

May 16, 2013

Jessica Jahr, Staff Counsel  
State Water Resources Control Board  
Office of the Chief Counsel  
1001 I Street 22<sup>nd</sup> Floor  
P O Box 100  
Sacramento, CA 95812-0100

Re: Your Request for Advice  
**Our File No. A-13-045**

Dear Ms. Jahr:

This letter responds to your request for advice on behalf of Dr. Jean-Pierre Wolff, a board member of the Regional Water Quality Control Board, Central Coast Region (CCWB), regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup>

Please note that the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) In addition, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090 or common law conflict of interest.

### QUESTION

Does the “public generally” exception allow Dr. Wolff to participate in the CCWB’s consideration of Agricultural Orders even though he is a discharger under the 2012 Agricultural Order?

### CONCLUSION

No. The public generally exception is not met and Dr. Wolff must disqualify himself from decisions affecting the 2012 Agricultural Order.

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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.

## FACTS

Dr. Wolff is one of seven members of the CCWB. According to the State Water Resources Control Board website, there are nine Regional Water Quality Control Boards. The CCWB has jurisdiction over Santa Clara (south of Morgan Hill), San Mateo (southern portion), Santa Cruz, San Benito, Monterey, Kern (small portions), San Luis Obispo, Santa Barbara, and Ventura (northern portion) counties.

One of the responsibilities of the CCWB is to regulate the discharges of waste from agricultural operations. On March 15, 2012, the CCWB adopted Resolution R3-2012-0011, the Conditional Waiver of Discharge Requirements for Discharges from Irrigated Lands ("2012 Order"). The 2012 Order regulates discharges from irrigated agricultural lands to protect surface water and groundwater. A multitude of different crop types and operations are covered by the 2012 Order, including land planted to commercial row, vineyard, field and tree crops; commercial nurseries, nursery stock production, and greenhouse operations with soil floors; and lands that are planted to commercial crops that are not yet marketable, such as newly-planted vineyards and tree crops.

Depending on the risk to water quality, dischargers are placed into one of three tiers, each with different requirements. Currently, there are 4,196 farms in the 2012 Order among all tiers. There are 2,174 farms in the lowest-risk tier (Tier 1), including Dr. Wolff's vineyard, Wolff Vineyard LLC. The 2012 Order places farms, rather than operations, into specific tiers; each operation may have multiple farms, but they are broken up to allow proper tiering for each farm. These numbers (4,196 total and 2,174 Tier 1 farms) are based on farm data rather than the number of operations. Since the 2012 Order covers only commercial operations, all of these farms are business entities. If the farms are divided into agricultural operations, then there are 1,739 operations enrolled in the Agricultural Order.

When the CCWB adopted the 2012 Order, Water Code Section 13207 prohibited board members from participating in orders that regulated them as dischargers. Dr. Wolff was disqualified from participating under the conflict-of-interest rules in Section 13207 because he owns 49 percent of a vineyard that is a discharger under the 2012 Order.

After the CCWB adopted the 2012 Order, the legislature amended Section 13207 to remove that provision, and the statute now prohibits Board Member participation only if the Board Member has a disqualifying financial interest in the decision within the meaning of Section 87103. Therefore, Dr. Wolff can participate in any revision of the 2012 Order or future Orders unless he has a disqualifying financial interest. The CCWB could potentially revise the 2012 Order during its term, and will need to renew the 2012 Order or adopt a new order once the 2012 Order expires. In addition, the CCWB may have to make decisions because of pending litigation challenging various aspects of the 2012 Order.

