

August 8, 2011

NJ State Ethics Commission
28 West State Street
Room 1407
Trenton, NJ 08625

Dear State Ethics Commission:

On behalf of the New Jersey Chapter of Public Employees for Environmental Responsibility (PEER), a national non-profit alliance of local, state and federal scientists, law enforcement officers, land managers and other professionals dedicated to upholding environmental laws and values, I am writing concerning Ms. Jane Kozinski, who was appointed Assistant Commissioner for Environmental Management at the New Jersey Department of Environmental Protection (DEP), effective August 1, 2011.

Assistant Commissioner Kozinski is responsible for the management of DEP's air quality, solid and hazardous waste management, and environmental health and safety regulatory programs.

Our concern is that Ms. Kozinski, in her prior employment capacity, provided legal representation for corporations and other private interests which are regulated by or otherwise impacted by DEP yet she has executed no recusal to separate herself from matters or clients on or for which she previously worked as private counsel.

In her current position, Ms. Kozinski could become involved in a broad range of situations at DEP that create the appearance of conflicts of interests involving her prior clients, as per the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq. For that reason we believe that these potential conflicts require a complete recusal by Ms. Kozinski, in accordance with NJAC 19:61-7.4.

We further contend that there should be public disclosure of all clients represented by Ms. Kozinski and the Saul Ewing law firm, where she was a partner, which are subject to regulation by the DEP.

In an effort to understand the nature of potential conflicts and promote transparency and ethics compliance, on August 1, 2011, we filed an Open Public Records Request with DEP asking for all DEP ethics review documents and recusals filed by Kozinski (see Attachment 1). DEP responded to that OPRA on August 4, 2011 (See Attachment 2)

confirming that Ms. Kozinski did not file any recusals. Note that Catherine Tormey, DEP's Ethics Officer, on August 3, 2011 determined that *no ethics review was required*.

Ms. Tormey's determination was based on review of DEP's "*Ethics disclosure form - outside activity questionnaire*". However, the DEP ethics disclosure form does not support a review that would meet the minimum requirements of the Commission's regulations. For example, it does NOT consider potential prior employment conflicts. Accordingly, any determination based on that form is incomplete and invalid, at best.

I) Legal Standard

The ethical standards with which public employees must comply are established by law (see New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq). The law provides a broad standard which considers appearances of as well as actual conflicts:

“The Legislature finds and declares:

(a) In our representative form of government, it is essential that **the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated**”. (Emphasis added)

With respect to the conditions that trigger mandatory recusal, the State Uniform Ethics Code (19:61-7.4) states that:

“(b) A State official is required to recuse himself or herself on an official matter if he or she had any involvement in that matter, other than on behalf of the State, prior to commencement of his or her State service. The recusal shall remain in effect until the agency no longer has any interest in the matter.”

The Code further provides that

“(d) A State official must recuse himself or herself from a matter if he or she has:

1. Any financial interest, direct or indirect, that is incompatible with the discharge of the State official's public duties; or
2. Any personal interest, direct or indirect, that is incompatible with the discharge of the State official's public duties.

(e) For purposes of (d) above, an incompatible financial or personal interest includes, but is not limited to, outside employment; a debtor/creditor relationship; a fiduciary relationship; a source of income; any matter pertaining to or involving a relative or cohabitant; a relationship with a person providing funds, goods or services without compensation; any matter pertaining to or involving a business associate or business investment; and a leadership role in a professional or trade organization, which interest might reasonably be expected to impair a State official's objectivity and

independence of judgment in the exercise of his or her official duties or might reasonably be expected to create an impression or suspicion among the public having knowledge of his or her acts that he or she may be engaged in conduct violative of his or her trust as a State official.”

We would submit that the past legal representation of regulated clients creates such an indirect interest requiring recusal.

