



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

March 4, 2024

Dyana Valencourt
1345 W Robinwood Ln
Fresno, CA 93711

Re: Your Request for Advice
Our File No. I-24-014

Dear Ms. Valencourt:

This letter responds to your request for advice regarding the post-governmental employment (“revolving door”) provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the post-government employment provisions of the Act. We therefore offer no opinion on the application, if any, of other post government employment laws, such as Public Contract Code Section 10411.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. As a former Environmental Scientist with the California Department of Fish and Wildlife (“CDFW”), under the one-year ban, may you, through a consulting firm, perform environmental review and permitting services in connection with California High Speed Rail projects?

2. Under the permeant ban, are you prohibited from performing environmental review and permitting services in connection with permits that you worked on during your tenure at CDFW?

CONCLUSIONS

1. Under the one-year ban, you are prohibited from appearing before or communicating with CDFW, your former agency, as described below, until December 13, 2024. The one-year ban does not prohibit your proposed work on environmental review and permitting matters, except to the extent it would involve an appearance before or communication with the CDFW during the one-year period and one of the exceptions detailed below does not apply. Note that you are not

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

prohibited under the one-year ban from making appearances before or communicating with CDFW as a part of services performed to administer, implement, or fulfill the requirements of an existing permit, so long as those services do not involve the issuance, amendment, awarding, or revocation of the permit during the one-year ban period, and you are not otherwise prohibited under the permanent ban. (Regulation 18746.1(c).)

2. The permanent ban prohibits you from participating in proceedings involving the State of California or assisting others in the proceedings, if you previously participated in the proceedings while employed by CDFW. The permanent ban therefore prohibits you from “switching sides” and assisting others on matters pertaining to the Fresno to Bakersfield Incidental Take Permit, and any other proceeding that you worked on during your employment at CDFW.

FACTS AS PRESENTED BY REQUESTER

You were employed as an Environmental Scientist by CDFW until December 13, 2023. In this role, which was designated in CDFW’s conflict of interest code, you were primarily responsible for activities related to environmental review and permitting of the California High Speed Rail (“HSR”) project.

The Authority is responsible for planning, designing, and building California’s proposed HSR system. Each phase of the HSR must comply with a number of environmental permitting and review requirements under both federal and state laws. At CDFW, you were responsible for representing CDFW’s interests in the environmental review and permitting of the HSR, including addressing issues related to ecological impacts of HSR construction projects and operations; developing and implementing conservation strategies and mitigation programs; and coordinating with representatives from the Authority and other state and federal entities.

Where an HSR construction project would require a “taking”² of an animal listed under the California Endangered Species Act, CDFW may issue an Incidental Take Permit (“ITP”), allowing the permittee to engage in the taking if it is incidental to, and not the purpose of, carrying out an otherwise lawful activity. The holder of the ITP is then required to implement species-specific minimization and avoidance measures, and fully mitigate the impacts of the project. While at CDFW, you drafted the Fresno to Bakersfield Incidental Take Permit, which CDFW ultimately approved.

You are now employed by Bancroft Construction Services (“Bancroft”), a private consultancy subcontracted to Orito & Associates, a project and construction management firm (“PCM”) that contracts with the Authority. In your new role, you plan to assist the PCM with environmental review and permitting tasks on behalf of the Authority, such as doing surveys for endangered species and preparing reports in connection with water quality certification issued by the State Water Resources Control Board (the “State Water Board”) under Section 401 of the federal Clean Water Act (a “401 Water Quality Certification”).

² “Take” in this context is defined as “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” (Fish & Game Code, §86.)

You ask whether the Act's revolving door provisions permit you to engage in this proposed work for Bancroft, and whether you may also perform future work related to the current Fresno to Bakersfield ITP, including any future amendments to the ITP.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, the "one-year ban" and the "permanent ban." These provisions are commonly referred to as the "revolving door" prohibitions.

The One-Year Ban

The Act's "one-year ban" prohibits designated employees of state administrative agencies, for one year after leaving state service, from representing any other person by appearing before or communicating with, for compensation, their former agency in an attempt to influence agency decisions that involve the making of general rules (such as regulations or legislation), or to influence certain proceedings involving a permit, license, contract, or transaction involving the sale or purchase of property or goods. (Section 87406(d)(1).)

The one-year ban applies for twelve months from the date the employee "permanently leaves" state employment, which is defined as the date the official is no longer authorized to perform the duties of the office or employment and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits. (Regulations 18746.1(b)(1).) and 18746.4(b).) The one-year ban applies to any designated employee of a state administrative agency. (Section 87406(d)(1); Regulation 18746.1(a)(4).) As a former Environmental Scientist, a position designated in the CDFW's Conflict of Interest Code, you are subject to the one-year ban. You left state service on December 13, 2023. Therefore, you are subject to the one-year ban until December 13, 2024.

