

ARKANSAS DEPARTMENT OF POLLUTION  
CONTROL & ECOLOGY

LOCATION - SUBJECT \_\_\_\_\_  
Williams' Motion on 12/6/91 to deny  
request to initiate rule making per  
opinion of representative from  
Office of the Attorney General.

MINUTE ORDER NO. 91-70

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Williams made a motion to deny Mr. Cremeen's request to initiate rule making to include the incorporation of the entire 123.25 section of Title 40, Code of Federal Regulations into Regulation 6, per Jochums opinion (letter November 26, 1991), Young seconded the motion. The motion carried.

COMMISSIONERS

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Norman Williams  
Chairman  
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MINUTEORDERFORM

SUBMITTED BY: Norman Williams DATE PASSED: Dec. 6, 1991



**STATE OF ARKANSAS**  
**Office of the Attorney General**

Winston Bryant  
Attorney General

November 26, 1991

Telephone:  
(501) 682-2007

Mr. J. W. Looney, Chairman  
Arkansas Pollution Control & Ecology Commission  
University of Arkansas School of Law  
Waterman Hall  
Fayetteville, Arkansas 72701

Re: Request for Rule-Making Submitted by Arkansans  
for Environmental Reform

Dear Professor Looney:

Pursuant to the applicable provisions of Regulation No. 8, Arkansans for Environmental Reform have filed a written request with the Board which asks that the commissioners amend Regulation No. 6 by adopting by reference the provisions of 40 CFR 123.25 in their entirety. As of this date, the commission has only incorporated into Regulation No. 6 subparagraph (b) of 40 CFR 123.25.

At the October commission meeting it was requested that the attorneys for the department and for the commission comment upon their request for rule-making.

It appears that Arkansans for Environmental Reform are primarily concerned that the commission incorporate into Regulation No. 6 the provisions of Section 123.25 (c), which reads:

"State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.  
(1) For the purposes of this paragraph:  
(i) "Board or body" includes any individual, including the Director, who has or shares

authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(ii) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(iii) "Permit holders or applicants for a permit" does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iv) "Income" includes retirement benefits, consultant fees, and stock dividends.

(2) For the purposes of paragraph (c) of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income."

To address this matter, we must look at the context in which the CFR provisions exist: Section 304(i) of the Clean Water Act, 33 U.S.C. 1314(i)(D) requires that all delegated state programs must provide assurances that members of regulatory bodies do not have conflicts of interest. To address that congressional mandate, USEPA has issued 40 CFR 123.25(c). The statutory and regulatory provisions are applicable only to states who choose to apply for and obtain NPDES permit delegation from the federal government. This commission, several years ago, decided to seek NPDES delegation and has been so delegated since 1986:

As a holder of NPDES permit delegation, the State of Arkansas and this commission is subject to the requirements of Section 123.25(c). Thus, there is no need to incorporate this provision within the language of Regulation No. 6.

Furthermore, it appears that the commission lacks legal authority to adopt the language requested by Arkansans for Environmental Reform. The effect of this language is to declare that certain individuals are ineligible for

Mr. J. W. Looney, Chairman  
November 26, 1991  
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appointment to the Pollution Control & Ecology Commission. The qualifications of appointees are established by the Arkansas Legislature and set forth at A.C.A. 8-4-104 (1991 Supp.). This commission lacks any authority to adopt rules which would set additional qualifications for appointment to the Commission.

I hope these reflections will prove of assistance to the commission in determining a proper response to Arkansans for Environmental Reform's request for rule-making.

Sincerely,

*Arnold M. Jochnums By R. J. H.*

ARNOLD M. JOCHUMS  
Assistant Attorney General

AMJ/nc

cc: APC&E Commission Members