



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

June 21, 2023

Diana C. Messina, P.E.

Re: Your Request for Informal Assistance
Our File No. I-23-097

Dear Ms. Messina:

This letter responds to your request for advice regarding post-government employment provisions of the Political Reform Act (“Act”).¹ 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, or other general conflict of interest prohibitions such as common law conflict of interest.

Given that your questions are general in nature, we are providing informal assistance. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) This letter should not be construed as assistance for any conduct that may have already taken place. 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.

QUESTIONS

Does the one-year ban or the permanent ban prohibit you from future employment or consulting on matters related to the current Sanitary Sewer Systems Waste Discharge Requirements Reissue (“SS WDR”) regulating individual sanitation agencies due to your past employment with the State Water Resources Control Board (“State Water Board”) or Central Valley Regional Water Quality Control Board?

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 18104 through 18998 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.

CONCLUSIONS

Under the one-year ban you are prohibited from appearing before or communicating with the State Water Board, your former agency, as described below, until May 31, 2024. The one-year ban does not prohibit your future anticipated employment relating to assisting individual sanitation agencies or entities that work with such agencies relating to the SS WDR, except to the extent it would involve an appearance or communication before the State Water Board during the one-year period and one of the exceptions detailed below does not apply.

The permanent ban only applies to proceedings involving specific parties in which you participated while employed by the State Water Board. Provided your only work on the SS WDR involved the making of rules or policies of general applicability as opposed to a proceeding involving specific parties, the permanent ban would not apply. Based on the facts provided, the permanent ban will not prohibit you from future employment or consulting work to assist an individual sanitation agency to develop plans to comply with the SS WDR, train others on how to implement the SS WDR requirements, or coach others on the technical expertise needed to serve regulated sanitation agencies in complying with the SS WDR.

FACTS AS PRESENTED BY REQUESTER

You are retiring from the State Water Board, with May 31, 2023, as your last day performing duties as a Supervising Water Resource Control Engineer (WRCE). After this date you will be exhausting excess vacation hours and officially retiring on December 7, 2023. The State Water Board is immediately backfilling your position; therefore you do not have the option to return to working in that same capacity. The following is your state employment history:

1993-2003 State Water Board Employment & Duties

Starting in 1993 you were employed by the State Water Board inspecting wastewater treatment plants and working on facility funding related projects. You worked in this role until 2003, when you were employed by the Central Valley Regional Water Quality Control Board (“CV Regional Board”).

2003-2013 CV Regional Board Employment & Duties

From 2003 to 2013, you worked for the CV Regional Board as a Senior Water Resource Control Board Engineer over technical Federal National Pollutant Discharge Elimination System (NPDES) permitting of wastewater discharges in the Northern Sacramento watershed. From 2009 to March 2013, you served as a Supervising Engineer and Program Manager for the Central Valley region’s NPDES program (wastewater and municipal stormwater discharges). All tasks involved permitting only. Enforcement was a separate section due to the Water Boards’ separation of functions. The CV Regional Water Board NPDES permits were individual permits to specific parties, typically an individual municipality. The last individual permits you were involved with at the CV Regional Water Board was prior to March 2013. NPDES Permits have a five-year term and each NPDES permit that you were previously involved with has since been reissued (a board action) at least once since your March 2013 transfer to the State Water Board.

2013-2023 State Water Board Employment & Duties

Starting in 2013, you worked for the State Water Board as a Supervising Water Resource Control Engineer (WRCE) managing regulatory water quality permitting programs.

1. General Permit/Orders to a Category of Dischargers

As a WRCE you managed staff that developed and implemented Water Board-adopted statewide general NPDES permits and statewide general waste discharge requirements for sanitary sewer spills. These general permits/orders implement already established federal Clean Water Act and the State of California Water Code regulations, Water Board policies, and established Board adopted resolutions, for a general category of dischargers discharging a common category of pollutants. The general statewide permits/orders do not provide specific requirements for specifically named dischargers.

2. Reissuance of SSS WDR-General Sanitary Sewer Systems Discharge Requirements

In the last five years, you were heavily involved in the proposed update (termed “reissuance”) and Board proceedings for the SSS WDR adopted by the State Water Board in December 2022. This action updated the existing statewide general waste discharge requirements to current federal and state regulations and policies. During the development of the reissued statewide general SSS WDR (prior to Board adoption), as a Supervising WRCE, you:

- Managed staff that conducted the water quality analysis and drafted proposed permit/Order requirements;
- Briefed Water Board members, the regulated sanitation agencies and external stakeholders on the staff-proposed updated requirements;
- Led public-stakeholder outreach discussions and workshops regarding proposed requirements, for the general audience to understand the public process for Board adoption of the Order; and
- Participated in the State Water Board hearings in which the Board heard and considered public comments prior to taking the December 2022 action to adopt the statewide general SSS WDR reissuance.

You did not conduct work that involved permitting, compliance determination or enforcement on any specific individual regulated agency.

The SSS WDR requires regulated sanitation agencies to develop their own system-specific procedures, custom to each individual system, to prevent and minimize sewage spills by addressing local climate change impacts and system-specific causes of spills. State Water Board staff does not provide consultation to regulated agencies on how to comply with the adopted Order.

After the Board proceedings that adopted the SSS WDR, as a Supervising WRCE, you:

- Presented at public workshops and conferences, to educate local sanitation agencies, consultants and sanitation agency association representative of the updated sewage spill regulatory requirements, including updated general planning, monitoring, and reporting requirements; and
- Explained how the Order requirements do not prescriptively dictate how each regulated sanitation agency must manage its system; the Order requires each agency to develop its own sewer system-specific operation and maintenance procedures.

