

March 27, 2013

Steven S. Lucas  
Nielsen Merksamer  
Parrinello Gross & Leon LLP  
2350 Kerner Blvd., Suite 250  
San Rafael, CA 94901

Re: Your Request for Advice  
**Our File No. A-13-024**

Dear Mr. Lucas:

This letter is in response to your request for advice on behalf of California Fish and Game Commissioner Michael Sutton regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based solely on the facts presented; the Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note, we do not address the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

### QUESTION

May Commissioner Sutton, who is employed by the Audubon Society, participate in his official capacity in decisions implementing the Ridley-Tree Condor Preservation Act that bans the use of lead ammunition in certain areas? The Audubon Society is a proponent of the ban.

### CONCLUSION

Based on the facts provided, it is not reasonably foreseeable that the California Fish and Game Commission's decision implementing the Ridley-Tree Condor Preservation Act will have any financial effect on the commissioner's employer, the Audubon Society. Additionally, assuming that the decision will not have a reasonably foreseeable material financial effect on the

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<sup>1</sup> 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 18110 through 18997 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.

commissioner's compensation received from the Audubon Society, the commissioner will not have a conflict of interest in the decision based on his personal finances.

### **FACTS**

Commissioner Sutton has served as a Member of the California Fish & Game Commission (the "FGC") since 2007 and his term will expire in 2015. He was elected President of the FGC in February 2013 for a one-year term.

Since mid-2012, Commissioner Sutton has also worked for the National Audubon Society as the Executive Director of Audubon California. You provided the following facts about the Audubon Society:

- The Audubon Society is a nonprofit corporation organized under Internal Revenue Code section 501(c)(3), with annual revenues of just over \$100 million.
- You stated that its mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. In 2012, it published a new strategic plan that articulates five main areas of focus: (1) putting working lands to work for birds and people; (2) sharing our seas and shores; (3) saving important bird areas; (4) shaping a healthy climate and clean energy future; and (5) creating bird-friendly communities.
- The Audubon Society works on a wide range of conservation issues, including issues relating to the lead poisoning of endangered California Condors and other birds of prey such as eagles, hawks, and vultures that scavenge hunter-killed animals and consume lead bullet fragments. Its policy objective is to remove lead from the avian food chain and substitute less toxic or nontoxic ammunition for hunting in California.
- In 2007, the Audubon Society actively supported the enactment of Assembly Bill 861, known as the Ridley-Tree Condor Preservation Act, to protect vulnerable wildlife species from the ongoing threat of lead poisoning. The law banned the use of lead ammunition within the current range of the California Condor in central and southern California. The Audubon Society coordinated with the author's staff closely on bill content and amendments, testified at relevant legislative hearings, and engaged its chapters and members in California in outreach efforts to ensure enactment of the bill. The legislation directs the FGC to promulgate regulations to implement the law. The Audubon Society continues to advocate limits on the use of lead ammunition in California and may sponsor legislation in 2013.
- The Audubon Society does not contract with the FGC, and has not been a party to or the subject of, and has not initiated, any proceeding against or before the Commission.

- The Audubon Society is financed by numerous sources, including individual charitable donations, membership dues, and grants from charitable foundations. You stated that you do not believe that the FGC's decisions to limit the use of lead ammunition for hunting in California would have a reasonably foreseeable impact on the revenues of the Audubon Society.
- You also reported that Commissioner Sutton was not aware of any reason that adoption, modification, or rejection of proposed regulations governing the use of lead ammunition for hunting in California would affect (1) the numbers of members joining the Audubon Society, (2) revenue received by the Audubon Society from grants, whether from charitable organizations or individual donors, (3) Audubon Society expenses, including staff expenses, which are fixed costs established by an annual budgeting process conducted without regard to possible outcomes on matters likely to come before the FGC, including the lead ammunition issue, or (4) the number of Audubon Society staff.

You also provided the following facts about Commissioner Sutton's relationship to his employer, the Audubon Society.

- As an employee of the Audubon Society, Commissioner Sutton receives compensation in excess of \$500 per year. However, you stated that Commissioner Sutton has no employment agreement with the Audubon Society and that his position is at-will.
- As the Executive Director of Audubon California, Commissioner Sutton is tasked with articulating and implementing his employer's goals and strategies in the state. While he does not directly manage the personnel that perform the Audubon California's advocacy work before the FGC or the state Legislature, he does provide general programmatic oversight of the Audubon Society's entire conservation program in California as part of his overall responsibility to implement the Audubon Society's goals and strategies in the state.
- Commissioner Sutton is also the Vice President of the Audubon Society's Pacific Flyway Conservation Team. The Pacific Flyway Conservation Team is developing an integrated Pacific Flyway conservation plan and associated marketing, development, and communications plans.
- You stated that Commissioner Sutton's actions, decisions, and votes on the FGC do not reflect on or affect in any way the Audubon Society's assessment of his job performance with the Audubon Society. You also stated that the Audubon Society is very aware of and respectful of the separation between Commissioner Sutton's public duties and responsibilities, and the duties and responsibilities he owes to the Audubon Society.

