

**KATE BROWN
GOVERNOR**



November 14, 2021

The Honorable Rob Wagner
Oregon State Senate
900 Court St. NE, S-223
Salem, OR 97301

Dear Senator Wagner,

As you are aware, Governor Brown recently received a letter from an attorney representing a lobbying coalition, alleging that a conflict of interest may exist under certain provisions of the Oregon Rules of Professional Conduct (ORPC) if Amy Schlusser, a staff attorney for the Green Energy Institute, were to serve as a member of the Environmental Quality Commission. Our office previously forwarded you Ms. Schlusser's response. I am attaching both communications, for your convenience.

I write to emphasize one point. When Ms. Schlusser learned about these allegations, she sought advice from ethics attorneys at the Oregon State Bar, because the Bar is the entity tasked by law with investigating and disciplining lawyers for alleged ethical misconduct under the ORPC. Notably, attorneys from both the Bar and its Professional Liability Fund have advised Ms. Schlusser that serving on the Environmental Quality Commission while employed as a staff attorney at the Green Energy Institute does not present a conflict of interest under those rules. The attached email from Ms. Schlusser explains why that is so.

In other words, Ms. Schlusser has sought and received advice from ethics lawyers at the very entity that has investigative and disciplinary authority for the conflict of interest rules at issue. The Oregon State Bar's lawyers have advised Ms. Schlusser that there is no conflict of interest here.

Sincerely,

Dustin Buehler
General Counsel
Office of Governor Kate Brown

Enclosures



November 5, 2021

Governor Kate Brown
Chief of Staff Gina Zejdlik gina.zejdlik@oregon.gov
Executive Appointments Director See Eun Kim seeeun.kim@oregon.gov

RE: EQC Appointee's Ethical Conflicts Would Undermine Public Trust

Dear Governor Brown:

We appreciate your vow to restore public trust in state government. We share your commitment to prioritizing transparency and ethics. To that end, we write on behalf of a coalition that needs to raise for your consideration significant concerns regarding ethical issues faced by one of your nominees for the Environmental Quality Commission.

Since we trust that you continue to prioritize maintaining public trust in government, we respectfully request that you withdraw your nomination of Amelia Schlusser to the Environmental Quality Commission (EQC). Ms. Schlusser's desire to serve in this role is admirable and she seems like a qualified and capable nominee. However, her service on the EQC, while also being employed as a staff attorney for an advocacy organization that pushes policy changes at the EQC, would place her in a uniquely difficult ethical conundrum that would undermine public trust in EQC decisions made during her tenure.

As an attorney for the Green Energy Institute (GEI), Ms. Schlusser has and continues to advocate for GEI's priorities including 100% decarbonized energy, indirect source regulation, opposing fossil fuels, cap and reduce, clean power plans, GHG and air emission taxes, and similar policies.¹ Her GEI bio emphasizes that she regularly communicates with state policymakers and "participates in regulatory proceedings convened by Oregon's Department of Environmental Quality."² Because the EQC oversees many of these very same policy areas, Ms. Schlusser cannot serve in both roles simultaneously without facing numerous and significant ethical conflicts. These conflicts would prevent her from fulfilling full EQC duties and undermine public trust in the EQC.

As a lawyer yourself, you know that the Oregon Rules of Professional Conduct (ORPC) are important ethical standards that apply to all attorneys. Because of their dual responsibilities,

¹ Green Energy Institute, Policy Recommendations, https://law.lclark.edu/centers/green_energy_institute/projects/ (accessed Nov. 4, 2021).

² Green Energy Institute, Amelia Reiver Schlusser, Staff Attorney, <https://law.lclark.edu/live/profiles/2100-amelia-schlusser> (accessed Nov. 4, 2021).

attorneys serving in current government positions while also working for nongovernment entities may not:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

ORPC 1.11(d)(2)(i) and (ii).³ There are no exceptions to these standards. Any vote or discussion by Ms. Schlusser as an EQC member that supports or furthers GEI's positions would violate these rules. Given GEI's extensive advocacy on issues overseen by the EQC, it is questionable whether there are any substantive actions in which Ms. Schlusser could ethically participate while serving on the EQC. Having a commissioner who must recuse herself from such an extensive list of policies would not only present an operational challenge to the EQC, but would undermine public trust in the Commission more broadly.