Pursuant to New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq., the Commission is empowered “to undertake investigations and hold hearings regarding alleged violations of the Conflicts Law. The Commission also issues advisory opinions concerning whether a given set of facts and circumstances would in the Commission's opinion constitute possible violations of the Conflicts Law or any code, rules or regulations promulgated pursuant thereto.” (Commission website)

II) Facts

According to a July 7, 2011 email from DEP Commissioner Bob Martin announcing her appointment:

“Prior to joining the Embassy in 2009, Jane was a partner at the law firm Saul Ewing LLP in Princeton, NJ. In her legal practice, Jane counseled clients on issues arising under federal and state environmental laws, including CERCLA, the Clean Air Act, RCRA, the Clean Water Act, and comparable state laws, including NJ’s Spill Act, ISRA, Air Pollution Control Act, and Solid Waste Management Act.” (Attachment 3)

The Saul Ewing website short bio for Ms. Kozinski stated:

“Jane Kozinski is a Senior Climate Change Policy Advisor for the British Embassy and a member of Saul Ewing’s Project and Resource Development Department. In her work for the British Embassy, she works with United States businesses and state governments to develop their support for federal climate change and energy legislation and US participation in international actions to address climate change.

In her legal practice, Ms. Kozinski brings to clients a thorough understanding of federal environmental laws and regulations, including CERCLA, the Clean Air Act, RCRA, the Clean Water Act, and comparable state laws, including New Jersey’s ISRA and Solid Waste Management Act. She counsels clients in regulatory compliance and environmental issues **arising from business and real estate transactions, and also represents clients in commercial litigation. Her clients range from large Fortune 500 companies to small- to medium-sized businesses in a variety of industries, including solid waste, electric and gas, natural gas transmission, pharmaceutical, mining, commercial real estate development, metal fabrication, fragrance and flavors, retail fuel, and more.**

Ms. Kozinski's experience in environmental litigation includes the defense and prosecution of numerous private party cost recovery actions under CERCLA and comparable state law in New Jersey and New York, as well as defense of government CERCLA cost recovery actions. Most recently, she represented clients in the defense of CERCLA actions that involve unique theories of corporate successor liability and derivative parent liability. **She also has experience in the defense of class actions and environmental citizen suits.**

In recent years, Ms. Kozinski led the Firm's climate change practice. She has counseled clients on carbon off-sets, disclosure of climate change risk, and the advantages/disadvantages of proposed federal climate change legislation. She is frequently asked to write and speak on global climate change, reducing greenhouse gas emissions and related environmental issues." (Emphasis added)

As an attorney at that firm Ms. Kozinski provided legal representation to Waste Management Inc. (WMI) in the Appellate Division case: *WASTE MANAGEMENT OF NEW JERSEY INC v. UNION COUNTY UTILITIES AUTHORITY IWS NJ* (see <http://caselaw.findlaw.com/nj-superior-court-appellate-division/1452124.html>), among other regulated industries.

WMI is a corporation regulated by DEP Divisions of Solid and Hazardous Waste and Air Quality. These regulatory programs are now directly under Ms. Kozinski's management oversight.

Ms. Kozinski has also authored law journal articles providing analysis and advice to private sector interests on minimizing compliance costs and avoiding compliance with environmental regulations. See, for example, **New Life for Solid Waste** (*Legal Intelligencer* - May 4, 2010 http://www.saulewing.net/common/publications/pdf_2488.pdf)

The foregoing represents only a small portion of Ms. Kozinski's activities on behalf of clients relating to her current official duties.

III) Request

Given the apparent failure of DEP and Ms. Kozinski to apply the standards and requirements set forth in NJ Conflicts of Interest Law, the State Ethics Code and Commission regulations, we request that the Commission take the following actions:

- 1) Initiate a thorough review of this matter, conduct hearings, and apply the law to the facts of this case;
- 2) Require that Ms. Kozinski disclose all prior clients or private sector interests she or her law firm represented that are regulated or impacted by the DEP;
- 3) Require that Kozinski file recusals in accordance with NJAC 19:61-7.4 and make them publicly available; and

4) Issue an Advisory Opinion, Guidance, and/or promulgate regulations that apply to this kind of situation.

We urge the Commission to give prompt and favorable consideration to this request. I am available at 609-397-4861 to discuss this matter.

Sincerely,

Bill Wolfe, Director
New Jersey PEER
PO Box 112
Ringoes, NJ 08551

Cc: Catherine Tormey, Ethics Officer, Department of Environmental Protection