive Code of Ethics]

WHEREAS, it is essential to the proper operation of government that public officers be independent and impartial; that governmental decisions and policy be made fairly and impartially, on the merits of the matter at issue; that public office not be used for private gain other than the remuneration provided by law; and that there be public confidence in the integrity of government; and

WHEREAS, there is a risk that the attainment of one or more of these ends may be impaired whenever a conflict exists between the private interests of a public officer and his or her official responsibilities; and

WHEREAS, it is also essential to the proper operation of government that those best qualified not be discouraged from serving as public officers by requiring them to relinquish totally the opportunity to further their own interests, at least where such interests do not create irreconcilable conflicts with their official responsibilities; and

WHEREAS, both the public and private sectors of Vermont are enriched by the healthy exchange of individuals who have hands-on knowledge and work experience in both the public and private sectors.

NOW, THEREFORE, an Executive Code of Ethics effectively ensures fairness and impartiality in the conduct of state business while at the same time, encouraging the recruitment and retention of those best qualified to serve the state and ought to be reaffirmed and continued.

BE IT RESOLVED THAT I, James H. Douglas, by virtue of the authority vested in me as Governor, do hereby promulgate the following Executive Code of Ethics.

Except where otherwise provided by law, all gubernatorial Appointees of the executive branch shall be subject to provisions of this Executive Order. Nothing in this Executive Order shall exempt an Appointee from any other requirement of law or any duly adopted state personnel policy.

To assure adherence to this code, all current Appointees are asked to sign the

acknowledgment attached hereto as Exhibit A and submit it to the Secretary of Civil and Military Affairs (the "Secretary"). All future Appointees will be asked to sign and submit the acknowledgment upon acceptance of their appointments.

The Secretary has the authority to interpret the provisions of this code as they relate to particular circumstances and to issue exemptions from the Code under special circumstances. All such interpretations and exemptions shall be written and kept by the Secretary in the same manner as the Conflict Questionnaires.

I. Definitions

As used in this Executive Order:

A. "Appointee" means any exempt employee or any member of any Public Body appointed by or upon the approval of the Governor, or by or upon the approval of such an Appointee.

B. "Appearance of a conflict of interest" as used below in §§ III (A) (2) and (7) means the impression that a reasonable person might have, after full disclosure of the facts, that an Appointee's judgment might be significantly influenced by outside interests, even though there is no actual conflict of interest.

C. "Conflict of interest" means a significant interest, of an Appointee or such an interest, known to the Appointee, of a member of his or her immediate family or household or of a business associate, in the outcome of any particular matter pending before the Appointee or his or her Public Body. "Conflict of interest" does not include any interest that (i) is no greater than that of other persons generally affected by the outcome of the matter, or (ii) has been disclosed and found not to be significant.

D. "Full-time Appointee" means any Appointee receiving a full-time salary for state service.

E. "Private Entity" is any person, corporation, partnership, joint venture or association, whether organized for profit or not for profit, except those specifically chartered by the State of Vermont or which relies upon taxes for at least 50 percent of its revenues.

F. "Public Body" means any agency, department, division or office and any board or commission of any such entity, or any independent board or commission, in the executive branch of the state.

II. General Conduct

An Appointee must conduct the affairs of his or her office in such a manner as to instill public trust and confidence.

A. Thus, an Appointee shall take all reasonable steps to avoid any action or circumstances, whether or not specifically prohibited by this code, which might result in:
Page 2 of 6 (1) Undermining his or her independence or impartiality or action;

(2) Taking official action on the basis of unfair considerations;

(3) Giving preferential treatment to any private interest on the basis of unfair considerations;

(4) Giving preferential treatment to any family member or member of the Appointee's household;

(5) Using public office for the advancement of personal interest;

(6) Using public office to secure special privileges or exemptions; or

(7) Affecting adversely the confidence of the public in the integrity of state government.

B. Every Appointee shall be true and faithful to the State of Vermont; will not, directly or indirectly, do any act or thing injurious to the Constitution or Government of the State of Vermont; will faithfully execute the office which he or she holds; and will therein do equal right and justice to all men and women, to the best of his or her judgment and ability, according to law. [VT. Const., Ch 11, §56]

C. Appointees shall always treat each other, employees, staff, volunteers, and the public with dignity, respect and courtesy.

D. Appointees shall support efforts to create and maintain a diverse and effective work force.

E. Every Full-time Appointee shall devote all of his or her work time to the duties of his or her office.

F. An Appointee shall not use state property nor permit others to use state property unless the use is reasonably related to his or her official responsibilities or the conduct is permitted pursuant to a duly adopted state or agency personnel policy.

G. An Appointee shall not enter into any commitment to expend state funds unless the expenditure is reasonable and valuable to the state and made in accordance with all applicable statutes, rules or directives from the Secretary of the Agency of Administration.

H. An Appointee shall be in good standing with respect to, or in full compliance with a plan to pay, any and all taxes due the State of Vermont. An Appointee shall be in good standing with respect to, or in full compliance with a plan to pay, any and all child support obligations.

Page 3 of 6 I. Exemptions sought under this Code shall be issued only to further the twin goals of this Code; to establish high standards of ethical conduct for all Appointees and to encourage those Vermonters best qualified to serve in state government.

III. Personal Interests, Outside Employment, and Financial Activities

A. Ethical Rules While in State Employ:

(1) No Full-time Appointee shall be the owner of, or financially interested, directly or indirectly in any Private Entity or Private Interest that is subject to the supervision of his or her respective department or agency, except as a policyholder in an insurance company or a depositor in a bank. (3 VSA 204). For the purpose of this Executive Order, a direct or indirect financial interest excludes:

(i) any insignificant interest held individually or by a member of the Appointee's immediate household or by a business associate, or

(ii) any interest which is no greater than that of other persons who might be generally affected by the agency's or department's supervision.