Likewise, attorneys serving as current government officials may not:

- (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment; ORPC 1.11(d)(2)(v); nor*
- (2) represent a client if the representation involves a current conflict of interest. . . . [such as when] the representation of one client will be directly adverse to another client [or] there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; ORCP 1.7; ORCP 1.11(d)(1).*

These two rules can only be waived if both GEI and the appropriate government agency give informed consent, confirmed in writing. It is unclear who would or could provide such consent in this situation. Since the EQC oversees a state agency, it would be inappropriate for the agency or agency director to attempt to waive Ms. Schlusser's conflicts here, not to mention that such a waiver would rightly shake public confidence in the objectivity of all EQC and agency work.

Further, regardless of who might provide such informed consent, that only—perhaps—addresses a *technicality* in the rule. It does not in any way address the *spirit* of the rule or the State's policy that interested parties, such as employees or representatives of regulated entities, are precluded from serving, while there are no similar limitations on environmental advocates. Confirmation of informed consent for this nominee may technically reconcile the ORPC conflict, but the appointment would remain fraught with ethical dilemma.

³ The ORPCs are available online: <https://www.osbar.org/docs/rulesregs/orpc.pdf>

Finally, Ms. Schlusser's own biography raises substantial questions about compliance with Oregon's lobby registration requirements due to her advocacy with state policy makers.⁴ Having a professional lobbyist who is paid to advance certain policies while simultaneously voting on those same policies as an EQC member also raises concerns about prohibited use of official position and both actual and potential conflicts of interest under the state ethics laws that you helped expand.⁵ We believe that the Oregon Rules of Professional Conduct, Oregon ethics rules, and expectations of public trust cannot be realistically met by Ms. Schlusser. Consistent with your commitment to restoring public trust and ethics in government, we respectfully request that you withdraw this nomination.

Yours truly,

/s/ Steve Elzinga

steve@shermlaw.com

cc:

Angela Wilhelms, Oregon Business & Industry
Chris Edwards, Oregon Forest & Industries Council
Dallin Brooks, Western Wood Preservers Institute
Dave Dillon, Oregon Farm Bureau
Jana Jarvis, Oregon Trucking Associations
Katie Murray, Oregonians for Food & Shelter
Mike Salsgiver, Associated General Contractors, Oregon-Columbia Chapter
Shaun Jillions, Oregon Manufactures and Commerce
Tammy Dennee, Oregon Cattlemen's Association
Tami Kerr, Oregon Dairy Farmers Association

⁴ See ORS 171.740 (registration); ORS 171.735(4) (no exception due to compensation); ORS 171.725 (definitions).

⁵ ORS 244.040 (prohibited use of official position); ORS 244.120 (conflicts of interest).

GUTRIDGE Shevaun * GOV

From: MINER Jason * GOV
Sent: Friday, November 12, 2021 12:31 PM
To: SEN Wagner; POWERS Tom
Cc: BUEHLER Dustin E * GOV; KIM SeeEun * GOV; COOPER Andrea * GOV; LAPIZ Tony D * GOV; WESTON Sarah K * GOV; BAKER Jennifer * GOV
Subject: FW: EQC nominee response to opposition allegations

Leader Wagner,

Amy Schlusser, the nominee for EQC is aware of the letter circulating regarding her nomination. She has worked diligently and expediently over the past several days, including contacting the Bar Association and Professional Liability Fund, to put to rest any concerns raised in the letter. Please see below.

