



California Fair Political Practices Commission

December 13, 1994

Catherine Witherspoon
1131 Castro Way
Sacramento, CA 95818

Re: Your Request for Advice
Our File No. A-94-371

Dear Ms. Witherspoon:

This is in response to your letter requesting advice regarding your responsibilities under the provisions of the Political Reform Act (the "Act")¹ restricting postgovernment employment of public officials.

Please note that this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

Will the "revolving door" provisions of the Act restrict your ability to accept employment with the United States Environmental Protection Agency or the South Coast Air Quality Management District once you leave your position with the Air Resources Board?

CONCLUSION

The "revolving door" provisions of the Act do not prohibit you from accepting employment with the United States Environmental Protection Agency or the South Coast Air Quality Management District. However, you may not act as agent or attorney for, or otherwise represent, any other person before any court or state administrative agency (or any officer or employee thereof) in

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Sections 18000-18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

connection with any judicial, quasi-judicial or other proceeding in which you were involved as a public employee, if the State of California is a party or has a direct and substantial interest.

Moreover, you may not act, for compensation, as an agent or attorney for (or otherwise represent) any other person before the Air Resources Board, 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. This prohibition applies to any formal or informal appearance, or any oral or written communication and lasts for one year after the date you leave the Air Resources Board.

FACTS

You stated that from June 1981 to November 11, 1994, you were employed with the Air Resources Board (ARB) which is under the aegis of the California Environmental Protection Agency. Since August of 1992, you held the dual positions of assistant executive officer and the chief of the office of air quality and transportation planning. In those positions you were responsible for setting policies relating to air quality planning (the state implementation plan involves setting air pollution goals for the various sources of air pollution in the state) and managing the ARB's transportation related research, publications, and regulations.

In addition, you were periodically called upon to assist in speech preparation, participate in airport certification proceedings, analyze legislation, and represent the ARB's executive officer and chairwoman at public forums and on committees. You stated that most of these assignments were one-time events or short-lived projects.

You are currently considering employment with two public entities.

1. **United States Environmental Protection Agency (U.S. EPA):**
The U.S. EPA has offered you a temporary position as an interim expert consultant on the Federal and State Implementation Plans. Your duties will include:

- o Providing policy advice on strategies for eliciting effective state and local air quality plans;
- o Providing guidance on where legislative authority may be needed and how to acquire it;
- o Developing effective outreach on the Federal Implementation Plan for various audiences;

- o Providing technical expertise to Region IX to facilitate State Implementation Plan replacement, including an independent assessment of the interrelationship between Federal and State Implementation Plan.

- o Acting as a liaison between Region IX and other key players (not including the ARB).

2. **South Coast Air Quality Management District (SCAQMD):**
You are also considering a position with the SCAQMD as their director of intergovernmental affairs, a legislative advocacy position. If you take the position, your duties will include:

- o Representing SCAQMD before state and federal agencies (excluding the ARB);

- o Analyzing legislation;

- o Lobbying and advocating legislative positions in the state capitol;

- o Preparing reports to the board of directors of SCAQMD.

You have asked whether the provisions of the Act restrict your ability to accept these positions once you leave your employment with the ARB.

Additionally, there are two pending lawsuits involving the State Implementation Plan. You have asked whether these lawsuits create a conflict of interest for you in your future employment.

ANALYSIS

I. Revolving Door Restrictions, Generally

A. Traditional Revolving Door Provisions

Sections 87401 and 87402 provide restrictions on the activities of administrative officials after leaving office. Section 87401 provides:

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.

In addition, Section 87402 provides:

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

Consequently, you are prohibited from representing, aiding, advising, counseling, consulting or assisting² other persons³ for compensation concerning judicial, quasi-judicial or other proceedings before the ARB when the State of California is a party or has a direct and substantial interest and the proceeding is one in which you participated.⁴

However, this restriction is limited to judicial, quasi-judicial or other proceedings. Section 87400(c) provides:

"Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a

² This would include acting as agent or attorney for another, making any formal or informal appearance, or by making any oral or written communication with the intent to influence, or aid, advise, counsel, consult or assist in representing any other person. (Sections 87401 and 87402.)

³ "Person" is defined for purposes of the Act to include an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert. (Section 82047.) This would include public entities. (McGrath Advice Letter, No. A-90-085.)

⁴ Section 87400(d) defines "participated" to include involvement 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. This definition has been interpreted to include involvement in a proceeding in a supervisory role as well as personally. (Evans Advice Letter, No. I-86-117.)

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. [5]

Emphasis added.

Thus, for a proceeding to be one covered by the prohibition in Sections 87401 and 87402, the proceeding must involve a specific party or parties.

B. Revolving Door Restrictions Under the Ethics Bill

Effective January 1, 1991, the Legislature enacted a series of statutes intended to establish ethical guidelines for public officials. The Act now provides that legislators, state officeholders, and designated employees of administrative agencies are subject to new restrictions on their post-employment activity.⁶ Please note that this restriction is in addition to the restrictions in Sections 87401 and 87402 discussed above.

