



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

November 19, 2020

Emily B. Erlingsson
Special Counsel
Pillsbury Winthrop Shaw Pittman LLP
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94111-5998

Re: Your Request for Informal Assistance
Our File No. I-20-139

Dear Ms. Erlingsson:

This letter responds to your request for advice on behalf of Dr. Mark Nechodom, former Department of Conservation Director, regarding the post-employment provisions of the Political Reform Act (the “Act”).¹ Due to the general nature of your request, we are treating this request as one for informal assistance.²

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.

QUESTION

Is Dr. Nechodom, former Director of the state Department of Conservation, prohibited under the Act’s permanent ban from representing his current employer, the Western States Petroleum Association (“WSPA”), before his former state agency, the Natural Resources Agency, and his former department regarding the state’s policies and general regulation of well stimulation treatment operations, the Department’s permit process, or on other oil and gas industry issues?

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 18110 through 18997 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329.)

CONCLUSION

As former Director of the Department of Conservation, the permanent ban applies to Dr. Nechodom in his employment with WSPA, and prohibits his participation to the extent a matter is a “judicial, quasi-judicial or other proceeding” in which he previously “participated” as those terms are defined under the Act and discussed below. The permanent ban does not apply to matters that involve the making of rules or policies of general applicability. Sufficient facts were not provided to make a determination as to a particular proceeding or subject matter.

FACTS AS PRESENTED BY REQUESTER

Dr. Nechodom served as the Director of the Department of Conservation (“Department”) from January 9, 2012 to June 19, 2015. In this position, he administered four divisions: the Division of Oil, Gas and Geothermal Resources (formerly known as DOGGR, now called California Geologic Energy Management Division or “CalGEM”); the Office of Mine Reclamation; the Division of Land Resource Protection; and the California Geological Survey. He also had oversight over the State Mining and Geology Board. The Department is within the state Natural Resources Agency.

As director, Dr. Nechodom provided policy leadership and had direct supervisory authority over the CalGEM division supervisor. The CalGEM supervisor issued policy for the regulated industry, and enforcement orders affecting individual oil and gas operators. (See Cal. Pub. Res. Code §3106, et seq.)³ Dr. Nechodom’s direct role in the activities of CalGEM was to provide high-level guidance and leadership. As director, Mr. Nechodom had the same responsibilities for fiscal due diligence oversight and knowledge of the division’s budget and reporting to the Legislature as he had for all other divisions of the department. He also had judicial or quasi-judicial authority over the division or the regulated industry if there is an appeal of a decision of the supervisor. No such appeals were processed during Dr. Nechodom’s tenure with the Department.

On August 17, 2020, five years after his departure from state service and, Dr. Nechodom became Vice President for Upstream Strategy at WSPA, a trade association that represents companies in five western states, including California. He anticipates working closely with his former state agency, Department officials and CalGEM staff on behalf of WSPA members regarding policy issues such as well stimulation treatment operations (including hydraulic fracking), carbon capture, and utilization and storage. You and WSPA representative Oyango Snell clarified in

³ At the beginning of his tenure, the Oil and Gas Supervisor was a position that served at the pleasure of the Director, and was appointed. During his tenure, the CalGEM Supervisor position became a gubernatorial appointment, in order to expand the potential pool of candidates beyond state civil service and enable the governor to select candidates from anywhere in the world. Per Dr. Nechodom’s understanding with the Governor’s office, the supervisory relationship between the Director and the Supervisor did not change, even though candidate selection became the purview of the Governor’s office.

a phone conversation on November 10th, that his work will not involve specific permits affecting specific WSPA members. Dr. Nechodom believes there are no proceedings (judicial, quasi-judicial, application, request for determination, hearing, permit submission, etc.) that he participated in as director of the Department that are currently in progress. His work will involve advocacy for changes in the Department's regulation and policy on behalf of WSPA members. You further clarified that recently the Department cancelled a policy meeting to be held with Mr. Nechodom, apparently citing his former position with the Department. You request clarification as to the application of the permanent ban to general discussions of department policy and regulation relating to oil and gas industry issues with his former Department.

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." Only the permanent ban is applicable here. As a former state official, the permanent ban restricts Dr. Nechodom's activities in the private sector.

Permanent Ban: Proceedings and Participation

The permanent ban prohibits a former state employee from "switching sides" and participating, for compensation, in a certain 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 and 87402; Regulation 18741.1.)

Section 87401 sets forth the following:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

For purposes of applying the permanent ban to Dr. Nechodom in his post-government employment, it is essential to determine if the particular proceeding meets the definition of a "judicial, quasi-judicial or other proceeding" and whether Mr. Nechodom previously participated in the proceeding.

These types of proceedings are defined as “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 including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.” (Section 87400(c).) Thus, the permanent ban covers proceedings that affect the rights or claims of specific parties.

The permanent ban does not apply to matters that involve the making of rules or policies of general applicability. Generally, the adoption, amendment, or repeal of regulations are not considered “judicial, quasi-judicial or other proceedings,” because they involve the formulation of rules of general application to be applied prospectively and not the rights or claims of specific parties. (See for example *Huston* Advice Letter, No. A-84-002, and *Sweeney* Advice Letter, No. A-98-022.) Similarly, the rendering of a legal advisory opinion that does not involve a specific party or parties is specifically excluded from the definition of a “judicial, quasi-judicial or other proceeding.” (Regulation 18741.1(a)(4).) However, where a regulation or policy decision focused on specific parties, it may meet the definition of a “proceeding” subject to the permanent ban.

If a matter is a proceeding subject to the permanent ban, Dr. Nechodom must next determine if he previously participated in the same proceeding as director of the Department. For purposes of the permanent ban, participation by an official in a proceeding is defined as follows:

(d) “Participated” means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.

Regulation 18741.1(a)(4) provides that a supervisor is deemed to have participated in any proceeding pending before his agency during his time of service, including matters where the supervisor had contact with the parties involved regarding the subject of the proceeding. Regulation 18741.1(a) states:

(4) ... A supervisor is deemed to have participated in any proceeding that was “pending before,” as defined in subdivision (b) of Regulation 18438.2, the official’s agency and that was under his or her supervisory authority. For purposes of this regulation, a proceeding is under a supervisor’s “supervisory authority” if any of the following applies to the supervisor:

(A) The supervisor's duties include the primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted. However, this provision does not apply to a supervisor who is only responsible for the general oversight of the administrative actions or functions of a program in which the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency.

(B) The supervisor directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken.

(C) The supervisor reviews, discusses, or authorizes any action in the proceeding.

(D) The supervisor has contact with any of the participants in the proceeding regarding the subject of the proceeding.

We lack sufficient facts to determine whether Dr. Nechodom's regulation and policy advocacy on behalf of WSPA before the Department may involve a proceeding subject to the permanent ban, or whether he participated in any such proceeding in his role as director. While the above information may provide some guidelines, we recommend that additional advice be sought when a particular proceeding is at issue and a full factual record may be provided.

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 'BL' followed by a stylized flourish.

By: Brian Lau
Assistant General Counsel

BL:aja