During this time, you are prohibited from appearing before or communicating with CDFW as a paid consultant for the purpose of influencing any administrative, legislation or discretionary action, to the extent that such action involves the issuance of a permit, license, grant, contract or sale of goods or property during the one-year period. Appearances and communications are prohibited if they are before CDFW or before a state agency "whose budget, personnel, and other operations are subject to the direction and control of" CDFW. (Regulation 18746.1(b)(6).) Thus, the one-year ban prohibits you, for a period of one year, from being paid to appear before or communicate with CDFW for the purpose of influencing any administrative, legislation or discretionary action involving an ITP, 401 Water Quality Certification, or the issuance of any other permit, license, grant, contract, or sale of goods or property.

However, you will not be prohibited under the one-year ban from performing work as an independent contractor on matters involving CDFW that do not require you to appear before or communicate with CDFW. We have advised that a former agency official may, without violating the one-year ban, draft proposals on a client's behalf to be submitted to their former agency, so long as the former employee is not identified in connection with the client's efforts to influence an administrative action. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural

requirements, plans, or policies of the official's former agency so long as the employee is not identified with the new employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.) Thus, you may advise on or even draft ITPs, 401 Water Quality Certifications, and other permits, licenses, and contracts with CDFW, so long as you are not identified in connection with Bancroft's efforts to influence such actions.

In addition, you are not prohibited under the one-year ban from making appearances or communications before CDFW as a part of services performed to administer, implement, or fulfill the requirements of an existing permit, so long as those services do not involve the issuance, amendment awarding or revocation of the permit during the one-year ban period and you are not otherwise prohibited under the permanent ban. (Regulation 18746.1(c).)

Finally, we note that while the one-year ban does not prohibit appearances or communications in representation of a state agency, this exception applies only where the former state official has become an officer or employee of the state agency, and where the appearance or communication is for the purpose of influencing legislation or administrative action on behalf of the state agency. While Bancroft is a subcontractor of the PCM, who was hired to perform work on behalf of the Authority, you are not an employee of the Authority.

The Permanent Ban

The permanent ban prohibits a former state employee from switching sides and participating, for compensation, in a particular proceeding involving the State of California and other specific parties or assisting in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401, 87402; Regulation 18741.1.) You are a former employee of CDFW, a state agency, and thus the permanent ban applies to you.

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication, or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication, made with the intent to influence any judicial, quasi-judicial, or other proceeding in which the official participated while a state employee.

Unlike the one-year ban, which applies to agency decisions that involve the making of general rules such as regulations or legislation, the permanent ban applies to any judicial, quasi-judicial, or other proceedings in which you participated while you served as a state administrative official, in which the State of California is a party or has a direct and substantial interest. (Section 87401). "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency" (Section 87400(c).) Thus, the permanent ban only applies to proceedings that affect the rights or claims of specific parties; it does *not* apply to proceedings that involve the making of rules or policies of general applicability, such as most legislation.

Both an ITP and 401 Water Quality certification appear to involve requests for rulings/determinations involving specific parties (the applicants) before a state administrative

agency (CDFW and the State Water Board, respectively). Thus, both appear to qualify as a “judicial, quasi-judicial, or other proceeding” for purposes of the permanent ban.³

An official or employee has “participated” in a proceeding if the official took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information” (Section 87400(d).) You personally drafted the Fresno to Bakersfield ITP. Thus, you participated in the proceeding and the permanent ban prohibits you from switching sides and participating, for compensation, in the Fresno to Bakersfield ITP.

The permanent ban does not apply to a “new” proceeding, even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A “new” proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings. (See, e.g., the *Rist* Advice Letter, No. A-04-187 and the *Goldberg* Advice Letter, No. I-05-225.) Thus, a mere amendment to the existing Fresno to Bakersfield ITP would not constitute a “new” proceeding. We recommend you seek additional advice if you plan to work on a new proceeding arising out of the Fresno to Bakersfield ITP or any other proceeding that you participated in while at CDFW.

Further, the application, drafting, and awarding of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (See *Starovoytov* Advice Letter, No. A-14-149, citing *Anderson* Advice Letter No. A-98-159, and *Blonien* Advice Letter, No. A-89-463.) The “performance” or “implementation” proceeding is narrowly construed and limited to the execution of the existing terms of an existing contract. (*Lujan* Advice Letter, No. A-14-009.) Where an employee has participated in the implementation proceeding, the employee may not switch sides and work for compensation for an outside employer on the same implementation proceeding. (*Culp* Advice Letter, No. 1-14-051.) Therefore, the permanent ban prohibits you from participating in the application, drafting, and awarding of the Fresno to Bakersfield ITP, or any other contract, license, or approval you worked on at CDFW, regardless of whether the proceeding is pending before CDFW or another agency. However, you may be permitted to participate in the monitoring and performance phase of the Fresno to Bakersfield ITP, or any other contract, license, or approval you worked on at CDFW. Again, we recommend you seek additional advice if you think you qualify for this narrow “implementation” proceeding exception.

³ You have not identified any other proceedings that you may work on for Bancroft. We recommend you seek additional advice, as needed, if you anticipate working on other types of permits or applications or requests for a ruling or determination that may meet qualify as a “judicial, quasi-judicial, or other proceeding.”

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in black ink, appearing to be 'DB', written in a cursive style.

For

By: Toren Lewis
Counsel, Legal Division

TAL:aja