

ADVISORY OPINION

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REFERENCES: RCW 42.52.050, RCW 42.52.080

SUMMARY OF CHANGES: Updated statutory references.

Application of Post-Employment Provisions to Former Department of Ecology Employees Who Worked on the Hanford Federal Facility Dangerous Waste Program Permitting Process

QUESTIONS

1. May a former Department of Ecology (Ecology) employee, who participated at various levels in selected parts of Ecology's dangerous waste program permit at the Hanford Federal Facility (Hanford Site), assist a Department of Energy (DOE) contractor in its compliance with the Hanford Site dangerous waste permit?

2. May a former Ecology employee who participated in selected parts of Ecology's dangerous waste program permit at the Hanford Site, share his or her discussions with an Assistant Attorney General (AAG) regarding the Hanford Site dangerous waste permit with a DOE contractor?

ANSWERS

1. Perhaps. If the former Ecology employee participated in a specific Hanford Site unit's dangerous waste program permit, then he or she may not assist a DOE contractor to comply with that unit's section of the overall Hanford Site permit. Such conduct would violate RCW 42.52.080(5).

2. No. The content of a discussion between the former Ecology employee and an AAG regarding the Hanford Site dangerous waste permit may be subject to attorney-client privilege and would not be available to the public upon request. Sharing confidential information with a DOE contractor, after state employment, would be improper assistance in that transaction, a violation of RCW 42.52.050(2) and (3).

ANALYSIS

The following description of the Hanford Site and Ecology's Dangerous Waste Permit Program is based on documents provided by Ecology and an AAG who represents Ecology. The Board does not investigate the facts that form the basis of an advisory opinion. Please be aware that modification of the facts, or knowledge of more specific facts or circumstances, might cause the Board to reach a different conclusion.

The Hanford Site was acquired by the Federal Government in 1943 for the construction and operation of facilities to produce plutonium for World War II. The site encompasses approximately 560 square miles within the Columbia River Basin. Initially, the Hanford Site facilities were dedicated to the production of plutonium for national defense. Recently, the Hanford site programs have diversified to include research and development of advanced reactors and renewable energy sources. Currently DOE, who operates the Hanford Site, plans to phase out defense production, emphasize research and development, cleanup waste units resulting from past operations, and achieve compliance with Federal and State laws. (See Hanford Federal Facility Agreement and Consent Order Action Plan (Tri-Party Agreement Action Plan) page 1)

The Hanford Site has and will continue to provide for the Treatment, Storage, and Disposal (TSD) of hazardous and mixed wastes. Mixed wastes are those that contain both hazardous chemical waste and radioactive waste. In 1984, Congress amended the Resource Conservation and Recovery Act (RCRA), imposing, among other things, additional restrictions on hazardous waste storage and disposal. The analogous Washington Hazardous Waste Management Act (HWMA) imposes similar restrictions. (See Tri-Party Agreement Action Plan page 1)

A 1998 agreement between Ecology, DOE, and the Environmental Protection Agency (EPA) (Tri-Party Agreement) designates Ecology as a lead TSD permitting agency under the HWMA. Ecology enforces HWMA's dangerous waste TSD provisions in lieu of the federal mixed waste TSD provisions at many Hanford Site TSD units. (See Tri-Party Agreement Action Plan page 1)

The Tri-Party Agreement notes that the Hanford Site has been assigned a single identification number for use in Ecology's Dangerous Waste Program (HWMA/RCRA) permitting activity. Accordingly, the Hanford Site is considered a single RCRA facility, although there are numerous unrelated units spread over large geographic areas on the Site. For example, the Hanford Site includes over 50 separate TSD units/groups that range from complete TSD facilities like the Waste Receiving and Processing Facility (WRAP) to a single waste storage tank or waste burial site. (See Tri-Party Agreement Action Plan 6-2)

Since all the TSD units or groups cannot be permitted simultaneously, Ecology and EPA issued the initial permit for less than the entire facility. The initial permit will eventually grow to a single permit for the entire Hanford Site. Any units that are not included in the initial permit are normally incorporated through a permit modification. The process of permit modification is specified in WAC 173-303-830. A permit modification does not effect the term of the overall permit (a permit is generally issued for a term of 10 years). The initial permit was issued in 1994 and will be reissued in 2004. (See Tri-Party Agreement Action Plan 6-2)

Under the Tri-Party Agreement, Ecology shall be responsible for drafting permit conditions and permit modifications for all TSD units/groups. Ecology will ensure that the permit applications for existing, or past-practice, facilities, (Part B RCRA permit modifications) are complete and that the facility permit application is investigated and approved according to state and federal laws, including those related to HWMA. (See Tri-Party Agreement Action Plan 6-3)

A former Ecology employee served as the Unit Manager for two TSD units, authored the WRAP's Part B permit modification, and participated in a "peer review" process with other Ecology and EPA employees who drafted, reviewed, and investigated permit modifications at other TSD units/groups within the Hanford Site.

This opinion concerns a former Ecology employee, who participated in transactions involving several dangerous waste-processing facilities within the Hanford Site, assisting a federal contractor with regard to the same transactions. The opinion also concerns a former Ecology employee, who participated in privileged conversations regarding the Hanford Site dangerous waste permit, being asked to share that information with a current federal contractor at the Hanford Site.

1. Post-Employment Provisions - Transaction Involving the State

The Ethics in Public Service Act prohibits a former state employee from assisting another person in a transaction involving the state in which the former state employee participated during state employment. RCW 42.52.080(5) provides, in relevant part:

No state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment. ...

In EEB Advisory Opinion 97-06, the Board found that an application for a water rights permit was a "transaction involving the state." In this opinion, the Board also found that the permit process was a "single transaction that begins with the application and ends when the permit is finally granted or denied."

