

ADVISORY OPINION

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REFERENCES: RCW 42.52.080

SUMMARY OF CHANGES: Updated statutory references.

Transactions Involving the State

QUESTIONS

1. How does the term “transaction involving the state” as defined in RCW 42.52.010(21)(a) apply to the Department of Ecology’s (DOE) multi-step site sediment cleanup process?
2. How is “personal and substantial” involvement in a “transaction involving the state” determined?
3. May a former employee who participated in transactions involving the state assist a state agency as a contractor with regard to the same transactions?
4. What is the definition of “another person” as used in RCW 42.52.080(5) and does it apply to state agencies?
5. Do the restrictions in RCW 42.52.080 apply to situations that do not involve transactions with the state?

ANSWERS

1. The 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. Assisting other persons in such transactions may also violate RCW 42.52.080(4).
2. 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.

3. 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.

4. The former employee may contract with DOE to provide assistance on sites that are pending completion, so long as the contract was not expressly authorized or funded by a legislative or executive action in which the former employee participated.

5. A state agency is not “another person” under RCW 42.52.080(5), and a former employee is not prohibited from assisting state agencies as an independent consultant.

6. The prohibitions under RCW 42.52.080 apply generally to transactions involving the state, and do not prohibit a former employee from assisting other governmental agencies when such assistance would not involve transactions in which the employee formerly participated as a state employee, or when such transactions were not the subject of state action.

ANALYSIS

A sediment cleanup specialist in DOE intends to leave state employment and become an environmental consultant. The employee’s current duties include oversight for investigations and cleanups at contaminated aquatic/sediment sites; assisting site managers with sediment-related questions at cleanup sites; developing technical and policy guidance; conducting training; and, serving as a technical resource to agency staff, other governmental agencies, consultants and the public. Upon leaving employment, the employee will pursue consulting activities related to sediment cleanup for public and private sector clients.

The questions posed to the Board essentially involve an interpretation of RCW 42.52.080(5) which provides:

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. This subsection shall not be construed to prohibit any employee or officer of a state employee organization from rendering assistance to state officers or state employees in the course of employee organization business.

1. How does the term “transaction involving the state” as defined in RCW 42.52.010(21)(a) apply to the Department of Ecology’s (DOE) multi-step site sediment cleanup process?

The sediment cleanup process is covered under the Model Toxics Control Act, Chapter 173-340 WAC, and Sediment Management Standards, Chapter 173-204 WAC. Pursuant to these chapters, the sediment cleanup process consists of four identifiable steps—site identification and ranking, investigation, the cleanup decision, and the cleanup action. Key actions during each of the steps are briefly summarized as follows:

During *site identification*, DOE conducts a contaminated site hazard assessment, confirms the presence of hazardous substances, and ranks the site. If a site is designated high priority, a site manager is assigned. The cleanup specialist recommends site listing to the department's headquarters staff; who then implements the recommendation.

During the *investigation* phase, the cleanup specialist requires a potentially liable party (PLP) to prepare an extensive cleanup study plan and report. This action may be accomplished by issuing an agreed order or enforcement order, or by negotiating a consent decree. The cleanup specialist reviews and approves the plan and the report. Using information gathered during the investigation, a cleanup action is developed. This is the *cleanup decision phase*.

The cleanup action plan identifies preferred cleanup methods and specifies cleanup standards and other requirements at the site. The cleanup specialist negotiates with the PLP(s) to establish the remedial action level. The cleanup specialist, or the site manager with assistance from the cleanup specialist, authors the cleanup action plan which is used as the basis for subsequent permits or consent decrees and agreed orders.

These decisions may have a significant financial implication for the PLP(s). The last step of this process is site cleanup or *the cleanup action*. Actual cleanup begins when the cleanup action plan is implemented.

