

OHIO ETHICS COMMISSION

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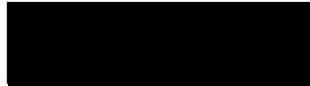


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December 17, 1999 Informal Opinion 1999-INF-1217-4

Ron Trivisonno, P.E.



Dear Mr. Trivisonno:

In your letter received by the Ethics Commission on June 5, 1999, you ask about the application of the Ohio Ethics Law and related statutes to yourself as a principal in a company, Wetland Resources, Ltd. (WR) and as an employee of the Ohio Department of Natural Resources (ODNR) Division of Mines and Reclamation. Specifically, you ask whether the laws preclude WR from conveying a conservation easement and donating real estate to the ODNR Division of Wildlife (DOW).

WR asked a private law firm for advice and received a written response from an attorney, Maribeth Devers, on March 10, 1999. You included the response written by Ms. Devers with your request for an advisory opinion. This advisory opinion is written incorporating facts presented in your letter and the response by Ms. Devers.

As explained below, because of your status as a principal in the company, WR is precluded from conveying a conservation easement and donating real estate to DOW unless you can objectively demonstrate that you meet the exception provided by R.C. 2921.42(C) to the prohibition against having an interest in a public contract with your own state department. In addition, if the mitigation credits are sold to ODOT, then you must file a 102.04(D) Statement and meet the disqualification requirements of that section. Furthermore, you are prohibited from authorizing, or using the authority or influence of your employment with ODNR, formally or informally, to secure decisions by public officials and employees that are beneficial to the financial interests of WR.

Facts

You state that you are a principal in WR, which is a limited liability corporation that was formed to obtain properties and construct wetlands. WR constructs wetlands to accumulate wetland mitigation credits. Wetland mitigation credits can be purchased by developers to offset damage done to existing wetlands through development.

WR plans to sell wetland mitigation credits—but not the land—at prevailing market rates to developers or other parties who have disturbed wetlands through construction in other locations. Land that is used for wetland mitigation credit is forever maintained as a wetland by means of a deed restriction known as a conservation easement. The holder of the conservation easement is required to maintain the land as a wetland. The party that sells the mitigation credit locates an agency or group to hold the conservation easement.

In the instant situation, WR has an option to purchase approximately 50 privately owned acres along the eastern side of Delaware Lake. The US Army Corps of Engineers owns the land surrounding this 50-acre parcel. The Corps of Engineers leases its land to DOW for public hunting and DOW currently maintains wetlands on that parcel. WR has approached DOW with the suggestion that DOW hold the conservation easement on the 50-acre parcel. DOW has agreed to hold the easement provided that, after a five-year period of wetland establishment, WR donate the property to DOW and pay DOW a maintenance fee. WR has agreed to these conditions. You also state that WR will seek permission from the Corps of Engineers to construct a wetland on the 50-acre parcel because it is likely that the wetland would naturally extend onto the Corps's adjacent property. You speculate that DOW, as a lessee of the Corps of Engineers, would be required to approve the Corps's decision to grant this permission to WR. If WR purchases the 50 acres and constructs the wetlands under the above conditions, it is possible that the Ohio Department of Transportation (ODOT) may purchase the mitigation credits from WR.

Interest in a Public Contract—R.C. 2921.42(A)(4)

Your attention is directed to R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include an employee of the state. ODNR is a statutorily created administrative department of the state. R.C. 121.02(F). An employee of ODNR is a "public official" for purposes of R.C. 2921.42. Ohio Ethics Commission Advisory Opinion No. 85-001.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of any agency or instrumentality of the state. In order to be prohibited under R.C. 2921.42, an interest must be definite and direct and may either be pecuniary or fiduciary in nature. Adv. Ops. No. 78-005, 81-008, and 86-002. A person with an ownership interest in a business has a definite and direct interest in the contracts of the business. Adv. Ops. No. 86-005 and 89-008. As a principal in WR, you have a definite and direct interest in the contracts of WR.

If DOW were to become the holder of the conservation easement on the 50-acre parcel, DOW would be acquiring real property. See Weir v. Consolidated Rail Corp., 12 Ohio App.3 63 (1983) (an easement conveys an interest in real property). The acquisition of real property is a public contract for purposes of R.C. 2921.42.

