

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)
42 IAC 1-5-10 Benefiting from confidential information
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The DNR Ethics Officer requested an amendment to Advisory Opinion No. 14-I-13 regarding the approved procedure to screen the State Forester from matters related to the inclusion of his property in the Indiana Classified Forest and Wildlands Program. SEC determined that the proposed amendments to the screening procedures previously approved for any tracts of the State Forester's land that are being considered for the Program are appropriate and should be implemented as necessary to avoid a conflict of interest under IC 4-2-6-9.

December 2014
No. 14-I-13A

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is the Ethics Officer for the Indiana Department of Natural Resources ("DNR"). The Ethics Officer requests this advisory opinion on behalf of the State Forester, for an amendment to Advisory Opinion No. 14-I-13 ("Opinion") regarding the inclusion of property owned by the State Forester into Indiana's Classified Forest and Wildlands Program ("Program").

In brief, the Opinion provided the procedural framework that the State Forester would follow in submitting lands he owns into the Program. The Commission found that a conflict of interest could arise under IC 4-2-6-9 if a screening procedure was not implemented by the DNR. The Commission provided that the DNR's proposed screening procedure was appropriate, with the exception that the Natural Resources Commission ("NRC"), not the Department Deputy Director should serve as the ultimate authority in determining whether additional lands owned by the State Forester would be accepted into the Program. The Commission favored the increased transparency provided by the approval being issued at an open, public meeting.

After receiving the Opinion and reviewing it with the Chief Administrative and Ethics Officer for the NRC, concerns were raised regarding the legal authority of the NRC to approve an application submitted to the Program and the corresponding process of administrative review that would follow should an objection be filed. Specifically, IC 14-11-3-1 provides that notwithstanding any other law, the DNR's Director shall issue all licenses. As to administrative review, 312 IAC 15-1-3(b) provides that a person aggrieved by action of the State Forester is entitled to administrative review pursuant to the Administrative Orders and Procedures Act. If the NRC were to be substituted as the ultimate authority, no entity would be left to review the NRC's determination.

In order to address these concerns, the ALJ and the Ethics Officer met with the Commission's Executive Director in early November to discuss a solution that would address the

Commission's transparency concerns and those raised by the NRC regarding ultimate authority and administrative review. To that end, the following has been proposed:

- The State Forester would submit his application to the Program to the Department Deputy Director for review and approval;
- The Department Deputy Director would review the application but refrain from issuing a decision until the next regularly scheduled meeting of the NRC; copies of the application would be available via Indiana's Access to Public Records Act;
- Upon receipt of State Forester's application, the Department Deputy Director would so inform the NRC;
- The NRC would place the matter as an information item on the agenda for its next regularly scheduled meeting;
- At the following NRC meeting, the Department Deputy Director would publically review the application and issue an approval or rejection. The NRC would offer no comment or review of the matter, nor would copies be provided to its members;
- Any party that wished to contest the decision would then have fourteen days to file an administrative appeal with the NRC.

Under such proposed procedures, the Commission's desire for transparency would be addressed by having the Department Deputy Director issue the decision at an open, public meeting with the item having been placed on the NRC's agenda in advance. By withholding a decision until the following NRC meeting, the public would be on notice of the appropriate timeline to file an objection. Further, by having the Department Deputy Director issue the decision on behalf of the DNR, the NRC would still be in compliance with any legal or ethical considerations in conducting an administrative review should an objection be filed.

ISSUE

Is the proposed amended screening procedure proposed by the DNR appropriate to prevent a conflict of interest from arising for the State Forester?

RELEVANT LAW

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict

of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

ANALYSIS

As provided in the Opinion, a conflict of interest would arise if the State Forester participates in a decision or vote regarding any tracts of land in which he has an ownership interest and that are currently part of the Program and/or other tracts of land he wishes to enroll in the Program.

To prevent the State Forester from engaging in any such decisions or votes, the Department has proposed amending the screening procedures that were approved by the Commission in the previous Opinion. In general, the Department Deputy Director would review and determine approval of any of the State Forester's applications for the Program instead of having the NRC perform such duties to preserve the NRC's ability to review matters related to the application and/or participation of the State Forester's land tracts in the Program.

CONCLUSION

The Commission finds that the proposed amendments to the screening procedures previously approved for any tracts of the State Forester's land that are being considered for the Program are appropriate and should be implemented as necessary.

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A state employee who serves as the State Forester for DNR oversees all Division activities, including the Division of Forestry's Classified Forest and Wildlands Program which offers tax benefits to landowners whose properties are accepted into the Program. The State Forester, prior to his appointment, had applied for property he owned to be entered into the Program. Upon the State Forester's appointment, the Deputy Director oversaw the re-evaluation of the land for tax purposes. The State Forester now wishes to enter more land into the Program while maintaining compliance with the Code of Ethics. SEC found the arrangement proposed by the DNR was sufficient to avoid any potential conflicts of interest with the amendment that applications for new tracts of land that the State Forester wishes to be accepted into the Program shall be reviewed by the Natural Resources Commission rather than the Deputy Director.

September 2014

No. 14-I-13

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is the Ethics Officer for the Indiana Department of Natural Resources ("DNR"). The Ethics Officer requests this advisory opinion on behalf of the State Forester.

