



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 6, 2021

Matt Wetter
PE Environmental Engineer
Army Corp of Engineers
1325 J Street, 12th Floor
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. I-21-038

Dear Mr. Wetter:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ Because your question is general in nature, we are treating your request as one for informal assistance.²

Please 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

As a former employee of the State of California Department of Toxic Substances Control (“DTSC”) may you directly interact with DTSC in meetings, telephone calls, and through written correspondence related to federal clean-up projects where DTSC is neither the lead regulator nor the lead agency?

CONCLUSION

The one-year ban generally does not apply to a proceeding in which the former state employee’s state agency is not the governmental decision-maker in the proceeding. Therefore, your appearance or communications in your capacity as a federal employee with your former state agency, where the DTSC is a stakeholder rather than a decision-maker, is generally not prohibited by the one-year ban. However, as explained below, you may not attempt to influence your former state employer in its decisions relating to its own administrative or legislative actions or in its decisions to issue, amend, or revoke a license, grant, contract or the sale or purchase of goods or

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(c)(3).)

property. Notwithstanding the one-year ban, the permanent ban strictly prohibits you from participating in a meeting, or assisting others participating in a meeting, if the meeting is a proceeding, as defined below, in which you previously participated on behalf of your former employer.

FACTS AS PRESENTED BY REQUESTER

You previously worked for the State of California as a Senior Hazardous Substances Engineer with DTSC, and you now work for the U.S. Army Corp of Engineers (“USACE”) as an Environmental Engineer. As a DTSC employee you did not directly work on any military projects related to any of the work you will be conducting in your current position with USACE. As part of your role with the USACE, you will provide technical advice and support and assist with interpretation and implementation of various state and federal environmental rules, regulations and policies on behalf of the USACE. DTSC is actively engaged as a stake holder, but not a decision maker, with several of the projects that you will be working on, and you state that it would be advantageous for you to actively participate in meetings and discussions where DTSC is also present in order to best communicate specific technical and regulatory concerns and develop a path forward.

Background on Work for USACE

The work you will be doing with the USACE is conducted under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)³ of 1980, and the National Oil and Hazardous Substances Pollution Contingency Plan⁴. CERCLA and SARA established a series of programs for cleanup of hazardous materials disposal and release sites nationwide. The primary objective of the programs is to clean up past waste disposal or spill areas that endanger public health, welfare or the environment following a process developed by the U.S. Environmental Protection Agency (USEPA), pursuant to CERCLA to identify, assess, and remediate hazardous waste sites.

Under CERCLA, the lead federal agency for environmental restoration at the sites that you will be working on is generally the U.S. Department of the Army or the U.S. Department of the Air Force, or another military department, and the lead regulatory agency is USEPA. Stakeholders include DTSC and the San Francisco Bay Regional Water Quality Control Board (“RWQCB”) among others. The point being that DTSC is neither the primary decision maker (that is the Army, Air Force) nor the lead regulator (that is the USEPA). DTSC advises USEPA on matters related to the restoration programs. DTSC’s advisement is a significant data point, but DTSC does not have decision making authority. Your role is to advise the USACE project manager, who advises the Army or Air Force; and the Army or Air Force will make all decisions related to implementation of the various CERCLA programs. You state that there are several layers of advisors and decision makers between any advisement you provide and any advisement DTSC provides, and neither of you have direct or final decision-making authority.

³ As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA, 42 United States Code 9601, et seq.)

⁴ 40 Code of Federal Regulations 300.

By definition, under CERCLA there are no permit requirements for a lead federal agency such as the Army or Air Force. However, a Record of Decision (“ROD”) is prepared that defines the goals of the remediation effort and dictates how the remedial action will be implemented. The ROD is a “discretionary action” that triggers a National Environmental Policy Act (“NEPA”) review. You state that neither the Army, Air Force nor DTSC, would generally classify a ROD as a permit. The only permits that DTSC administers are hazardous waste permits that are administered under the Resource Conservation and Recovery Act (“RCRA”) program which is separate from CERCLA. Other environmental permits that would otherwise be necessary for implementation of the CERCLA program by the Army or Air Force are not actually issued, instead the Army or Air Force is required to comply with the substantive portions of the permit, so no discretionary decision is made by the administering agency of such permits (i.e., regulator, municipality etc.).