In addition, an agreement that provides for WR to donate the property to DOW and pay DOW a maintenance fee after a five-year period of wetland establishment is a public contract for purposes of R.C. 2921.42 because DOW would be entering into a contract to acquire a full property interest in the 50 acres. See generally Adv. Op. No. 90-003 (the definition of the term "public contract" does not require a purchase, but also includes "acquisition" of property through other means). Compare R.C. 102.04(B) (set forth below, stating that a state officer or employee cannot "sell or agree to sell" any goods or services, except through competitive bidding, to any governmental entity of the state). Finally, ODOT's proposed purchase of the wetland mitigation credits that would correspond to the establishment of a wetland on this 50-acre parcel is a public contract for purposes of R.C. 2921.42 because ODOT would acquire the credits in order to engage in development that would disrupt wetlands in other locations. The public contracts that involve DOW as a party will be addressed first.

Application of R.C. 2921.42(A)(4) to "Connected" Entities

As stated above, R.C. 2921.42(A)(4) prohibits a public official from having an "interest" in a public contract entered into by or for the use of "the political subdivision or governmental agency or instrumentality with which he is connected." The Ethics Commission has held that to be "connected" with something is to be related to, or associated with, that entity. Adv. Op. No. 87-002.

As stated above, you are an employee of the Division of Mines and Reclamation which is a statutorily created division within ODNR. See R.C. 121.04 and R.C. 1561.02. The Ethics Commission has held that, at the state level, a public official's department is the government agency with which he is connected for purposes of R.C. 2921.42(A)(4). See Adv. Op. No. 84-008 (an employee of the Bureau of Vocational Rehabilitation within the Rehabilitation Services Commission may not have an interest in a contract with either the Bureau or the Commission). An employee of any division of ODNR is prohibited by R.C. 2921.42(A)(4) from contracting with that division, or any other division, of ODNR.

Therefore, R.C. 2921.42(A)(4) prohibits you, as an employee of ODNR from having an interest in a public contract with any division of ODNR. The prohibition imposed by R.C. 2921.42(A)(4) will apply despite the fact that DOW is administratively separate from DMR. See R.C. 121.04 and R.C. 1531.03. Because you are prohibited from having an interest in a contract with ODNR, WR is effectively prohibited from donating the property or transferring a conservation easement to the DOW, unless you can meet the exception to R.C. 2921.42(A)(4), set forth below.

Exception to the Prohibition—R.C. 2921.42(C)

Division (C) of Section 2921.42 sets forth an exception to the prohibition of Division (A)(4). In order to meet the exception provided by R.C. 2921.42(C), four requirements must be met. R.C. 2921.42(C), states:

- (C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when all of the following apply:
 - (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
 - (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
 - (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions; and
 - (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the criteria of Division (C) is a question of fact which, when applied to the circumstances of an individual situation, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 82-007. The criteria of Division (C) are strictly construed against the public official, and the burden is on the official to demonstrate that he is in compliance with the exception. Adv. Op. No. 84-011.

Division (C)(2) is of particular importance in the instant situation and requires that the subject of the public contract be "unobtainable elsewhere for the same or lower cost." Adv. Op. No. 83-004. In Advisory Opinion No. 84-011 the Commission held:

[T]he application of the exemption [provided in Division (C) of Section 2921.42] must be consistent with the principle underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.

Under the facts you have presented, DOW wishes to acquire the conservation easement on the 50-acre parcel with the understanding that WR will donate the property to DOW and pay DOW a maintenance fee after a five-year period of wetland establishment. In order to meet the requirements of Division (C)(2), you must be able to demonstrate that DOW's proposed action is objective and reasonable and is not devised to favor your private interests. Adv. Op. No. 88-003. See also Adv. Ops. No. 84-011 and 88-001. You must also be able to justify objectively through appropriate documentation that the 50-acre parcel is either the least costly property for DOW or is uniquely suited to meet the needs of the DOW because of the property's location, size, or other characteristics. Adv. Op. No. 88-003. See also R.C. 102.04(B) (The prohibition imposed by R.C. 102.04(B) applies when a public official or employee "sells or agrees to sell" goods or services to his own public agency, but not, as explained below, if the public agency is acquiring the property by a transaction that is not a "sale.>"). The fact that the 50-acre parcel is surrounded by land that DOW currently leases, and on which DOW currently maintains wetlands, may be an indication of this requirement.