Jason Miner (pronouns: he/him/his)
Natural Resources Policy Director
Office of Governor Kate Brown
Jason.Miner@Oregon.gov

Assistant: Halley Parker
775 Court Street NE
Salem, Oregon 97301
Halley.Parker@Oregon.gov



From: Amelia Reiver Schlusser <ars@lclark.edu>
Sent: Friday, November 12, 2021 11:37 AM
To: MINER Jason * GOV <Jason.MINER@oregon.gov>
Subject: EQC nominee response to opposition allegations

Dear Mr. Miner:

I am a staff attorney with the Green Energy Institute at Lewis & Clark Law School, and I am currently a nominee for the Environmental Quality Commission. I was recently forwarded a letter, dated November 5, 2021, sent by Steve Elzinga to Governor Kate Brown on behalf of several industry trade groups, requesting that the Governor withdraw my nomination to the EQC. The Elzinga letter argued that my status as a licensed attorney (though I do not represent or work on behalf of clients) would create an inherent conflict of interest between myself and my duties as an EQC member, and therefore my participation on the EQC would violate the Oregon Rules of Professional Conduct (ORPC). The Elzinga letter's assertions reflect an incorrect interpretation of the ORPC requirements and their applicability to attorneys like myself that do not represent clients in legal or regulatory matters. I have consulted with an attorney from the Oregon State Bar's professional liability fund and confirmed that the ORPC conflict of interest rules apply to conflicts of interest resulting from concurrent or former client representation. Because I do not represent or work on behalf of clients, I have no conflicts of interest under the ORPC that could impede my ability to serve on the EQC. The

Elzinga letter raised several inaccurate and misleading allegations about me, my work, and my professional conduct that I feel compelled to address.

Before I respond to the Elzinga letter's specific allegations, I'd like to provide some context about the Green Energy Institute (GEI) and the nature of my work with the organization. GEI is an energy and climate law and policy institute within Lewis & Clark Law School's environmental, natural resources, and energy law program. It is a non-profit academic organization under the umbrella of Lewis & Clark College. GEI is not an advocacy organization, and does not engage in lobbying. GEI does not represent clients in any legal or regulatory matters, nor does it work on behalf of any special interest groups. Instead, our work aims to further and protect the public interest by applying our legal expertise to help inform the design of effective climate policies. We produce comprehensive analyses of laws and policies from various jurisdictions and develop evidence-backed recommendations that we share with stakeholders and policymakers. Our publications are publicly available for free on our website. We are often invited to share our objective findings and policy expertise with public employees, though we do not receive any compensation or financial benefits from the outcomes of these discussions.

As a staff attorney with GEI, I have developed extensive expertise in a variety of legal and regulatory frameworks relating to climate change, energy, air quality, and transportation, including many laws and regulations that are administered by DEQ, such as the federal Clean Air Act and Oregon's air quality laws. I have a strong understanding of DEQ's legal and regulatory authorities. My legal expertise and demonstrated commitment to the public interest are two of my most notable qualifications for serving on the Environmental Quality Commission. My willingness to freely share my expertise and perspectives with regulators does not make me ineligible for public service on the EQC. Indeed, individuals with relevant subject matter expertise and demonstrated commitment to supporting informed and equitable policymaking should be encouraged to enter into public service.

The allegations raised in the Elzinga letter reflect a clear lack of understanding of GEI's structure and operations and misrepresent my role and activities as a staff attorney for the organization. Though I do not represent clients, I am a lawyer licensed under the Oregon Bar, and I take my ethical obligations very seriously. Despite my demonstrated history of ethical professional conduct, the Elzinga letter raises baseless and false allegations that I have conflicts of interest that would prevent me from fulfilling my duties as an EQC member. The letter even goes so far as falsely asserting that I am a "professional lobbyist" that is currently violating Oregon's ethics laws.

