

MEMO

From: Mikey O'Connor ([mike@haven2.com](mailto:mike@haven2.com), 651-647-6109)

To: Parties to frac sand mine permits

RE: Legal liability

Date: February 2, 2012

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I am concerned that local landowners, policy makers and county staff are participating in decision-making that will expose them to significant legal and financial liabilities without adequate advice or representation. I know the questions I would be asking of my attorney and risk advisors if I were a land owner negotiating one of these deals with a mining company, or if I were on the Board of Adjustments.

If the answers to these questions came out the way I think they might, I'd be VERY cautious about moving these deals forward. I'm not a lawyer; I don't play one on TV. But I have started and sold several successful businesses, I was the Controller for the University of Minnesota for a while, I've worked for two of the biggest accounting firms in the world, I'm an international policy-maker that works on how the Internet functions, and I know the value of good legal and risk-management advice.

Here are the questions I would be asking myself if I were in your shoes:

**Am I covered?** These deals aren't like deciding where to place somebody's barn or dog-kennel. You are going up against some of the toughest negotiators in the world. Are you relying on the lawyers and negotiators for the energy companies for your advice? It's probably good advice, but they are looking out for their interests, not yours.

**Am I a target?** These are going to be multi-million dollar a year businesses, which will make them good targets for lawsuits. And they will have very wide-ranging impacts, which will create a large pool of potential

plaintiffs. Do I have the right legal, insurance and risk-management team giving me advice that ensures that if one of these conditions isn't met, and a terrible accident happens, that I'm clear of personal liability?

**Is the County covered?** As a County tax payer the last thing I want to see is a giant lawsuit that sucks all the money out of the courthouse. Again, this isn't about moving a chicken coop – these are large-scale industrial operations on the scale of large cement plants that feed into the multi-billion dollar worldwide energy industry. Does the legal team advising my County really have the expertise to advise them (and me), given the complexity of these issues?

**Is my legal and risk management team comprised of specialists who are familiar with this situation?** Or are they local “general practice” lawyers and insurance agents that handle all kinds of “soup to nuts” issues every day?

**Does my team feel confident they can handle all the issues that might be brought under these Federal laws?** Are they advising me about them right now, while we're striking this complicated deal?

- The National Environmental Policy Act (NEP) - 42 USC 4321 and 40CFR 6
- The Federal Land Planning and Management Act -- 43 CFR 3809
- The National Historic Preservation Act - 16 USC 470(f)
- The Mine Safety and Health Act of 1977, as amended USC 801
- The Federal Clean Air Act of 1970, as amended 42 USC 85
- The Federal Clean Water Act of 1972, as amended 33 USC 1251
- The Federal Safe Water Drinking Act of 1974 - 42 USC 300f
- The Federal Endangered and Threatened Species Act of 1973 - 16 USC 1531
- The Occupational Safety and Health Act of 1970 - 29 USC 651

**Am I sure that all the right Procedures and Concerns are being addressed?** If I'm on the Board of Adjustments, do I see a lawyer in the room that's there to keep me out of trouble (personal legal and financial liability) when we're negotiating with landowners and other interested parties? What if my mistake causes the deal to unravel in a lawsuit a couple years from now? Am I on the hook for damages? How do I know?

**If I'm a landowner, am I assured that my whole deal can't be unwound because somebody made a mistake with the rulebook that some plaintiff found and ran with?**

Here's a list of "rulebooks" I'd want somebody to be giving me advice about every step of the way.

- Open Meeting Law -- Chapter 19 Wisconsin Statutes
- Open Records Law -- Chapter 19 Wisconsin Statutes
- Ethics Law -- Section 19.59 Wisconsin statutes
  - Limits certain financial activities and involvement by county and local officials with mining representatives
- Civil forfeiture and Criminal administrative laws
  - Bribery felony
  - Misconduct in office felony
  - Perjury felony
  - False swearing felony
  - Extortion felony
  - Racketeering felony
  - Private interest in public contract felony
- Other legal concerns
  - Road damage - Chapter 86/Chapter 943 Wis Stat
  - Trespass on others land -- Chapter 943 Wis Stat
  - Non-metallic mining violations -- Chapter 295 Wis Stat
  - Air pollution violations -- Chapter 285 Wis Stat
  - Damage to water supply -- Chapter 281 Wis Stat
- Have the County Board, the County Board Chair and the Chair of the Board of Adjustments:
  - Ensured that the Public Meetings, Public Records, Ethics and Civil Forfeiture and Criminal Administrative laws have been carefully followed?
  - Properly, timely and completely advised County committee members of the procedures and concerns to be followed to avoid later civil or criminal alleged charges and violations
  - Made it clear that improper and illegal actions by County Committees and their respective officers and employees may ultimately lead to:
    - **The voiding of any prior enacted public actions**
    - **The possibility of charges against County officers and board members**

**Let's get out of the "rulebooks."** At the end of the day we're trying for a deal that going to hold up for a long time, for all the parties. At a minimum does this application address the following issues with the proposed operation?

- Any specific Threatened or Endangered Species concerns
- Any specific Cultural, Scenic, Habitat, Archeological or Historical Resources concerns
- Groundwater, Wetland, Floodplain and Surface water concerns
- Public Health concerns, including toxic waste, potable wells and air quality
- Public safety concerns, including any ponds and roads
- Any specific local negative Tax, Fiscal and Economic Municipal and resident concerns, including financial assurances to allow proper and timely closure/reclamation.
- Any specific potential Public Nuisance concerns including dust, noise, traffic congestion, odor, blasting, drilling, light pollution and erosion.
- Any specific Closure/Reclamation concerns
- Any specific work place and local resident safety health and financial concerns

**What does my insurance agent think of all this?** Many of us carry insurance policies with general liability clauses in them. Thus, your insurance agent might be really interested to hear about the issues I'm raising here. You may want to run this memo by them. I'd be thinking that it's better to have this conversation now, rather than in the heat of a lawsuit.

Again, I'm not a lawyer, nor am I a risk advisor. As an interested party in these deals, it's certainly above my pay-grade to advise you on matters like this. So please check with your advisors about financial and general liability. But also make sure you're asking yourself whether THEY are experts in this kind of situation.

One last thing I'd do if I were on the Board of Adjustments – I'd check with the County to see whether they have liability insurance for me as a board member if the County gets sued.