It should also be emphasized that Division (C)(4) requires that the transaction between DOW and WR be at "arm's length" with DOW being fully aware of your interest in WR. See also R.C. 2921.42(A)(1) (set forth below). In addition, Division (C)(1) requires that you demonstrate that DOW's proposed action is an objective and reasonable means of acquiring supplies or services that are necessary for it to meet its statutorily mandated duties. Finally, Division (C)(3) requires that the treatment that WR accords DOW must be either the same as or preferential to the treatment WR accords any other person or entity that would desire to hold the conservation easement or acquire full title to the 50-acre parcel.

As stated above, the proposed sale of mitigation credits from WR to ODOT is also a public contract. Because ODOT is a state department that is separate from ODNR and an employee of ODNR is not "connected" with ODOT, the prohibition imposed by R.C. 2921.42(A)(4) will not apply to the proposed sale of mitigation credits from WR to ODOT. As stated above and explained below, however, the proposed sale of mitigation credits from WR to ODOT implicates the prohibition imposed by R.C. 102.04(B).

Sale of Mitigation Credits to ODOT—R.C. 102.04(B)

As set forth above, you state that if WR purchases the 50 acres and constructs the wetlands, it is possible that ODOT may purchase the mitigation credits that correspond to this particular wetland from WR. The sale of goods or services to a state agency by a business owned by a state officer or employee implicates the prohibition imposed by R.C. 102.04(B):

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. (Emphasis added).

R.C. 102.04(B) prohibits a state officer or employee from selling, or agreeing to sell, any goods or services, except through competitive bidding, to the General Assembly or any other governmental entity of the state. Because you are an employee of ODNR and a principal of WR, WR is prohibited from selling wetland mitigation credits to ODOT except through competitive bidding, unless you meet the exception provided by Division (D) of R.C. 102.04.

As described previously, a "public contract," as defined for purposes of the prohibitions imposed by R.C. 2921.42, does not require a purchase, but also includes an "acquisition" through other means. In contrast, R.C. 102.04(B) specifically uses the words "sell or agree to sell." See Adv. Op. No. 89-001 (in interpreting a statute, reference is made to the fact that if the legislature intended a particular meaning, it could have easily have found apt words or phrases to express that meaning, especially where it has used such words or phrases in another connection). In the instant situation, if the legislature intended that the prohibition of R.C. 102.04(B) did not require a sale, but also included an "acquisition" through other means, it would have specifically so indicated through its choice of words.

Based on the language employed in the respective statutes, it is clear that R.C. 102.04(B) does not prohibit the same type of activity that R.C. 2921.42 prohibits. In the instant situation, the proposed conveyance of a conservation easement and donation of the 50-acre parcel from WR to DOW does not implicate the prohibition imposed by R.C. 102.04(B). However, the proposed purchase of mitigation credits by ODOT from WR is a "sale" that will implicate the prohibition imposed by R.C. 102.04(B). R.C. 102.04(B) would prohibit you, as a state employee, from selling mitigation credits to ODOT, a state department, unless the credits were purchased by ODOT through a competitive bidding process.

Exception Provided by R.C. 102.04 (D)

Division (D) of Section 102.04 of the Revised Code provides an exception to the prohibition of R.C. 102.04(A) for state employees and officials who are appointed to a non-elective state office. Adv. Ops. No. 89-006, 90-009, and 92-006. R.C. 102.04(D) and (E) read as follows, in pertinent part:

- (D) A public official who is appointed to a nonelective office or a public employee shall be exempted from division (A), (B), or (C) of this section if both of the following apply:
 - (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
 - (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

The required statement shall contain the official's or employee's name and home address, the name and mailing address of the public agencies with which he serves and before which the matter is pending or that is purchasing or has agreed to purchase goods or services, and a brief description of the pending matter and of the personal services to be rendered or a brief description of the goods or services to be purchased. The statement shall also contain the public official's or employee's declaration that he disqualifies himself for a period of two years from any participation as such public official or employee in any matter involving any public official or employee of the agency before which the present matter is pending or to which goods or services are to be sold.

In order to meet the exception provided by R.C. 102.04(D) two conditions must be met: (1) the official or employee must sell the goods or services to an agency other than his own; and (2) prior to selling the goods or services, the official or employee must file a 102.04(D) Statement, which describes the goods or services to be sold and discloses other specified information.