You also provided the following facts:

- Wolff Vineyards LLC owns and operates a certified sustainable vineyard in San Luis Obispo. Wolff Vineyards grows commercial wine grapes, produces wine that is sold commercially, and owns the underlying land, which covers 125 acres. Of those acres, 55 acres are irrigated, necessitating enrollment in the 2012 Order under Tier 1.
- Dr. Wolff owns 49% of Wolff Vineyards LLC and the remainder is split among his wife and children. Dr. Wolff has an investment of greater than \$2,000 in Wolff Vineyards LLC. The value of Wolff Vineyards LLC's real property exceeds \$4,100.
- Wolff Vineyards LLC is enrolled in the 2012 Order, and will be enrolled in any future Orders as well. Under the existing order, as a Tier 1 filer, Wolff Vineyards LLC was required to enroll in the Order by filing an electronic-Notice of Intent; develop and implement a Farm Plan; implement management practices to protect water quality; conduct surface water receiving monitoring and reporting (cooperatively or individually); conduct groundwater monitoring and reporting (cooperatively or individually); and install backflow prevention devices.
- Pursuant to the California Porter-Cologne Water Quality Control Act, dischargers of waste, including agricultural dischargers, are required to enroll in either waste discharge requirements (either a general order or individual waste discharge requirements) or obtain a waiver. The 2012 Order is a general order, and does not name any specific dischargers. Instead of naming individuals or businesses, the 2012 Order states that all owners or operators of agricultural operations must enroll in the 2012 Agricultural Order (or dischargers may seek individual waste discharge requirements). Therefore, the 2012 Order does not name Wolff Vineyards LLC or any other agricultural operator, but Wolff Vineyards LLC has enrolled in the permit as an operator of an agricultural operation.
- According to a November 2012 slide show presented at a the Sustainable Ag Expo in Monterey, the order applies to (1) Land planted to row (vineyard, field and tree crops) where water is applied for producing commercial crops; (2) Specific commercial nurseries, nursery stock production, and greenhouse operations; and (3) Land planted to commercial crops that are not yet marketable, such as vineyards and tree crops.
- The 2012 Order did not impact Wolff Vineyards' gross revenue or any assets or liabilities.
- However, the Order did increase expenses to Wolff Vineyards LLC by \$300 in one-time expenses. Wolff Vineyards LLC is a certified sustainable vineyard through the Sustainability in Practice program, which requires a higher level of environmental stewardship than the requirements of the 2012 Order. Therefore, the 2012 Agricultural Order has a very limited financial impact on Wolff Vineyards LLC since the vineyard has already implemented water quality best management practices through the SIP

program that are the same as the requirements of the 2012 Order. Any future extensions of the 2012 Order would have a similar financial impact on Wolff Vineyards LLC. Proposed modifications of the 2012 Order, whether in response to pending litigation or otherwise, are likely to cause at least some minor increase or decrease in Wolff Vineyards LLC's expenses.

- The potential effect of the 2012 Order on Wolff Vineyards LLC as a landowner is very limited. The 2012 Order applies to both the landowner and the operator, but only one party must enroll in the Order and fulfill the requirements. If Wolff Vineyards LLC did not operate a vineyard on the property, Wolff Vineyards LLC would only be impacted at all by the 2012 Order if the operator of the agricultural operation failed to enroll in the 2012 Order. Therefore, since Wolff Vineyards LLC is enrolled in the 2012 Order as an operator, any modifications to the 2012 Agricultural Order are unlikely to impact Wolff Vineyards LLC as a landowner. The 2012 Order did not impact the value of the property owned by Wolff Vineyards LLC.
- On May 1, 2013, you provided the following additional information: Of the farms enrolled in the Order, 1,015 farms have selected vineyard as a crop type which represents 24.2 percent of the total farms enrolled in the Order. Other types of businesses could be regulated by the Order if the business involved discharges from irrigated lands. Vineyards, farms, and nurseries are the dominant businesses included in the Order (referred to collectively as "farms.")
- In the Central Coast Region, there are many different commodities grown, including lettuce, strawberries, raspberries, artichokes, asparagus, broccoli, carrots, cauliflower, celery, fresh herbs, mushrooms, onions, peas, spinach, wine grapes, tree fruit, and nuts. Each commodity requires different farming operations.
- All Tier 1 farms must comply with the same requirements, so all Tier 1 farms would be impacted in substantially the same manner as Dr. Wolff's winery.
- In the Petition to the State Water Resources Control Board on the 2012 Order, the California Farm Bureau Federation stated that it had a total of 7,006 members affected by the 2012 Order within the Central Coast region. Those members will need to comply with the 2012 Order and will be affected in the same manner as Wolff Vineyards LLC. Therefore, Wolff Vineyards LLC should meet the test for a significant segment of the population affected by the 2012 Order and thus meet the "public generally" exception. On May 3, 2013 you clarified that the 7,006 figure is members of the Farm Bureau who reside within the Central Coast region and are most likely individuals engaged in the agricultural industry within the Central Coast region. Most of the members are likely employees/owners of businesses enrolled in the 2012 Order, but some may be individuals that are employees/owners of businesses that are not enrolled.