DTSC does not have ultimate decision-making authority related to CERCLA cleanup actions. That authority is delegated to the lead regulator (USEPA for the projects you will be working on) or the federal lead cleanup agency (which is the Army or Air Force for most of the projects you will be working on) depending on the specific situation and site-specific Federal Facility Agreement (FFA). The goal for all decisions is to reach consensus between the federal lead cleanup agency and the various environmental agencies (i.e., US EPA, DTSC and RWQCB) and for the environmental agencies to issue letters of concurrence. However, in the event that one or more environmental agencies does not concur, the issue would go through a dispute resolution process, and then the decision would be resolved by the lead cleanup agency or lead regulatory agency (but not DTSC) as defined in the associated FFA; though DTSC would be a stakeholder in the dispute resolution process and you would generally not be directly involved in the dispute resolution process.

As noted above, during CERCLA cleanup actions, the lead agency is required to adhere to the substantive aspects of a permit that would otherwise be required. However, administrative and procedural aspects of the permit are not required under a CERCLA action.

ANALYSIS

Revolving Door Prohibitions

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.

One-Year Ban

The “one-year ban” prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions or any discretionary act involving the “issuance, amendment, awarding, or revocation of a permit, license, grant or contract.” (See Section 87406; Regulation 18746.1.) Unlike the permanent ban, this ban is not confined to particular proceedings.

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(4).) An employee should be designated when that employee holds a position that entails making or participating in making decisions. The ban applies for twelve months from the date the employee permanently leaves state office or employment. While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

An appearance or communication is for the "purpose of influencing" if it is made for the "principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding." (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

Finally, as relevant to these facts, appearances and communications are prohibited if they are (1) before a state agency that the public official worked for or represented, or (2) before a state agency "which budget, personnel, and other operations" are subject to the control of a state agency the public official worked for or represented. (Regulation 18746.1(b)(6).)

We point out, however, that not all communications are prohibited by the one-year ban. For example, so long as not otherwise prohibited by under the permanent ban, services performed to administer, implement, or fulfill the requirements of an existing contract, or sale agreement are excluded from the one-year ban, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. (Regulation 18746.1(c); *Williams* Advice Letter No. I-06-058 citing to *Quiring* Advice Letter, No. A-03-272 and *Hanan* Advice Letter, No. I-00-209.)

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if a former employee attends a public meeting with many other persons where there are many topics on the agenda, it may be reasonable to infer that the former employee's attendance is not for the purpose of influencing the agency's action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, or other specific action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property (Section 87406(d)), it may more readily be inferred that the former employee's presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, No. A-99-300.)

Additionally, a former agency official may draft proposals on a client's behalf to be submitted to the agency. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289); or may use his or her expertise to advise clients on the procedural requirements, plans, or policies of his or her former agency (*Perry* Advice Letter, No. A-94-004), so long as the former employee is not identified in the client's efforts to influence the agency.

More specifically, you have asked whether the one-year ban prohibits you from attending meetings concerning CERCLA projects where DTSC is neither the lead regulator nor the lead agency. As outlined above, the one-year ban prohibits you from appearing, or making a communication, before your former state employer (in your case DTSC). Generally, if a former state employee's state agency is not the governmental agency making the decision in a particular proceeding, the former employee is not appearing before the former agency for purposes of the one-year ban. Therefore, merely attending a meeting with USACE or a federal lead cleanup agency in which your former state employer is participating as a stakeholder generally would not be an appearance or communication subject to the one-year ban.

We caution, however, that your participation in these meetings will be restricted because you may not use the meetings as opportunities to make appearances or communications otherwise prohibited. At no time, even during the course of the meetings you have described, may you make an appearance or communication, while representing the USACE, to influence your former state employer in its decisions relating to its own administrative or legislative actions or in its decisions to issue, amend, award, or revoke a permit, license, grant, or contract, or the sale or purchase of goods or property.

As an example, you may participate in a meeting as an appointed officer of a federal agency, in which your former state agency employer participates as a stakeholder, to the extent that the federal agency is making determinations concerning the CERCLA cleanup actions. Moreover, you may evaluate the proposed actions and seek clarification from your former state employer as necessary to answer any questions you may have pertaining to the CERCLA cleanup actions.

Permanent Ban

The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. "'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).) Additionally, an official is considered to have "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).)

"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." (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. 1-03-119.) New contracts with the employee's former agency in which the former employee did not participate are considered new

proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. 1-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra; Blonien* Advice Letter, No. A-89-463.)

While we have detailed the general provisions of the permanent ban for your review, you have not provided any information as to your participation in any proceeding as an employee of the USACE that may affect your ability to engage in any of the conduct listed herein. To apply the permanent ban to your situation, you need to determine if any of the actions in which you may engage on behalf of the USACE involve a proceeding in which you participated while employed with the DTSC. (Regulation 18741.1(a)(4).)

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

Sincerely,

Dave Bainbridge
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Zachary W. Norton

By: Zachary W. Norton
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