



## FAIR POLITICAL PRACTICES COMMISSION

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February 23, 1999

Craig S.J. Johns  
3345 Mildred Lane  
LaFayette, California 94549

**Re: Your Request for Advice**  
**Our File No. A-99-017**

Dear Mr. Johns:

This letter is in response to your request for advice regarding Sections 87401 and 87402 of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTION

May you provide consulting services to Orinda Gateway LLC regarding its permit application before the San Francisco Regional Water Quality Control Board involving the Montanera Development in Gateway Valley?

### CONCLUSION

Yes. You may provide consulting services to Orinda Gateway regarding its permit application since the new permit application is considered a new proceeding from the permit application you participated in when you were a member of the San Francisco Bay Regional Water Quality Control Board. Of course, pursuant to the one year revolving door provision of Section 87406, you may not make an appearance or communication before your former agency for the purpose of influencing the permit proceeding.

### FACTS

Until September 17, 1998, you were a member of the San Francisco Bay Regional Water Quality Control Board ("regional board").

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<sup>1</sup> Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

In January 1997, Orinda Gateway LLC ("Orinda Gateway") submitted an application to the U.S. Army Corps of Engineers to allow certain filling of waters and wetlands of the United States on Gateway Orinda's property known as the Montanera Development in Gateway Valley ("Montanera Project"). Under federal law, no fill permit may be issued until and unless the State of California (acting by and through the State Water Resources Control Board upon the recommendation of the regional board) issues an affirmative water quality certification. At about the same time that Orinda Gateway applied for the permit from the Army Corps of Engineers, it also submitted an application to the regional board for water quality certification.

On July 28, 1998, a public site inspection of the proposed project was conducted by regional board staff. Regional board members also attended that inspection, including yourself. On September 16, 1998, upon the recommendation of regional board staff, the regional board voted to deny (without prejudice) the applicant's water quality certification request. The grounds cited for the denial was insufficient information and lack of local approval of the environmental impact report under the California Environmental Quality Act. You voted in favor of the staff recommendation to deny certification.

On or about November 17, 1998, Orinda Gateway submitted a new application for water quality certification of the Montanera Project to the regional board. You were told by Orinda Gateway that the scope of the project has been substantially revised subsequent to the September 16, 1998, vote. You have been asked by Orinda Gateway to provide them consulting services as the new application for water quality goes forward.

### ANALYSIS

The Act places certain restrictions on individuals who have recently left state service and who wish to use the expertise and relationships they developed at their former agency for compensation by third parties.<sup>2</sup> The first restriction is the one year revolving door prohibition of Section 87406, which prohibits you from appearing before your former state agency for the purpose of influencing for 12 months after leaving state service. The second restriction is the permanent ban on "switching sides." (Sections 87401 and 87402.) You have asked for advice regarding only the permanent ban on switching sides. You understand, however, that Section 87406 does apply to you and restricts your ability to appear before or communicate with your former agency regarding the permit application.<sup>3</sup>

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<sup>2</sup> In addition, the Act includes a restriction on influencing prospective employment while still a state official. (See Section 87407 and Regulation 18747.)

<sup>3</sup> An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (Regulation 18746.2.)

Sections 87401 and 87402 provide:

“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.” (Section 87401.)

“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.” (Section 87402.)<sup>4</sup>

You were a state administrative official. (Section 87400(b).) The permanent ban of Sections 87401 and 87402 applies only to judicial, quasi-judicial, or other proceedings before any court or state administrative agency in which you participated while with the regional board.

Section 87400(c) defines “judicial, quasi-judicial or other proceeding” to include:

“[A]ny 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.”

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<sup>4</sup> For your information, the Commission recently passed Regulation 18741.1 (copy enclosed), which interprets Sections 87401 and 87402. Please note that an inadvertent error was included in the final draft of the regulation. As adopted, the regulation appears to require that the former official make “an appearance or communication before any officer or employee of the state administrative agency” in order for Section 87402 to apply. However, no such communication or appearance is required pursuant to Section 87402. Regulation 18741.1 will be amended shortly to prevent any confusion regarding the continued applicability of Section 87402 to former state administrative officials.

Section 87400(d) provides that a public official participated in a proceeding if he or she has "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."

Clearly, you "participated" in a "proceeding" involving the application for water quality certification when you voted against the application of Orinda Gateway. Since you left the regional board, Orinda Gateway has submitted a new application for water quality certification of the Montanera Project to the regional board. You have been informed from Orinda Gateway that the scope of the project has been substantially revised subsequent to the denial of the original application.

Now you wish to determine whether you may receive compensation from Orinda Gateway in consideration for providing consulting services on the new application for water quality certification involving the Montanera Project. You may receive compensation for your consulting services with Orinda Gateway if the new application is considered a new proceeding from the one in which you participated in while a state administrative official.

Regarding permit applications, we have consistently applied the *Galanter* Advice Letter, No. A-82-079, which states as follows:

"A new permit application, even if it involves the same tract of land, or some of the same issues, as a prior application, is ordinarily considered a new proceeding. There may, however, be situations in which a new permit application would be considered part of the same proceeding as a prior application."

Where this Commission has found that a new application was found to be the same proceeding as the original application, there was no final resolution of the original application or there was a technical defect in the original application that was corrected in the new application. (See, e.g., the *Anderson* Advice Letter, No. A-98-159 and the *Levander* Advice Letter, No. A-92-565.)

Under the facts you have provided, the denial of the original application was based on insufficient information and the lack of local approval of the environmental impact report under the California Environmental Quality Act. In addition, you have stated that the scope of the new project has been substantially revised. Based on these facts, we find the new application for certification is a new proceeding. (*Anderson* Advice Letter, No. A-86-324.) Therefore, you may provide, for compensation, consulting services for Orinda Gateway regarding the new application to the regional board.

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

Sincerely,

Steven G. Churchwell  
General Counsel



By: Marte Castaños  
Staff Counsel, Legal Division

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