## ANALYSIS

Section 87100 prohibits any 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. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

We need not consider the initial steps of the eight-step process. You have confirmed that Dr. Wolff, a public official under Sections 82048 and 87200, wishes to make and participate in future Agricultural Order decisions as a member the CCWB. (Regulation 18702 et seq.) Further, you have identified his economic interests as follows:

- *Business Interests:* Dr. Wolff owns 49% of Wolff Vineyards LLC and the remainder is held by his wife and children. Dr. Wolff has an investment of greater than \$2,000 in Wolff Vineyards LLC.<sup>2</sup> (Section 87103(a).) We also assume he receives income from the Vineyards and is employed by the Vineyards. (Section 87103(c) and (d).)
- *Real Property:* Wolff Vineyards LLC owns and operates a certified sustainable vineyard in San Luis Obispo which covers 125 acres. Of those acres, 55 acres are irrigated, necessitating enrollment in the 2012 Order under Tier 1. The value of Wolff Vineyards LLC’s real property exceeds \$4,100. (Section 87103(b).)
- *Other Sources of Income:* A public official also has an economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 18703(c); Regulation 18703.3.) Income of an individual also includes a pro rata share of any income to a business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. Consequently, sources of income to Wolff Vineyards LLC are considered sources of income to Dr. Wolff.<sup>3</sup>

### Materiality and Foreseeability (Step 4, 5, and 6)

Once an official’s economic interests have been identified, the next step in the analysis is to determine the degree to which the economic interest is involved in the governmental decision

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<sup>2</sup> Please note, a public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a).) Indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

<sup>3</sup> You have not presented sufficient information for us to analyze other sources of income.

in question. (Regulation 18700(b)(4).) Different standards for measuring materiality apply depending upon whether the interest is directly involved or indirectly involved in the governmental decision.

*Business Interests:* Your initial question concerns the appropriate materiality standards. You stated that the 2012 Order is a general order, and does not name any specific dischargers. Instead of naming individuals or businesses, the 2012 Order states that, all owners or operators of agricultural operations must enroll in the 2012 Agricultural Order (or dischargers may seek individual waste discharge requirements). Therefore, the 2012 Order does not name Wolff Vineyards LLC or any other agricultural operator, but Wolff Vineyards LLC has enrolled in the permit as an operator of an agricultural operation. As you are aware, Regulation 18704.1(a) provides three standards for direct involvement. They are:

- The person initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- Is a named party in the proceeding concerning the decision before the official or the official's agency; or
- Is the subject of the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

In your facts, you reference the registration under the 2012 Order as a permit. In addition, operation of Dr. Wolff's farm would be dependent on compliance with the Order and the California Porter-Cologne Water Quality Control Act. Thus, the business is the subject of the decision even though not specifically named. Under Regulation 18704.1(a)(2), the business is directly involved in the decision.

*Real property:* Regulation 18704.2 states that real property in which a public official has an economic interest is directly involved in a governmental decision if (among other scenarios) when the real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. In this case, the property will be the subject of the decisions regarding the 2012 Order or future orders that apply to the property.

Thus, with respect to both the real property and the business, they are considered directly involved in the decisions. Generally, when an economic interest is directly involved in a decision, it is also clearly foreseeable (if not certain) that the interest will be affected by the

decision. Consequently, Dr. Wolff is disqualified from the decision unless he can show that there will be no reasonably foreseeable<sup>4</sup> material financial effect on the interest.