The public official or employee must file the 102.04(D) Statement with: the Ohio Ethics Commission; (2) his own state agency; and (3) the state agency that is purchasing or is agreeing to purchase the goods or services. The public official or employee must declare on the 102.04(D) Statement that he will disqualify himself, for a period of two years from the date the statement is filed, from participation as a public official or employee in any matter involving any public official or employee of the agency that is purchasing, or has agreed to purchase, the goods or services. (Division (E) of R.C. 102.04 emphasizes that a public official or employee who files, or is required to file, a 102.04(D) Statement, must disqualify himself from any participation as a public official or employee in any matter involving any official or employee of the agency that is purchasing, or has agreed to purchase, the goods or services.) Adv. Op. No. 89-010.

Therefore, if WR desires to sell wetland mitigation credits to a state agency, other than ODNR, without engaging in competitive bidding, then you are required to file a 102.04(D) Statement and would be subject to the two-year disqualification, as explained above. Accordingly, WR and ODOT may enter into the contract without competitive bidding provided that you file a 102.04(D) Statement and comply with the disqualification requirements, as explained above.

Authorizing a Public Contract—R.C. 2921.42(A)(1)

Assuming that the criteria of Division (C) can be established so that DOW may properly acquire a conservation easement, and ultimately full title, to the 50-acre parcel from WR, and that you satisfy the requirements of R.C. 102.04(D) and (E) to enable ODOT to purchase wetland mitigation credits from WR, then the prohibition of Division (A)(1) of R.C. 2921.42 must be observed. R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Use of Authority or Influence and Accepting Things of Value—R.C. 102.03(D) and (E)

In addition, your question raises the application of the general conflicts of interest provisions of the Ethics Law, as set forth in Chapter 102. R.C. Sections 102.03(D) and (E) provide the following:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office or is an employee of any department, division, institution, board, commission, authority, bureau, or other instrumentality of the state. R.C. 102.01(B) and (C). Therefore, as an employee of ODNR, you are subject to the prohibitions of R.C. 102.03(D) and (E). Adv. Op. No. 84-012.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). Payments received by a company for property or services fall within the definition of "anything of value." In the instant situation, the decision by DOW to acquire the conservation easement on the 50-acre parcel will enable WR to sell the corresponding wetland mitigation credits to another party, which, as described above, may be ODOT, and thus is a thing of value for purposes of R.C. 102.03(D) and (E). See Adv. Ops. No. 90-002 and 92-012 (the beneficial economic impact of a decision by a public agency is a thing of value for purposes of R.C. 102.03). In addition, the proceeds that WR will receive from the sale of wetland mitigation credits to either ODOT or another party is a thing of value for purposes of R.C. 102.03(D) and (E).

The Ethics Commission has recognized that a public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. Adv. Op. No. 90-002. R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision by another public official or employee affecting his private interests or the interests of his business associates. Adv. Op. No. 96-004.

As stated above, the land surrounding the 50-acre parcel is owned by the Corps of Engineers which leases it to DOW for public hunting. WR plans to seek permission from the Corps of Engineers to construct a wetland on the 50-acre parcel because it is likely that the wetland would naturally extend onto the Corps's adjacent property. You speculate that DOW, as a lessee of the Corps, would be required to approve the Corps's decision to grant this permission to WR.

As a person employed by ODNR, it is possible that you have access to, and working relationships with, other ODNR officials and employees that is not enjoyed by business owners who do not hold public employment with ODNR. R.C. 102.03(D) prohibits you from using your access and working relationships with DOW officials and employees to affect their decisions on matters that could economically benefit a company in which you are a principal. In the instant situation, those matters include the decisions by DOW to acquire the conservation easement and ultimately full title to the 50-acre parcel, and the approval of the Corp of Engineer's decision to permit WR to extend the wetland onto its adjacent property.

In addition, the prohibitions imposed by R.C. 102.03(E) will be implicated if the purchaser of mitigation credits from WR is a party that is regulated by, interested in matters before, or doing or seeking to do business with, ODNR.

R.C. 102.03(E) does not require that the public official or employee use the authority or influence of his office or employment to secure an improper thing of value. Rather it prohibits a public official or employee from merely soliciting or accepting an improper thing of value. Adv. Ops. No. 90-004 and 96-004. The Ethics Commission has held that a public official's or employee's objectivity and independence of judgment could be impaired with regard to his official decisions and responsibilities if he were to receive a financial benefit from engaging in private outside business with a party that is interested in matters before, regulated by, or doing or seeking to do business with, his own public agency. Adv. Ops. No. 87-006, 89-006, and 93-015.