The Indiana Classified Forest Act was established in 1921. DNR's Division of Forestry ("Division") is responsible for administering the Classified Forest and Wildlands Program ("Program"). A Classified Forest and Wildlands tract is an area of land that is at least 10.0 contiguous acres of forest or non-forest wildlife habitat where the landowner has agreed (by application) to be a good steward of the land and its natural resources. In return, the State agrees to see that the assessed value of the land is reduced to \$1 per acre, and taxed on that preferential assessment. The land is managed for timber production, wildlife habitat, and the protection of watersheds while conserving other natural resources and values.

To be considered for the Program, an initial inspection of the property is performed by a District Forester to determine whether it meets the eligibility requirements. A written management plan, which may be prepared by the District Forester or by a wildlife biologist or other professional forester, is required prior to the application. This plan puts into writing a description of the land, the goals for the land, and prescribes how to reach those goals over the next 5-10 years. This plan is flexible and may change as objectives change and/or the property develops over time. The prescriptions will always take into account the health and productivity of the property as activities are done to reach the goals.

Pursuant to IC 6-1.1-6-12, if, in the State Forester's opinion, an application is properly filed and the land to be classified complies with the provisions of this statute, the State Forester shall

approve the application. Following acceptance into the Program, at least once every seven years the District Forester or other Division representative will re-inspect the property (at no cost). The forester will look at the area to see how it is progressing, to be sure there are no violations occurring, and to help update the management plan. A written report is provided after the re-inspection.

The state employee has been the State Forester since 2005. The State Forester oversees and is responsible for all Division activities. Prior to his appointment, the State Forester had previously submitted Classified Forest applications to the Program which were accepted. The District Forester assigned to the geographic location of the State has re-inspected the State Forester's submitted land since that time. Since becoming State Forester, all classified tracts that have been re-inspected were approved by his immediate supervisor, DNR Deputy Director. The State Forester, without objection, has accepted all recommendations offered by the District Forester pursuant to re-inspection.

The State Forester now wishes to enter additional tracts of land into the Program while maintaining compliance with the Code. To that end, the DNR proposes procedures to screen the State Forester from DNR decisions related to any new tracts of land he wishes to enter into the Program. Specifically, the State Forester will consult with the inspecting forester on management decisions and a draft plan will be written for approval and signature by the State Forester, as landowner, and the DNR District Forester. This is the normal course of action for any landowner entering into the Program. The final review of the application and the decision to accept the land into the Program will be performed by DNR Deputy Director. If the new land is accepted into the Program, the State Forester will accept and properly act in response to any required actions necessitated by the Division to keep the land enrolled in the Program.

Pursuant to IC 4-2-6-9, the State Forester has informed the DNR Director and Appointing Authority, of the potential conflict of interest that would arise should he submit a new application to the Program without the appropriate safeguards in place.

ISSUE

Would a conflict of interest arise for the State Forester under IC 4-2-6-9? If so, would the proposed screening procedure be appropriate to prevent a conflict of interest from arising for the State Forester?

RELEVANT LAW

42 IAC 1-5-10

Benefiting from confidential information

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 IAC 1-5-11

Divulging confidential information

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

ANALYSIS

The State Forester's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to confidential information and conflicts of interest. The application of each provision to the State Forester is analyzed below.

A. Confidential Information

The State Forester is prohibited under 42 IAC 1-5-10 from benefitting from, or permitting any other person to benefit from, information of a confidential nature except as permitted or required by law. Similarly, 42 IAC 1-5-11 prohibits the State Forester from divulging information of a confidential nature except as permitted by law. In this case, it is possible that the State Forester has access to confidential information, though it is unclear if such information could be used to his benefit. While it would be a violation of 42 IAC 1-5-10 for the State Forester to benefit personally or permit a person to benefit from information of a confidential nature to which he has access, it would also be a violation under 42 IAC 1-5-11 for him to even divulge any such

information, regardless of whether it is used to that person's benefit. So long as the State Forester does not divulge confidential information or allow any other person to benefit from confidential information, he would not be in violation of these rules.

B. Conflicts of Interest

IC 4-2-6-9(a) prohibits a state employee from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including the employee or an immediate family member. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest in a contract and an interest involving property or services. However, the term does not include an interest that is not greater than the interest of the general public or any state officer or state employee.

Because of the tax benefits associated with participation in the Program, the State Forester would appear to have a financial interest in the outcome of the decisions regarding the re-evaluation of the properties that have already been accepted into the Program. Similarly, he would have a financial interest in decisions regarding whether future pieces of property are accepted into the Program. Accordingly, a conflict of interest would arise if he participates in a decision or vote regarding the tracts of land that are currently part of the Program and/or other tracts of land he wishes to enroll in the Program. To prevent the State Forester from engaging in any such decisions or votes, DNR has proposed the screening procedures previously discussed.

CONCLUSION

The Commission finds that a conflict of interest could arise for the State Forester under IC 4-2-6-9. The Commission further finds that the proposed screening procedures are appropriate and should be implemented with the following amendment: applications for new tracts of land that the State Forester wishes to be accepted into the Program shall be reviewed and approved by the Natural Resources Commission rather than the Deputy Director.