STATE OF MAINE

Inter-Departmental Memorandum Date December 3, 1974

To William R. Adams, Jr., Commissioner Dept. Environmental Protection

From Jon A. Lund, Attorney General Dept. Attorney General

Subject Conflict of Interest of Member of Maine Board of Environmental Protection

You have asked whether it is a conflict of interest for a member of the Board of Environmental Protection to hold the position of Director of the Maine Audubon Society, or, if not, whether such a conflict would exist when such a member participated in proceedings before the Board involving issues on which the Audubon Society has taken an official position.

The answer to the first question is clearly that it is not a conflict of interest per se for a board member to hold such a position. The Board of Environmental Protection's enabling statute specifies that it shall be made up of ten part-time members, each of whom is to represent one of five particular interests on the Board. 38 M.R.S.A. §361. The Legislature thus contemplated that the members of the Board would hold positions elsewhere and that they would not be disinterested in matters of policy, but rather would bring varying points of view to the matters brought before them. This approach has been expressly sustained by the Supreme Judicial Court. In re Maine Clean Fuels, Inc., 310 A.2d 736, 749-51 (Me. 1973). The member of the Board who is the subject of the present question, Mr. Richard Anderson, was appointed to represent "the conservation interests in the State." His holding of a position with the Maine Audubon Society certainly does not disqualify him from sitting on the Board in this capacity; in fact, it may actually serve to qualify him to represent the category of interest which he was chosen to represent.

As to your second question, it is impossible to answer conclusively without a particular set of facts, but certain general principles may be noted. First, it should be repeated that a member of an agency who is selected to represent a certain interest may not be disqualified merely for representing that interest. Columbus Green Cabs, Inc. v. Board of Review, 184 N. E. 2d 257 (Ohio Ct. Common Pleas, 1961). See generally Davis, Administrative Law §12.03 at 157-59 (1958); Cooper, State Administrative Law 346 (1965). Second, the general rules for disqualifying members of public agencies for bias or personal interest apply with less force to proceedings in which the agency is acting in its quasi-legislative

(or rulemaking) capacity, rather than in its quasi-judicial (or adjudicatory) capacity. 1/ Aldom v. Roseland, 127 A.2d 190, 197 (N.J. App. Div. 1956); Van Gilder v. Board of Chosen Freeholders of Cape May, 83 A. 500 (N.J. 1912); Davis, supra 12.03 at 155, 161; Cooper, supra, at 339.

Finally, even in adjudicatory proceedings, "the courts make a distinction between . . . emotional predisposition (which is not disqualifying) and a bias which results from personal animosities or personal interest." Id. at 338. Moreover, as the Supreme Judicial Court has held, an "interest that disqualifies from judicial action may be small, but it must be an interest, direct, definite, and capable of demonstration; not remote, uncertain, contingent or unsubstantial, or merely speculative and theoretic." Selectmen of Andover v. County Commissioners, 86 Me. 185, 188 (1893), cited with approval in In re Maine Clean Fuels, Inc., supra, at 751. Usually such an interest must be found to be pecuniary in nature to result in disqualification, 2/ although in rare cases the membership of

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1/ In Air Transport Association of America v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967), the court disqualified a member of the Equal Employment Opportunity Commission from participating in a rulemaking proceeding when she had agreed to take a job with an organization which had taken a policy position relating to that proceeding. The case is of limited relevance here because members of the BEP, unlike the EEOC, are expected to represent certain interests in proceedings before them. In addition, its result has been strongly criticized by Professor Davis. See Davis, Administrative Law, §12.03 at 438 (1970 Supp.).

2/ For a discussion of what constitutes the necessary pecuniary interest, see the Opinion of Assistant Attorney General E. Stephen Murray on Conflicts of Interest for the Maine Land Use Regulation Commission, 6-12, 15-17 (March 16, 1973). In the present case the question of pecuniary interest is not directly present inasmuch as the Audubon Society, as a charitable organization, does not stand to be affected pecuniarly by any action of the Board.

an agency member in an organization which has strong and active views on a particular issue may result in a disqualification. An example of this latter situation is Smith v. Department of Registration and Education, 106 N. E. 2d 722 (Ill. 1952), in which the court disqualified members of a medical committee which had recommended revocation of the license of a certain doctor for using a particular treatment for cancer, when the committee all were members of the American Medical Association which had conducted a crusade against the treatment. That situation would not appear to be directly analagous here, however, in that, first (as noted above) the members of the Board of Environmental Protection are selected expressly to represent specific interests and, second, the mere taking of a position by the Audubon Society on an application pending before the Board appears to be significantly different from the kind of massive campaign which was conducted by the American Medical Association in Smith. On the other hand, Mr. Anderson is not merely a member of the Audubon Society; he is its director and would therefore be inevitably deeply involved in whatever activities the Society chose to undertake regarding an application before the Board.

This is as much, therefore, as can be said at this time as to whether a conflict of interest would exist as a matter of law if Mr. Anderson were to participate in a proceeding on which the Audubon Society had taken an official position: A court would probably weigh the latitude of action which is granted to Mr. Anderson by virtue of his designation as a representative of a specific category of interest against the degree to which the organization of which he is a director is seeking to affect the Board's decision. In addition, however, while the court would probably exercise considerable restraint before concluding that a disqualification is appropriate, it will undoubtedly also be aware of the rule that fairness in an administrative proceeding requires the appearance of fairness. In view of this, it is worthwhile to point out that in cases of doubt, Mr. Anderson can always eliminate any legal questions as to his participation by disqualifying himself.

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