### **“Public Generally” Exception<sup>5</sup> (Step 7)**

Even if a public official determines that a decision will have reasonably foreseeable material financial effect on his or her economic interest, the official may still participate under the “public generally” exception if the financial effect of the decision on his or her economic interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

An official may participate in a decision under this statutory exception only in cases that meet the requirements specified at Regulation 18707.1. This means that the official must, while exercising due diligence, determine that the decision would affect (1) a “significant segment” of the public in (2) “substantially the same manner” as it affects the official’s own economic interest. Regulation 18707.1(b)(1)(C) provides, with respect to business interests, that a significant segment is defined as “either 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession.” However, as discussed further below, the regulation precludes application of the public generally exception if the affected persons constitute a single industry, trade, or profession.

***The Single-Industry Issue:*** What constitutes a single industry, trade, or profession has been subject to periodic interpretation in advice letters and in Commission memoranda. It is useful to examine some of these in deciding what a “single industry” is in the context of your letter. Below are various discussions from some past letters on the subject.

- “We must first determine whether or not the residential rental property business can be characterized as an ‘industry.’ That business certainly has some attributes of an industry. Persons involved in the rental property business for the most part earn their income in a similar manner and share distinct and common interests which may be affected by government regulation. On the other hand, the rental property business differs from most other businesses in that the persons engaged in it are a very diverse group, many of whom are not economically tied to the common interests of the business. Despite the diversity of the group involved in the business, it is our belief that the residential rental property business has sufficient attributes of an industry to be characterized as such. (*In re Ferraro* (1978) 4 FPPC Ops. 62.)

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<sup>4</sup> A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met because of the governmental decision. (Regulation 18706(a).) 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.)

<sup>5</sup> We have not addressed the legally required participation exception (Step 8) since it does not appear that the exception would apply to you facts.

- “It is true that under our regulations a single industry, trade or profession does not constitute the ‘public generally.’ *We do not believe retail merchants constitute a single industry, however.* Rather, such merchants constitute a major part of what is generally regarded as the business community and taken as a whole, may reasonably be regarded as ‘the public generally’ within the meaning of Section 87103 and our regulations. (*In re Owen* (1976) 2 FPPC Ops. 77. emphasis added.)
- “Obviously, *landlords constitute an important industry* in the City of Los Angeles. However, we do not think landlords or any other industry are ‘predominant’ within the meaning of 2 Cal. Adm. Code Section 18703. That provision was included in the regulation in order to avoid disqualification in such cases as a farmer elected in a rural community in which agriculture is the major industry. [Citation]” (*In re Ferraro* (1979) 4 FPPC Ops. 62, emphasis added.)
- Additionally, in April 2000, the issue was discussed in the context of the Conflict of Interest Regulation Improvement Project and in light of a request by the California Association of Realtors to further examine the rule. The staff memorandum stated:

“One key aspect of the significant segment requirement currently existing in the Commission’s regulations is the concept that the significant segment be *heterogeneous* in nature. (*In re Ferraro* (1979) 4 FPPC Ops. 62, 67.) For example, since the adoption of the first public generally regulation in 1976, members of a single industry were precluded from being considered a ‘significant segment’ of the public. [footnote omitted]”

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“Project I stemmed from concerns raised by the California Association of Realtors that realtors tend to be more frequently disqualified from governmental decisions about land use. Under longstanding Commission interpretation and regulations, a particular industry, trade, or profession, such as *the real estate industry*, can be considered a ‘significant segment’ of the public generally only when it constitutes a ‘predominant’ industry, trade, or profession. (Regulation 18707.3, copy attached.) Under existing regulation 18707, a single industry, trade, or profession cannot constitute a significant segment of the public even where it represents fifty percent of the businesses in a jurisdiction or district. (Regulation 18707(b)(1)(B).)” (Emphasis added.)