In raising these alarming and completely baseless accusations, the letter notably ignores Oregon's statutory ethics laws concerning conflicts of interest under ORS § 244.020, which restrict *all* public officials (regardless of profession) from participating in official actions or decisions that would affect the financial interests of the officials, their relatives, or affiliated businesses, and impose public disclosure requirements for actions that *could* affect such financial interests. These laws establish important safeguards to prevent private financial interests from influencing government decisions, and I would diligently comply with them, just as I diligently comply with all ethics laws and professional obligations that apply to me. I have complete confidence that no actual or potential conflicts of interest currently exist or are likely to emerge in the future that would impede my ability to carry out my duties as an EQC member. It appears that Elzinga recognizes that I have no conflicts of interest under Oregon's ethics laws, because the letter asserts that my participation on the EQC would violate Oregon's Rules of Professional Conduct (ORPC, the ethics standards applicable to attorneys licensed in Oregon), rather than the statutory requirements. However, the letter's allegations regarding ORPC violations are incorrect—I have no actual or potential conflicts of interest under the ORPC, and the specific rule sections cited in the letter do not apply to public interest attorneys who do not represent clients or do not have the potential to directly benefit from legislative matters or tribunal actions. I have confirmed with the Oregon State Bar that this is an accurate reading of the ORPC conflict of interest rules, which are only applicable to attorneys who represent clients.

The Elzinga letter wrongly asserts that I would violate ORPC 1.11 if I participated in any vote or discussion "that supports or furthers GEI's positions." ORPC 1.11(d)(2)(i) and (ii) prohibit a lawyer serving as a public officer or employee from using their public position to obtain special advantage or influence tribunal decisions to benefit the lawyer or their client. The rules establish an important ethical safeguard to prevent attorneys from

abusing their public position for their own gain; they are not intended to prevent lawyers from applying their unique expertise to regulatory decisions. The rule does not, as the Elzinga letter asserts, prohibit attorneys in public service from voting on or discussing any and all issues that support or further the “positions” of the attorney’s nonprofit employer.

If ORPC 1.11 was as broad in application and effect as Elzinga claims, it would be completely counter to the ORPC’s objectives while failing to prevent the type of undue influence the rules are intended to safeguard against. For example, under Elzinga’s misinterpretation of the rule, a lawyer employed by a community health organization would be prohibited from discussing or voting on regulatory proposals that promote or benefit public health. According to Elzinga’s argument, this prohibition only exists for attorneys (the profession subject to the ORPC), and would apply regardless of whether an attorney is actually engaged in the private practice of law. In Elzinga’s view, a non-attorney agricultural lobbyist serving on the EQC is free to vote on matters that benefit private agricultural interests, while an attorney specializing in community health is prohibited from even discussing matters involving public health—simply because the attorney is licensed under the Oregon Bar. This is a gross misreading of ORPC 1.11. Indeed, given the broad scope of the environmental rules administered by DEQ, Elzinga’s misinterpretation of the rule would effectively prevent the governor from nominating *any* attorneys to sit on the EQC. This is certainly not the purpose or intent of the Rules of Professional Conduct.

The other ORPC rules referenced in the Elzinga letter do not apply to me or my position with GEI. ORPC 1.11(d)(2)(v) applies to attorneys serving in public office who previously represented a client on a matter that is now before the public body on which the attorney currently serves. ORPC 1.7 prohibits an attorney from representing a client if a current conflict of interest exists with another client. I have not represented any clients on any matters that have or could eventually be before the EQC, nor do I have any intention of representing any clients on EQC-related matters during my term of service if I am confirmed and appointed to the EQC. There are therefore no attorney-client conflicts of interest that could potentially arise that would violate my ethical obligations under the ORPC.

In addition to alleging that my participation on the EQC would invariably lead me to violate my ethical obligations as an attorney, the Elzinga letter also makes the false and baseless allegation that I am a professional lobbyist and may currently be violating Oregon’s lobbying laws. This is patently untrue. I am not a lobbyist. I do not engage in lobbying, nor do I receive any compensation for the purpose of lobbying. GEI does not engage in lobbying, nor does it receive any payment or compensation for the purpose of lobbying.

I assure you that I have no conflicts of interest that would impede my ability to fulfill my duties as a member of the EQC, and that I have not violated any ethics requirements under Oregon law. I am happy to provide any additional information that may be necessary to further demonstrate my character and fitness to serve on the EQC. Please let me know if you have any remaining questions or concerns.

Sincerely,
Amy Schlusser

--

Amelia Reiver Schlusser
Staff Attorney

Green Energy Institute
Lewis & Clark Law School
10101 S Terwilliger Blvd.
Portland, OR 97219
(503) 768-6741

ars@lclark.edu

