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June 7, 2006

ADVISORY OPINION NO. 2006-09

Mr. Edward Wolfe
Environmental Scientist III
Alabama Department of Environmental Management
303 Perdido Avenue
Fairhope, Alabama 36532

Conflict Of Interest/Environmental Scientist
With The Alabama Department Of
Environmental Management (ADEM)
Establishing Company To Assist Clients In
Completing Forms For Federal Permits
Required For Certain Coastal And Near
Coastal Construction Activities

An Environmental Scientist with the Alabama Department of Environmental Management (ADEM) may operate a business providing assistance to clients in completing forms for federal permits required for certain coastal and near coastal construction activities; provided, that this is not a function performed by ADEM; that the business would have no interaction with ADEM during the federal permitting process; that all activities relating to the establishment and operation of this business are conducted on his own time, whether after-hours, weekends, etc.; that there is no use of any public equipment, facilities, time, materials, human labor or other public property under his discretion or control to assist him in the operation of his outside business; and, that no confidential information obtained in the course of his employment with ADEM is used in either obtaining opportunities or performing the functions of his outside business.

Dear Mr. Wolfe:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTION PRESENTED

May an Environmental Scientist with the Alabama Department of Environmental Management (ADEM) establish a business that would assist clients in applying for federal permits required for certain coastal and near coastal construction activities?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

Edward Wolfe has been a State of Alabama employee for 21 years, during which the entire time has been with the Alabama Department of Environmental Management (ADEM), and located in their Mobile branch.

His present job duties for the State include inspections of land disturbances greater than one (1) acre in size for the purpose of construction activities and land disturbances greater than one (1), but less than five (5) acres in size for activities associated with mining. He states that these activities are conducted to evaluate impacts to State waters. He has provided to the Commission, a copy of his Employee Performance Pre-appraisal for the current year, as well as a listing of his ADEM responsibilities through January 2007.

Mr. Wolfe has recently decided to establish a company to be located in Baldwin County, Alabama. Because of the recent weather-related damage caused in that area, and the increased construction associated with the rapidly growing population, he states there has been an increased need for federal permits required for certain coastal and near coastal construction activities. He states that this would include, but would not be limited to construction of boathouses, piers and docks and minor filling of wetland areas.

He states that his proposed business would meet the needs for the accurate completion of the correct forms for these permits.

Mr. Wolfe states that the federal government allows for "third-party" completion of governmental forms submitted for these required permits. He states that, much like a CPA fills out

required IRS forms for individuals and companies, his company would do the same for federal permits. As a CPA holds only the responsibility to complete the necessary IRS forms and no direct responsibility for the activities, so also would this proposed company work. He states that the company would act as an "agent" for the customer. He has attached to his request an example form with the area highlighted that shows what his responsibilities would entail.

Mr. Wolfe states that his role in his company would exist on two fronts. One, he would be sole owner of the suggested business. There are no other owners associated with this company. Secondly, he would hire and train the employees needed to complete the work. There are no special requirements needed to complete these forms, other than a working knowledge of the different permits and the requirements needed for their accurate completion.

Mr. Wolfe states that these permits are independent of ADEM requirements for construction and have no bearing on the program for which he presently works. He states that, additionally, the area of service for this company would not be limited to Alabama, but would be conducted nationally.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-2(b) states:

"(b) An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Section 36-25-1(8) defines a conflict of interest as:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

Section 36-25-1(23) defines a public employee as:

"(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health

care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income."

Section 36-25-1(2) defines a business with which the person is associated as:

"(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business."

Section 36-25-5(a) states:

"(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-5(c) states:

"(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy."

Section 36-25-8 states:

"No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this

chapter, shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business."

While the Ethics Law recognizes that public officials and public employees should have the opportunity for outside employment, they may not accept outside employment when an unresolvable conflict of interest exists. It appears from the facts as provided that Mr. Wolfe's proposed outside business interests would have no bearing on or interaction with his current job responsibilities with ADEM, nor is this a service provided by ADEM. Therefore, no conflict of interest exists.

Based on these facts, it would not present a conflict of interest for Mr. Wolfe to develop and operate this business; provided,

- 1) that this is not a function performed by ADEM;
- 2) that the business would have no interaction with ADEM during the federal permitting process;
- 3) that all activities relating to the establishment and operation of this business are conducted on his own time, whether after-hours, weekends, etc.;
- 4) that there is no use of any public equipment, facilities, time, materials, human labor or other public property under his discretion or control to assist him in the operation of his outside business; and,
- 5) that no confidential information obtained in the course of his employment with ADEM is used in either obtaining opportunities or performing the functions of his outside business.

CONCLUSION

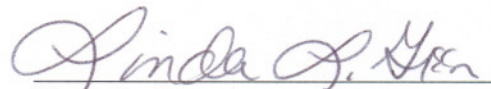
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AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on June 7, 2006.

A handwritten signature in dark ink, appearing to read "Linda L. Green", is written over a horizontal line.

Linda L. Green

Chair

Alabama Ethics Commission