Examination of these prior interpretations suggest that what constitutes a “single industry,” such that the public generally exception cannot be applied, has generally been focused on easily identifiable classes or types of businesses. The “single industry” will have similar characteristics and a somewhat narrow range of shared interests that are affected by the decision. It does not appear the rule was intended to preclude use of the public generally exception when broad categories of businesses are affected, such as agriculture, manufacturing, retail, or the service industry. These sectors of the economy contain myriad businesses with diverse

interests. Thus, the analysis under your facts is more appropriately focused on whether a certain homogeneous subsection of the agricultural sector is the only group affected.<sup>6</sup>

Under your facts, the decision concerns a wastewater discharge order that may apply to any agricultural dischargers in the central coast region. While these businesses are all agricultural in nature, the affected businesses are not a single industry or business as we have applied the test in the past. The 2012 Order appears to apply to a large and diverse group of businesses. According to Section 22 and 24 of the Order, it regulates discharges of waste from landowners and operators of:

(1) Irrigated lands, including, but not limited to, land planted to row, vineyard, field and tree crops where water is applied for producing commercial crops;

(2) Commercial nurseries, nursery stock production, and greenhouse operations with soil floors that do not have point-source type discharges and are not currently operating under individual WDRs; and

(3) Lands that are planted to commercial crops that are not yet marketable, such as vineyards and tree crops.

The order appears to focus on how waste water is discharged, not purely on a specific type of industry. “It is appropriate to adopt a waiver of WDRs for this category of discharges because, as a group, the discharges have the same or similar waste from the same or similar operations and use the same or similar treatment methods and management practices (e.g., source control, reduced agricultural surface runoff, reduced chemical use, holding times, cover crops, etc.)” (2012 Order, Attachment A, Section 24.)

While it is true the industries are similar with respect to this discharge of wastewater, it is difficult to say they are a single industry. For example, the order does not apply only to all wineries, or all farms, or all nurseries but rather all of these unique “industries.” Thus, the order does appear to apply to a diverse group of businesses (plant nurseries, farms, vineyards, etc.) and not to a single industry, trade, or profession. Therefore, we conclude the “public generally” exception is potentially applicable to your facts.

**Application of the Public Generally Exception for Businesses:** Having concluded the decision does not affect a “single industry, trade or profession,” we can now apply the proper standard to Dr. Wolff’s interests. As noted above, an official may participate in a decision only if the decision affects a “significant segment” of the public. The basic public-generally rule applicable to businesses in Regulation 18707.1(b)(1)(C) is, with respect to business interests, that

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<sup>6</sup> “The Central Coast of California is one of the most productive and profitable agricultural regions in the nation, reflecting a gross production value of more than six billion dollars in 2008 and contributing to more than 14 percent of California’s agricultural economy. The region produces many high value specialty crops including lettuce, strawberries, raspberries, artichokes, asparagus, broccoli, carrots, cauliflower, celery, fresh herbs, mushrooms, onions, peas, spinach, wine grapes, tree fruit and nuts.” (2012 Order, Attachment A, Section 9.)

a significant segment is defined as “either 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents”) in “substantially the same manner” as it affects the official’s own economic interest.

You have provided a variety of figures in your letter. However, the only group that is affected in “substantially the same manner” are those businesses in Tier 1. As you noted, these businesses will be affected identically.<sup>7</sup> You noted that Dr. Wolff’s business is a Tier 1 business, and that there were only 1,739 separately owned businesses in Tier 1 (some owning multiple farms). The total number of businesses in Tier 1 does not meet the requirements of Regulation 18707.1(b)(1)(C). Moreover, on May 14, 2013, you stated that you did not believe that those businesses affected by the order constituted 25% of all the businesses in the jurisdiction.

Please note that these conclusions are fact based. You may wish to contact us again if future decisions are factually different that what you have described herein.

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

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<sup>7</sup> The regulation requires a “substantially similar” effect, not identical. An argument can be made that Tier 2 is affected similarly to Tier 1, or possibly that all the business under the Order are affected similarly. Factually, the Tier in which the business is placed appears to have dramatically different effects and could not be considered as part of the segment.