Since the December 2022 adoption of the SSS WDR, you were aware that experienced consultants and sanitation industry association representatives were presenting erroneous information to regulated sanitation agencies, because they did not understand the updated regulatory requirements or were relying on older requirements that no longer exist in the updated SSS WDR.

Potential Future Employment

You are considering working as a nonprofit organization employee or as a consultant in the following manner related to the SS WDR:

- Assist an individual sanitation agency to develop system-specific Spill Emergency Response Plans and Sanitary Sewer System Management Plans – and/or
- Train or educate consultants and industry association representatives on how to implement the requirements while considering system-specific conditions and considerations. This would not involve working directly with an individual regulated agency for compliance purposes – and/or
- Coach consultants and nonprofit associations regarding the technical expertise they need to better serve regulated sanitation agencies.

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.

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 the official’s 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, or the sale or purchase of goods or property for a period of one year after leaving office or employment. (Section 87406; Regulation 18746.1.)

This ban is applicable to an employee who holds a designated position at a state agency, or one that should be designated in the agency's conflict-of-interest code.² (Regulation 18746.1(a)(4).) While in effect, the one-year ban applies only when the former employee is being compensated for their appearances or communications before the employee's 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" includes, but is not limited to, conversing directly or by telephone, corresponding by writing or email, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) An appearance or communication is considered to be for the "purpose of influencing" legislative or administrative action "if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding." (*Ibid.*)

Appearances and communications are prohibited under the one-year ban if they are made: (1) before a state agency that the public official worked for or represented; (2) before a state agency whose "budget, personnel, and other operations" are subject to the control of a state agency the public official worked for or represented; or (3) before any state agency subject to the direction and control of the Governor if the official was a designated employee of the Governor's office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6)(C).)

The ban applies for twelve months from the date the employee "permanently leaves" state employment, which is defined as the date the official is no longer authorized to perform the duties of the office or employment and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits. (Regulations 18746.1(b)(1).) and 18746.4(a)(1).)

The one-year ban is applicable to you as a former State Water Board manager. Your date of permanent separation from state service is May 31, 2023, and the ban will apply until May 31, 2024. During this one-year time period you may not make a formal or informal appearance before the State Water Board, your former agency, or any state agency whose "budget, personnel, and other operations are subject to the control" of your former agency, for compensation for the purpose of influencing any administrative or legislative actions or any discretionary acts involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

Not all appearances or communications before your former agency are prohibited by the one-year ban, however. Regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted under the one-year ban, if an individual:

² Positions that require designation in an agency's conflict of interest code include are those that involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. (Section 87302(a).)

1. Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
2. Attends a general informational meeting, seminar, or similar event;
3. Requests information concerning any matter of public record; or
4. Communicates with the press.

Regulation 18746.2(c) additionally excludes from the one-year ban's prohibitions appearances or communications before your former agency made as part of services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. (Regulation 18746.1(c).) (Please note that the permanent ban may apply to such proceedings, as discussed below.)

Although potentially prohibited under the permanent ban as discussed below, during the one-year period you may also draft proposals on an employer's behalf to be submitted to the State Water Board, so long as you are not identified in connection with the employer's efforts to influence the agency. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) Similarly, you may use your expertise to advise an employer on the procedural requirements, plans, or policies of your former agency so long as you are not identified with the employer's efforts to influence the State Water Board during the one-year period. (*Perry* Advice Letter, No. A-94-004.)

The Permanent Ban:

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, 87402.) The permanent ban applies when an official has permanently left or takes a leave of absence from any office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication, or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication, made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state employee. "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).) Thus, the permanent ban covers proceedings that affect the rights or claims of specific parties. It does not apply to proceedings that involve the making of rules or policies of general applicability.

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 applies throughout the duration of a proceeding in which the official participated. A former state official who held a management

position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during the official's tenure, and (2) the proceeding was under the official's supervisory authority. (Section 87400(d); regulation 18741.1(a)(4).)

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; see also *Donovan* Advice Letter, No. I-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. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson*, supra; *Blonien* Advice Letter, No. A-89-463.)

As noted above, the permanent ban covers proceedings that affect the rights or claims of specific parties. It does not apply to proceedings that involve the making of rules or policies of general applicability. You have not identified any proceeding you worked on in your state employment that involved a specific party for our analysis relating to your potential future employment providing assistance related to the updated SS WDR. The facts state that you conducted no work that involved permitting, compliance determination or enforcement on any specific individual regulated agency regarding the updated SS WDR. The work you describe performing on the SS WDR relates to that of making rules or policies of general applicability.

Therefore, the permanent ban does not prohibit your future employment or consultant work to assist an individual sanitation agency to develop plans to comply with the SS WDR, train others on how to implement the SS WDR requirements, or coach others on the technical expertise needed to serve regulated sanitation agencies in complying with the SS WDR.

Additionally, you have not identified potential employment related to NPDES Permits issued during your employment with the State Water Board or the CV Regional Board. However, it appears that the State Water Board NPDES Permits are permits of general application, without specific requirements for specifically named dischargers, and therefore may not meet the definition of a "proceeding" subject to the permanent ban. The CV Regional Board NPDES Permits were specific to individual parties; however, the five-year permits you were involved in were issued in 2013 at the latest and have since been reissued by the CV Regional Board without your involvement. It appears the reissued permits would meet the definition of a "new" proceeding, and therefore may not fall under the permanent ban. As we have no specific facts regarding a particular NPDES Permit, we do not provide any further analysis. We recommend you seek additional advice, as needed, if you anticipate work related to a NPDES Permit in which you participated during your state employment.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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