(2) An Appointee shall not take any action in any particular matter in which he or she has either a conflict of interest or the appearance of a conflict of interest, until such time as the conflict is resolved.

(3) An Appointee shall not take any official action that materially advances the interest of any entity (except the State of Vermont) with which the Appointee is actively seeking employment.

(4) A Full-time Appointee shall not, for pecuniary gain, be an advocate for any private entity in any matter before any Public Body or before the state legislature or its committees.

(5) An Appointee, while in state employ, shall not solicit or receive any payment, gift, or favor based on any understanding that it may influence any official action.

(6) An Appointee shall not solicit or receive any payment, gift or favor from any private interest which;

(i) has, or seeks to obtain, contractual or other business or financial relationships with the Appointee's Public Body;

Page 4 of 6 (ii) conducts business or activities that are regulated by the Appointee's Public Body; or

(iii) has an interest that may be substantially affected by the Appointee's official actions.

(7) An Appointee, or his or her designee, shall not accept gifts or trips from private interests if the gifts or trips are (i) a quid pro quo; (ii) are intended to influence any decision by the Appointee; or (iii) create an appearance of a conflict of interest.

(8) Absent specific law requiring disclosure, an Appointee shall not disclose to any private entity any confidential or privileged information obtained while in state employ.

(9) An Appointee or his or her family shall not trade in stock or otherwise transact private business based upon information obtained by the Appointee through his or her work on behalf of the state.

B. Ethical Rules After State Employ:

(1) For one year after leaving office, a former appointee shall not, for pecuniary gain, be an advocate for any private entity before any public body or before the state legislature or its committees, regarding any particular matter:

(i) in which the state is a party or has a direct and substantial interest; and

(ii) in which the appointee had participated personally and substantively while in state employ.

This prohibition applies to any matter the Appointee directly handled, supervised or managed, or gave substantial input, advice or comment, or benefited from, either through discussing, attending meetings on, or reviewing materials prepared regarding the matter.

(2) For one year after leaving office, a former full-time appointee shall not, for pecuniary gain, be an advocate for any private entity before any public body or before the state legislature or its committees, regarding any particular matter in which the appointee had exercised any official responsibility.

IV. Reports

Within thirty days of appointment and thereafter annually on June 30, every Appointee who earns \$30,000 or more per year shall file with the Secretary a "Ethics

Questionnaire" as prescribed in Exhibit B. These questionnaires shall be treated as confidential personnel documents as defined by 1 VSA §317 (b) (7) and kept as such during the gubernatorial administration in which the Appointee serves, or for one year after the Appointee leaves office, whichever first occurs, at which point they will be destroyed.

V. Enforcement

The purpose of this Executive Code of Ethics is to provide guidance to gubernatorial Appointees covered herein, and during such appointment, except as otherwise required by law, only the Governor or his designated agent shall have the power to sanction any violations hereof. Nothing in this code shall create a right to continue state employment. The remedy for a violation of post-employment restrictions set forth in Section III(B) shall rest with the Public Body before which the former Appointee appears and, barring unusual circumstances, shall result only in disqualifying the former Appointee from appearing or participating in the particular matter.

VI. Effective Date

This Executive Order takes effect upon signing, and except as otherwise required by law, supersedes and replaces Executive Order #04-00, dated June 13, 2000.

Witness my name hereunto subscribed and the Great Seal of the State of Vermont hereunto affixed at Montpelier this ____ day of September, 2003.

James H. Douglas Governor

By the Governor:

Neale F. Lunderville Secretary of Civil and Military Affairs

(Attachment B)

§ 813. Ex parte consultations

Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member:

- (1) May communicate with other members or employees of the agency, and
- (2) May have the aid and advice of one or more personal assistants. (1967, No. 360 (Adj. Sess.), § 13, eff. July 1, 1969.)

(Attachment C)

§ 61. Disqualification for interest

(a) A justice of the supreme court, judge, juror or other person shall not act in a judicial capacity in or as trier of a cause or matter in which he has been retained or acted as an attorney or counsel, or is interested in the event of such cause or matter, or is related to either party, if a natural person, within the fourth degree of consanguinity or affinity, or if a corporation, to any officer, director, trustee, or agent thereof within such degree; nor shall he be permitted to appear as attorney or counsel in a cause in which he has acted in such capacity or as trier; but he shall not be disqualified from so acting in a cause or matter in which a railroad corporation is a party by reason of being a taxpayer in a town which owns stock in such railroad corporation.

(b) A justice of the supreme court, or a judge shall not be disqualified from acting in a judicial capacity in a cause in which a county, town, village or school district is a party or interested, by reason of being a taxpayer or resident in such corporation.

(c) A superior judge, or justice of the supreme court shall not be disqualified to act in his official capacity in any matter in which a municipality, a life, fire or accident insurance company is a party in interest by reason of being a resident or taxpayer in such municipality or a policy holder in such insurance company.

(d) Membership in a domestic mutual fire insurance corporation shall not disqualify a district judge to take jurisdiction of a cause wherein such corporation is a party.

(e) A petit juror shall be disqualified from sitting as such in a case where a municipality is a party, if such juror is a resident or taxpayer of such municipality.

(f) A juror who is a policy holder in any cooperative or mutual insurance company shall not by reason thereof be disqualified as a juror in a cause where such cooperative or mutual insurance company is a party, or is interested in the outcome thereof by reason of being an insurer of any of the parties in such cause. (Amended 1965, No. 194, § 10, eff. July 1, 1965, operative Feb. 1, 1967; 1973, No. 249 (Adj. Sess.), § 13, eff. April 9, 1974.)