The Ethics Commission has held that in certain situations, a public official or employee may withdraw from consideration of matters that could pose a conflict of interest. Adv. Ops. No. 89-006, 90-002, and 96-004. A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with, his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by his employing agency. Adv. Ops. No. 89-006, 89-010, and 96-004. See also Adv. Op. No. 90-010.

Therefore, R.C. 102.03 (E) prohibits a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with his own agency unless he is able to withdraw from consideration of matters that could pose a conflict of interest. The withdrawal must be approved by the public agency, by appropriate officials at a supervisory level above the public official or employee who wishes to withdraw.

Therefore, if the purchaser of wetland mitigation credits from WR is regulated by, interested in matters before, or doing or seeking to do business with ODNR, then R.C. 102.03(D) and (E) prohibit you from participating, as an ODNR employee, in regulatory matters that pertain to the purchaser. Adv. Op. No. 96-004. You must be able to fully withdraw those matters, and the withdrawal must be approved by the appropriate officials at ODNR.

In addition, the Ethics Commission has held that a public official or employee is prohibited by R.C. 102.03(D) and (E) from participating in matters, as a public official or employee, that directly affect the pecuniary interests of competitors to his private outside business. Adv. Ops. No. 86-007 and 90-002. Therefore, R.C. 102.03(D) and (E) prohibit you from participating, as an ODNR employee, in any matter that affects a company or person who is a competitor to WR. Any matter before ODNR that affects the purchaser of wetland mitigation credits from WR or a competitor of WR must be handled by a ODNR official or employee whose position is independent of, or a check upon, your authority.

Disclosure of Confidential Information—R. C. 102.03(B)

You should also be aware of Division (B) of Section 102.03 of the Revised Code, which reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Division (B) of Section 102.03 prohibits a present or former public official from disclosing or using, without appropriate authorization, any confidential information acquired by him in the course of his official duties. No time limitation exists for this prohibition, and it is effective while a person serves in a public position and after he leaves public service. Adv. Op. No. 88-009. R.C. 102.03(B) prohibits you from using, without appropriate authorization, confidential information acquired by you in your official capacity as an ODNR employee in order to secure the purchase of property by WR or to otherwise benefit yourself or your business associates.

Other Issues

The response from your private legal counsel briefly mentioned R.C. 2921.42(A)(5) and R.C. 2921.43. As explained below, the prohibitions imposed by these statutes are not applicable to the facts disclosed by you in your request for an advisory opinion.

R.C. 2921.42(A)(5) prohibits a public official from having an interest in a public contract that is required by law to be let by competitive bidding and involves more than one hundred and fifty dollars. Under the facts that you have presented, the proposed transactions do not create a public contract that falls within this description. Therefore, the prohibition imposed by R.C. 2921.42(A)(5) need not be addressed.

Briefly, R.C. 2921.43 prohibits a public servant from soliciting or accepting compensation, other than allowed by law, for performing his official duties and soliciting or accepting anything of value to secure or maintain public employment for any party. In addition, R.C. 2921.43 prohibits a person from coercing campaign contributions in exchange for securing or maintaining public employment. Under the facts that you have presented, the proposed transactions do not involve any compensation for performing your official duties as an ODNR employee and have no bearing upon your public employment. Therefore, the prohibitions imposed by R.C. 2921.43 need not be addressed.

Conclusion

As explained above, because of your status as a principal in the company, WR is precluded from conveying a conservation easement and donating real estate to DOW unless you can objectively demonstrate that you meet the exception provided by R.C. 2921.42(C) to the prohibition against having an interest in a public contract with your own state department. In addition, if the mitigation credits are sold to ODOT, then you must file a 102.04(D) Statement and meet the disqualification requirements of that section. Furthermore, you are prohibited from authorizing, or using the authority or influence of your employment with ODNR, formally or informally, to secure decisions by public officials and employees that are beneficial to the financial interests of WR.

The Ethics Commission approved this informal advisory opinion at its meeting on December 17, 1999. It represents the views of the undersigned, based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions or desire additional information, please feel free to contact this Office again.

Sincerely,



John Rauski
Staff Attorney

cc: Steve Meagher, ODNR Chief Legal Counsel