## ANALYSIS

Your question concerning Commission Sutton presents questions under Section 87100, which prohibits a public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. The question posed is essentially the same as the question you asked in 2009 (*Lucas* Advice Letter, No. A-09-122), at which time the Commissioner was employed by the Monterey Bay Aquarium. Commissioner Sutton is no longer employed by the Monterey Bay Aquarium and is now employed as the Executive Director of the Audubon California, a branch of the Audubon Society. The Audubon Society and its regional branches are 501(c)(3) tax-exempt nonprofit organizations. While a nonprofit is not a “business entity” (see Section 82005) for purposes of Section 87103(a) and (d), it will still be considered the commissioner’s source of income since he receives \$500 or more annually from the Audubon Society. (Section 87103(c).)

In addition, a public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is known as the “personal financial effects” rule (Section 87103; Regulation 18703.5).

As in the *Lucas* letter, steps one through three of our eight-step analysis (described at Regulations 18700 - 18709) are easily answered. Commissioner Lucas is a public official who will be making a governmental decision, has economic interests in the Audubon Society as a source of income and in his personal financial effects. We therefore begin our analysis at step four.

### **Step Four: Are your economic interests directly or indirectly involved in the decision?**

*The Audubon Society:* In our prior letter, we concluded the Monterey Bay Aquarium was directly involved in the FGC’s decisions pursuant to the “nexus” test in Regulation 18705.3(c). Regulation 18705.3(c) provides:

“Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

Thus, if it was reasonably foreseeable that a FGC decision would financially affect the Aquarium, however small it might be, the reasonably foreseeable financial effect on the Aquarium was deemed to be “material.”

Based on your current facts, the same conclusion would apply to the Audubon Society. As the Executive Director of Audubon California, Commissioner Sutton is tasked with articulating and implementing his employer’s goals and strategies in the state and provides general programmatic oversight of Audubon’s entire conservation program in California. One of

the Audubon Society's missions is to conserve and restore natural ecosystems, creating bird-friendly communities. In furtherance of that goal, the Audubon Society actively supported the enactment of the Ridley-Tree Condor Preservation Act, to protect vulnerable wildlife species from the ongoing threat of lead poisoning and would obviously employ its executive director to do the same.

*Personal Finances:* In addition, a public official's personal finances are deemed to be directly involved in a governmental decision that will have any financial effect on his or her personal finances or those of his or her immediate family.

Thus, with respect to both of these economic interests, the commissioner will have a conflict of interest if there will be any financial effect on the economic interest, no matter how slight.

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interests?**

Having concluded that the strictest test applies to Commissioner Sutton's economic interest in his employer, then any financial effect on his employer resulting from the FGC decision will result in a conflict of interest. With respect to personal finances, Regulation 18705.5(a) provides: "A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least \$250 in any 12-month period." For a material financial effect to be foreseeable on an official's economic interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

*The Audubon Society:* You stated that it is not reasonably foreseeable that the FGC's decisions relating to lead ammunition will affect Audubon's sources or amounts of funding, its fundraising efforts, its staffing, and other fixed or variable costs, and, it is not reasonably foreseeable that Audubon will incur any costs based on the outcome of Commission decisions. Moreover, prior FGC decisions implementing regulations relating to the use of lead ammunition for hunting had no discernible effect on Audubon's revenues or expenses.

We have no reason to disagree with your conclusion. Thus, we believe that it is not reasonably foreseeable that the FGC decision in question will have any financial effect on the Audubon Society and that Commission Sutton does not have a disqualifying conflict of interest in the Audubon Society with regard to the governmental decision at issue.

*Personal Finances:* You stated that the Audubon Society has advised you that it would be inappropriate as an employer and as a nonprofit organization to assess an employee's job performance based in any way on their work in an appointed public office. You stated Audubon California supports the concept of its employees engaging in public service as long as the employee's outside public service responsibilities and time commitments do not impede the employee's ability to carry out their responsibilities with Audubon.

Thus, assuming that the FGC decision will not have a reasonably foreseeable financial effect on the commissioner's compensation by \$250 or more in any 12-month period, the commissioner will not have a disqualifying conflict of interest in the decision based on his personal finances.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl

## LEGAL DIVISION ASSIGNMENT SHEET

<b>Tracking Number:</b>	13024
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ITEM DESCRIPTION			
Advice Letter No.	13-024	Requestor	Lucas, Steven S.
Regulation Project No.			
Other (describe)			

<b>Received By FPPC On:</b>	02/21/13	<b>Due Date:</b>	03/22/13
<b>Assigned To:</b>	JWW	<b>Date To Assignee:</b>	02/26/13

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
<b>Proofed</b>				
<b>Senior</b>	3/7/13	SH		
<b>TAD Chief (SEI, Campaign, Conflict of Interest Code letters)</b>				
<b>Assistant GC</b>				
<b>General Counsel</b>		ZPM 3-14-13		
<b>Executive Director (discretion of GC)</b>				
<b>Chair (discretion of GC)</b>				