



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

June 16, 2021

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

Re: Your Request for Advice
Our File No. I-21-078

Dear Ms. Erlingsson:

This letter responds to your request on behalf of Berry Corporation (“Berry”) and Berry employee Jason Marshall 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

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 Mr. Marshall, former Chief Deputy Director of the state Department of Conservation (DOC), prohibited under the Act from representing his current employer, Berry, before his former state agency, the Natural Resources Agency, and his former department, DOC, regarding new applications submitted by Berry to DOC, as well as broad policy issues relating to the regulation of well stimulation treatment operations, carbon capture, utilization and storage, and other evolving policy issues affecting the oil and gas industry?

CONCLUSION

Under the Act, the “one-year ban” does not apply to Mr. Marshall in his interactions with the Natural Resources Agency and DOC because he left that agency and department more than one year ago. The Act’s “permanent ban” also does not prohibit Mr. Marshall from taking part in

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).)

matters involving the making of rules or policies of general applicability, nor does it apply to new proceedings, such as new applications submitted by Berry to DOC.

FACTS AS PRESENTED BY REQUESTER

Jason Marshall has been an employee of Berry since July 2020 and, more recently, became Vice President of Corporate Affairs on April 6, 2021. Prior to working for Berry, Mr. Marshall worked as Chief Deputy Director of DOC from January 2012 until his resignation on February 14, 2020. Thereafter, he exercised a right of return to work at the California Department of Resources Recovery and Recycling (CalRecycle) before resigning from CalRecycle in July 2020.

Mr. Marshall's role as Chief Deputy Director of the DOC was to support the Department Director in providing leadership and administrative oversight for four divisions and the State Mining and Geology Board. The four divisions included: the Division of Oil, Gas and Geothermal Resources (DOGGR, now called CalGEM); the Office of Mine Reclamation; the Division of Land Resource Protection; and the California Geological Survey.

In his role as Chief Deputy Director, Mr. Marshall supervised and provided policy leadership for the Oil and Gas Supervisor (Supervisor). During the period of July 2019 until November 2019, Mr. Marshall also served as the Acting Oil and Gas Supervisor in addition to his Chief Deputy Director duties. In this capacity, Mr. Marshall provided leadership to CalGEM District Deputies who oversaw the permitting of oil and gas wells, the site inspections attendant with CalGEM's regulatory oversight of the oil industry generally, and enforcement actions. Mr. Marshall also oversaw the enforcement of laws governing the operation of oil and gas production wells, including the issuance of Orders of the Supervisor as a means of obtaining compliance with CalGEM regulations. The authorities of the Supervisor are specified under Cal. Pub. Res. Code § 3106, et seq. None of the Orders issued by Mr. Marshall during his short time as Supervisor were issued to Berry. Since Mr. Marshall is currently employed by Berry, he would have no reason to be involved in any adjudications regarding those Orders or potential enforcement actions stemming from the Orders he signed. As of May 18, 2021, one Order issued by Mr. Marshall as Acting Oil and Gas Supervisor, for example, remains under adjudication—Order #1163, which was issued to Chevron's U.S.A. Inc. For the avoidance of doubt, Order #1163 was *not* issued to Berry, and the company to which it was issued—Chevron U.S.A. Inc.—is not directly or indirectly related to or an affiliate of Berry. Mr. Marshall will not be involved in the adjudication of this matter in any manner in his employment at Berry.

During his tenure as the Acting Oil and Gas Supervisor, Mr. Marshall directed a pause on work to develop new oil and gas well construction standards. The pause was necessitated by a need to focus resources on another rulemaking proceeding which subsequently was initiated by Mr. Marshall's successor. At the time that the work on developing well construction guidelines internal to CalGEM was paused, it had not yet progressed to a formal rulemaking and, as of May 18, 2021, still had not progressed to the start of formal rulemaking with the California Office of Administrative Law.

In November 2019, near the end of Mr. Marshall's time as the Acting Oil and Gas Supervisor, CalGEM, with the support of Governor Newsom, announced a moratorium on approving new high-pressure cyclic steam operations pending a review of the practice in consultation with experts from the Lawrence Livermore National Laboratory ("National Labs").

Subsequently in January 2020, Oil and Gas Supervisor Uduak Joe Ntuk signed the Notice to Operators that formally implemented the moratorium, defining the final terms of the moratorium and outlining the review process. During the moratorium, which is still ongoing, CalGEM and the National Labs have been reviewing the practice of high-pressure cyclic steam operations above the fracture pressure to determine whether it can be accomplished safely and if so, to identify precise criteria to comply with regulations. The review may result in new safety requirements for this type of operation, updated regulations, or an indefinite ban on new projects using this method. Mr. Marshall was involved in the development of the policy but did not personally issue the ban.

As Vice President of Corporate Affairs for Berry, Mr. Marshall desires and intends to now communicate with various officials at DOC and at CalGEM regarding technical and broad policy issues and regulations impacting the oil and gas industry. In addition to communicating on these broad policy issues, Mr. Marshall will be working with CalGEM permitting teams on general permitting processes, such as understanding how the approval of Underground Injection Control permits are reviewed and issued and work to help expedite that process by understanding what operators can do to support CalGEM with their review. On occasion, Mr. Marshall will engage with CalGEM management and staff about specific permit requests from Berry. In those cases, while the conversation may be specific to a Berry application or applications, it will be about how Berry's application(s) can meet the rules applicable to the oil and gas industry. These permit applications are not ongoing proceedings that Mr. Marshall participated in during his tenure with DOC. Mr. Marshall will only be communicating regarding new permit applications.

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 Act's "one-year ban" provides that "[a] designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position that entails the making, or participation in making, of decisions that may foreseeably have a material effect on any financial interest, and a member of a state administrative agency, for a period of one year after leaving office or employment, shall not, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any 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)(1).) Section 87406's one-year prohibition applies with respect to leaving a "any *particular* office or employment specified in [Regulation 18746.1(a)]," including work as a designated employee of a state administrative agency. (Regulation 18746.1(b)(1) (emphasis added); see also *Sheehy* Advice Letter, No. A-10-155 [applying one-year prohibition period with respect to two separate agencies based on the date on which the official left each respective agency].) Given that Mr. Marshall resigned from DOC in February 2020, the one-year ban is no longer applicable to him with respect to that agency.

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.)

Mr. Marshall desires and intends to now communicate with various officials at DOC and at CalGEM regarding technical and broad policy issues and regulations impacting the oil and gas industry, general permitting processes, and occasionally regarding specific permit applications from Berry. 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, e.g., *Huston* Advice Letter, No. A-84-002; *Sweeney* Advice Letter, No. A-98-022; see also Section 87400(c).) Further, to the extent Mr. Marshall would be working on permit applications submitted by Berry to DOC, you have indicated those applications would not be ongoing proceedings Mr. Marshall had participated in during his tenure with DOC, but rather would be new permit applications. Because new permit applications would qualify as new proceedings, the permanent ban would not apply. Accordingly, to the extent Mr. Marshall’s work at Berry involving the DOC is limited to new proceedings, the permanent ban would not apply and prohibit his participation in such proceedings.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

KMC:dkv