Under RCW 42.52.010(21)(a), a “transaction involving the state” is defined as:

A proceeding, application, submission, request for ruling or other determination, contract claim, case, or other similar matter that the state officer, state employee, or former state officer or state employee in question believes, or has reason to believe:

- (i) Is, or will be, the subject of state action; or
- (ii) Is one to which the state is or will be a party; or,
- (iii) Is one in which the state has a direct and substantial proprietary interest.

“State action” as defined in RCW 42.52.010(17) means any action on the part of a state agency, including, but not limited to:

- (a) A decision, determination, finding, ruling or order; and
- (b) A grant, payment, award, license, contract, transaction, sanction, or approval, or the denial thereof, or failure to act with respect to a decision, determination, finding, ruling or order.

Based on information provided by DOE, the Board concludes that the sediment cleanup process consists of two transactions involving the state. Because a site listing does not necessarily result in an investigation, cleanup decision, and cleanup action, the “site identification” or “site listing” step may be identified as one transaction. The second transaction includes the investigation, cleanup decision, and cleanup action phases, because the sediment cleanup specialist actively participates in regulatory decisions and actions during each of these steps, and state action in a subsequent step is dependent upon state actions in the previous step.

Under this analysis, 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 those transactions after leaving state employment. In addition to violating RCW 42.52.080(5), such assistance may, under certain circumstances, also violate RCW 42.52.080(4):

No former state officer or state employee may accept an offer of employment or receive compensation from an employer if circumstances would lead a reasonable person to believe the offer has been made, or compensation given, for the purpose of influencing the performance or nonperformance of duties by the officer or employee during the course of state employment.

For example, if a former employee secured permits for a PLP as a result of decisions made during the cleanup action plan, a reasonable person might conclude that the employee’s judgment while authoring the plan may have been influenced by prospective work with the PLP.

2. How is “personal and substantial” involvement in a “transaction involving the state” determined?

In Advisory Opinion 97-06, the Board held that the question of participation in a transaction involving the state is primarily factual. RCW 42.52.010(13) requires this participation to be personal and substantial. Personal and substantial participation is not limited to a determination 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.

In this case, the cleanup specialist may be said to have participated personally and substantially in the sediment cleanup process by implementing the agency’s regulatory rules; determining matters of enforcement or technical assistance, representing the agency before liable parties, and, by providing technical and regulatory advice to permit managers and site managers. These actions constitute “personal and substantial” involvement in state transactions.

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.

3. May a former employee who participated in transactions involving the state assist a state agency as a contractor with regard to the same transactions?

Under RCW 42.52.080(2) provides that:

No person who has served as a state officer or state employee may, within a period of two years following the termination of state employment, have a direct or indirect beneficial interest in a contract or grant that was expressly authorized or funded by specific legislative or executive action in which the former state officer or state employee participated.

This subsection prohibits a state officer or employee from having a beneficial interest in a contract that was expressly authorized or funded by specific legislative or executive action in which the former state officer or state employee participated. In this case the former employee may contract with DOE as long as the employee did not participate in the authorization or funding of the contract.

4. What is the definition of “another person” as used in RCW 42.52.080(5) and does it apply to state agencies?

Under RCW 42.52.010(14), “Person” is defined as:

any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit.

“Agency” is separately defined under RCW 42.52.010(1) as:

any state board, commission, bureau, committee, department, institution, division, or tribunal in the legislative, executive, or judicial branch of state government. “Agency” includes all elective offices, the state legislature, those institutions of higher education created and supported by the state government, and those courts that are part of the state government.

Based on these definitions, a state agency would not be considered “another person” under RCW 42.52.080(5), and a former employee would not be prohibited from assisting state agencies as an independent consultant.

5. Do the restrictions in RCW 42.52.080 apply to situations that do not involve transactions with the state?

The prohibitions under RCW 42.52.080 apply generally to transactions involving the state, and do not prohibit a former employee from assisting other governmental agencies when such assistance would not involve transactions in which the employee formerly participated as a state employee, or when such transactions were not the subject of state action.