As noted above, however, the Hanford Site HWMA/RCRA permit involves some 50 unrelated TSD units/groups that have, or will, apply for a modification to the overall RCRA permit. The RCRA permit modification application is based on unique circumstances related to each individual site or group.

In EEB Advisory Opinion 98-02, the Board found that Ecology's multi-step sediment cleanup process may be defined as two transactions involving the state. A former state employee whose participation was limited to site identification or site listing only, could assist persons during a subsequent investigation, cleanup decision and cleanup action without incurring a violation of RCW 42.52.080(5). However, if the former state employee participated in the investigation,

cleanup decision, and cleanup action with regard to any site, the former employee may not assist other persons in these transactions after leaving state employment.

The Board, however, recognizes the unique and complicated nature of the Hanford Site. In EEB Advisory Opinion 98-02, the Board noted the dependent and inter-related nature of the sediment site investigation, the cleanup decision and the cleanup action. In the Hanford Site HWMA/RCRA permit process, however, permit modifications for each of the TSD units/groups are not necessarily interrelated given their separate geographic locations and different technological issues. In fact, each TSD unit/group permit application undergoes a separate permitting process, which includes investigation, review, and public hearings. Accordingly, the Board advises that each TSD site/group permit modification application under HWMA is a separate transaction with the state.

As noted above, the initial Hanford Site HWMA/RCRA permit was issued in 1994 and will be re-issued in 2004. The Board advises that for most individual TSD units/groups re-issuing the overall permit in 2004 will terminate the individual TSD unit/group transaction. However, to determine if a specific transaction was terminated, former Ecology officers and employees who have participated in a TSD unit/group permit that was completed in 2002 and 2003, should review the re-issued specific site permit process to determine if the specific site permit has gone through a substantive review process.

2. Post-Employment Provisions - Participating in a Transaction with the State

As noted above, in addition to authoring the WRAP Part B permit modification the former Ecology employee participated in a "peer review" process regarding permit modifications for other TSD units/groups. These facts raise a question of first impression for the Board. Does participation in a "peer review" of another state employee's TSD unit/group permit modification constitute participation in the underlying TSD unit/group's permit modification? In EEB Advisory Opinion 98-02, the Board advised that:

The question of participation in a transaction involving the state is primarily factual. Under RCW 42.52.010(13) participation must be both personal and substantial. Personal and substantial participation is not limited to whether the state officer or state employee, or former state officer or state employee, is or was, the final decision maker with regard to a state action. Participation includes a broad spectrum of intermediary actions that may influence a final decision, including making recommendations, rendering advice, and conducting investigations.

...

Providing general or informational technical assistance that explains rules or procedures is not considered personal and substantial participation in a transaction involving the state. However, technical assistance that advises, recommends or

directs a person to take a certain action would constitute personal and substantial involvement. (emphasis added)

Based on this analysis, the Board advises that when a "peer review" consists of a detailed review of a draft TSD unit/group permit modification, which results in rendering specific advice, recommendations, or directions to the author, then the reviewer participated in that transaction. If, however, the "peer review" consists of providing general and informational technical assistance to the TSD unit/group permit modification's author or a limited grammatical review of the draft permit modification, then the reviewer did not participate in that transaction.

3. Post-Employment Provisions - Confidential Information

The Ethics in Public Service Act prohibits a state officer or employee from disclosing confidential information or accepting employment if it might reasonably require or induce the officer or employee to disclose confidential information. RCW 42.52.050 provides, in relevant part, that:

(2) No state officer or state employee may make a disclosure of confidential information gained by reason of the officer's or employee's official position or otherwise use the information for his or her personal gain or benefit or the gain or benefit of another, unless the disclosure has been authorized by statute or by the terms of a contract involving (a) the state officer's or state employee's agency and (b) the person or persons who have authority to waive the confidentiality of the information.

(3) No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.

In EEB Advisory Opinion 97-07, the Board advised that this provision applies to post-state employment and would prohibit a former officer or employee from disclosing confidential state information to his current employer. The confidentiality of attorney-client privileged communications is an issue of first impression to the Board. RCW 42.52.010(5) provides that:

"Confidential Information" means (a) specific, information, rather than general knowledge, that is not available to the general public on request or (b) information made confidential by law.

The State Public Disclosure Law generally exempts attorney-client privileged communications and attorney work product from disclosure upon request. RCW 42.56.290 provides that:

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

Assistant Attorneys General (AAG) assigned to the Ecology Division of the Attorney General's Office (AGO) are often involved in drafting and reviewing Ecology issued permits, including the Hanford Site RCRA permit and TSD unit/group permit modifications to the overall permit. That work may include a discussion with Ecology employees regarding the permit's specific strengths and weaknesses. Many of the Ecology employees who authored sections of the Hanford Site RCRA permit or managed Ecology's work on the permits also participated in these conversations and were given access to the Ecology AAG's privileged advice regarding specific permits.

The Board notes that the RCW 42.56.290 does not require an agency to withhold attorney-client privileged communications. Nevertheless, any decision to withhold public disclosure of such communications rests with the agency and not the individual state employee. (Restatement (Third) of The Law Governing Lawyers, section 74 comment e (2000)). Therefore, former Ecology employees may not disclose or otherwise use their personal knowledge of attorney-client privileged communications, unless authorized to do so by Ecology.

The Board's advisory opinion is based on the general facts as stated above. The Board does not investigate the facts. Please be aware that modification of the facts, or knowledge of more specific facts or circumstances, might cause the Board to reach a different conclusion. In addition, Board advisory opinions are narrowly drawn to interpret the Ethics in Public Service Act. They do not address whether the proposed action is prudent, good public policy or effective management practice.