For designated employees of state agencies, Section 87406 provides in relevant part:

(d) (1) No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any 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

⁵ Government Code Sections 11500 et seq, sets forth state agencies subject to the Administrative Procedures Act and the procedures applicable to those agencies.

⁶ These provisions do not apply to employees of the State Legislature.

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.

* * *

(e) The prohibitions contained in subdivisions (b), (c), and (d) shall not apply to any individual subject to this section who is or becomes an officer or employee of another state agency, board, or commission if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission.

You were a designated employee at the ARB. Pursuant to Section 87406, for one year you may not:

- o Act as representative, agent or attorney for any person before ARB for compensation;
- o If the contact is for the purpose of influencing administrative⁷ or legislative⁸ action or 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.⁹ (Section 87406.)

⁷ "Administrative action" is defined in Section 82002 as the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding.

⁸ Section 82037 defines "legislative action" as the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill.

⁹ Since the job descriptions you provided do not include proceedings involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property, we have not discussed these types of proceedings. If you are confronted with such a proceeding concerning the ARB, you should contact us for further advice.

II. Specific Questions

A. U.S. Environmental Protection Agency

1. May you participate in air quality planning at the U.S. EPA?

Sections 87401 or 87402: Regulatory proceedings are not considered judicial or quasi-judicial within the meaning of Section 87401 if they involve the formulation of rules of general application to be applied prospectively and not the rights or claims of specific persons. (Huston Advice Letter, No. A-80-002; Ramirez Advice Letter, No. A-83-203; Swoap Advice Letter, No. A-86-199.)

For example, in the Bersinger Advice Letter (No. A-82-209), we advised that a state administrative official who developed a system for setting foster care rates applicable generally to group homes was not involved in a judicial, quasi-judicial or other proceeding since the official "worked on governmental matters in which there was no involvement of any specific group home."

Additionally, in the Fong Advice Letter (A-88-024), we advised that a state administrative official's participation in investigations of rate design policy and rate making schemes for the Public Utilities Commission was not participation in a "proceeding." We stated: "We base this conclusion on the fact that the rate design policy and rate making scheme for the natural gas industry had an industry-wide application and did not focus on specific utilities." The fact that your future activities may involve the same general policy decisions, and may further the goals with which you were involved as a public official, will not by itself, result in any conflict of interest under Section 87400 et seq. (Ramirez Advice Letter, No. A-83-203.)

You stated that, while an employee with the ARB, you were involved in policies relating to air quality planning and managing ARB's transportation related research, publications, guidance and regulations. It appears that, based on this definition, most of your activities would not be considered "proceedings" as defined in Section 87400 since they did not involve specific parties. Thus, the prohibitions in Sections 87401 and 87402 would not apply to your postgovernmental employment.¹⁰

Section 87406: Section 87406 would not limit the policy advice you provide to the U.S. EPA. Section 87406 only prohibits "appearances" before or "communications" with the ARB or members

¹⁰ Please be aware, as noted above, our advice is based on the facts provided. If any of your activities did involve specific parties, you would be subject to Sections 87401 and 87402 with respect to this proceeding. You should contact us for further advice if this is the case.

or employees of the ARB. (Harrison Advice Letter, No. A-92-289.) Thus, you may use your expertise to advise the U.S. EPA on plans and policies, even if they will affect the ARB.

2. May you contact staff of the ARB regarding the status of State Implementation Plan submittals, the basis for technical conclusions concerning air pollution, and the ARB's expectations with respect to the U.S. EPA? May the ARB staff contact you regarding EPA activities?

Sections 87401 or 87402: So long as the contacts do not involve a judicial, quasi-judicial or other proceeding (as set forth above) that you participated in and in which the State of California is a party or has a direct and substantial interest, Sections 87401 and 87402 would not prohibit such contacts.

Section 87406: Communications to administrative agencies which are not for the purpose of influencing administrative or legislative action of the ARB are not restricted. Thus, for example, you may participate in the U.S. EPA hearings and meetings and question the ARB staff during the course of the hearings on behalf of the U.S. EPA. (McCay Advice Letter, No. A-92-541.) In addition, we have advised that informational meetings with an official's former public employer to determine the agency's viewpoint is not, in itself, influencing an administrative or legislative action.¹¹ This would be the case no matter who initiated the contact.

On the other hand, if at the meeting you suggested or requested that the agency consider drafting rules or regulations, or introducing or opposing a bill, resolution, amendment, report, nomination or other matter by the Legislature, these activities would be prohibited attempts to influence administrative and legislative action.

3. Would lawsuits filed against the ARB affect the revolving door prohibitions under the Act?

Sections 87401 or 87402: A lawsuit would be considered a judicial, quasi-judicial or other proceeding involving specific parties. (McGrath Advice Letter, supra.) Thus, if you participated in the lawsuit at the ARB, you are prohibited from representing, aiding, advising, counseling, consulting or assisting other persons for compensation.

¹¹ See, Bagetelos Advice Letter, No. I-91-202, where the term "influencing administrative action" was interpreted in the context of the regulation of lobbying.

You stated in our telephone conversation of December 5, 1994, that the ARB's legal office was responsible for the litigation. In addition, while you were involved in the proceeding underlying the lawsuits, in both cases the proceedings were general in nature and did not involve specific parties.

Section 87406: Lawsuits against the ARB would not affect the restrictions in Section 87406. Lawsuits are clearly not legislative action, and pursuant to Regulation 18202 are not considered administrative action. Moreover, you stated that the underlying action of the ARB that was the subject of the lawsuit did not involve the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Thus, Section 87406 would not apply to the lawsuit.

B. South Coast Air Quality Management District

1. Does the Act restrict your ability to lobby the Legislature?

Sections 87401 or 87402: Sections 87401 and 87402 apply to judicial, quasi-judicial or other proceeding before any court or state administrative agency if the State of California is a party or has a direct and substantial interest, and the proceeding is one in which you participated. However, Section 87400(a) expressly defines "state administrative agency" to exclude the Legislature.

Section 87406: Section 87406 restricts appearances before the official's former public sector employer and any other public agency for which the official worked in the 12 months prior to leaving office. However, Section 87406 does not prohibit appearances before other agencies so long as you did not work for these other agencies. (Hargrove Advice Letter, No. A-93-201.)

2. May you influence the Legislature or the Governor concerning the ARB's legislation?

Sections 87401 or 87402: As noted above, Sections 87401 and 87402 apply only if the proceeding is a judicial, quasi-judicial or other proceeding in which you participated as an employee of the ARB. Developing legislative proposals would not be "judicial or quasi-judicial."

Section 87406: As stated above, Section 87406 in pertinent part prohibits you from making any formal or informal appearance, or oral or written communication, before any state administrative agency for which you worked, if the contact is for the purpose of influencing administrative or legislative action of your former employer. Thus, lobbying the Governor and the Legislature regarding the ARB's legislation is not restricted by Section 87406.

3. May you consult with the California Environmental Protection Agency (ARB's oversight agency) regarding administrative and legislative action?

Sections 87401 or 87402: Sections 87401 and 87402 apply to judicial, quasi-judicial or other proceeding before any court or state administrative agency. Thus, if you contact the California Environmental Protection Agency to influence them with respect to a judicial, quasi-judicial or other proceeding of the ARB in which the State of California is a party or has a direct and substantial interest, and in which you participated, Sections 87401 and 87402 would prohibit it.

However, Sections 87401 and 87402 would not limit your contacts with the California Environmental Protection Agency regarding other matters.

Section 87406: Since you did not work for the California Environmental Protection Agency, the prohibition in Section 87406 would not apply to communications with the California Environmental Protection Agency. Please note, however, that the prohibition in Section 87406 has been interpreted to apply to all agencies subordinate to the former officials agency, in your case the ARB.

4. May you attend meetings of the California Air Pollution Control Officers Associations (an association of local air district officials and staff that collaborates with the ARB and U.S. EPA on air quality issues)?

Sections 87401 or 87402: Sections 87401 and 87402 limit your involvement in judicial, quasi-judicial or other proceeding before any court or state administrative agency, and officers or employees thereof. Since the meetings in question will involve ARB employees, you will be prohibited from participating if the meeting is regarding a judicial, quasi-judicial or other proceeding of the ARB in which the State of California is a party or has a direct and substantial interest, and in which you participated.

However, Sections 87401 and 87402 would not limit your contacts with the organization regarding other matters.

Section 87406: Under most circumstances, Section 87406 does not restrict your ability to attend informational meetings. However, if your appearance or participation is for the purpose of influencing administrative or legislative action, Section 87406 would prohibit your participation.

While we have advised that speaking at an informational public forum to discuss the reform of the California State Legislature would not be for the purpose of influencing legislative action (Craven Advice Letter, No. A-93-057), under

your facts it appears that the primary purpose for the meeting would be to influence the ARB's actions (as well as those of the member agencies). Thus, Section 87406 would prohibit your participation in these meetings for one year.

5. May the ARB staff contact you and ask you about SCAQMD legislative strategy, or ask you to represent them in legislative hearings?

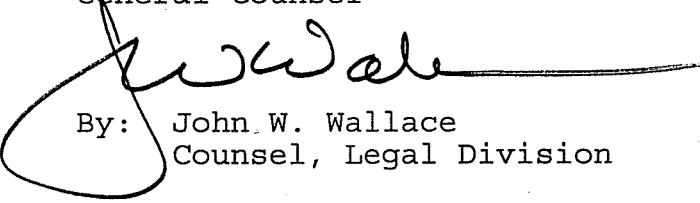
Sections 87401 or 87402: As noted above, Sections 87401 and 87402 apply only to judicial, quasi-judicial or other proceedings before any court or state administrative agency where the State of California is a party or has a direct and substantial interest, and the proceeding is one in which you participated. These sections would not prohibit your involvement in developing legislation.

Section 87406: The prohibition only applies to your communications in order to influence the administrative or legislative action of the ARB. The ARB staff may influence the U.S. EPA's activities by contacting you.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.¹²

Sincerely,

Steven G. Churchwell
General Counsel



By: John W. Wallace
Counsel, Legal Division

cc: Diane Glazer
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¹² Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.