

July 29, 2013

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

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

Dear Ms. Jahr:

This letter supersedes the prior letter sent to you (*Jahr* Advice Letter, No. A-13-045) 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”).¹ As was discussed in my prior communication (dated July 24, 2013), aspects of the analysis in the prior letter have been changed.

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?

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 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.

CONCLUSION

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

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 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 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.² (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 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.³

² Please note, a public official has an 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. Thus for purposes of the Act, his interest includes those of his spouse and dependent children.

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

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

Once an official's interests have been identified, the next step in the analysis is to determine the degree to which the interest is involved in the governmental decision 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 original question concerned 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.

In our prior letter to you, we concluded that Wolff Vineyards LLC was the subject of the proceeding concerning the decision because the decision involved the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person. However, unlike an approval of a permit application submitted by Wolff Vineyards LLC, this general regulation will affect a wide class of businesses and therefore should have been analyzed as *indirectly* affecting the winery. This letter corrects the prior letter's analysis.

With respect to business interests that are indirectly involved in a decision, Regulation 18705.1 provides materiality thresholds. For example, for a business entities that are not listed on a public stock exchange the materiality standard is met if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Since you noted the business will not be materially affected to the extent set out in any provisions in the regulation, we do not further analyze a potential conflict of interest based on Wolff Vineyards LLC as a business entity.

Real property: Regulation 18704.2 states that real property in which a public official has an 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 and is therefore directly involved in the decision and subject to a one-penny test.

You noted that you did not believe that any of the upcoming decisions would have a foreseeable financial effect on the value of the property on which Dr. Wolff operates his winery because the fees and requirements are assessed against the operator. However, it does not appear reasonable to assume that more stringent (or lenient) general permit requirements applicable to the ability to operate a winery would not affect what a willing buyer would pay for the property by a penny. A buyer who wished to purchase the property and the winery would obviously consider the fees used to operate the winery and the costs of complying with the order. We conclude that since the strict one-penny standard of materiality applies, it will be met under your facts.

“Public Generally” Exception⁴ (Step 7)

Even if a public official determines that a decision will have reasonably foreseeable material financial effect on his or her interest, the official may still participate under the “public generally” exception if the financial effect of the decision on his or her 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 interest.

In the prior letter we applied the business entity standard for public generally. However, since we now have concluded that the business will not be materially affected, we need not apply the public generally exception to the business. Rather, we instead apply the public generally exception as applied to an Mr. Wolff’s real property interests.

Regulation 18707.1(b)(1)(B) provides that for decisions that affect a public official’s interest in real property, the decision must also affect, in substantially the same manner, either of the following:

(i) Ten percent or more of all property owners or all residential property owners in the jurisdiction of the official’s agency or the district the official represents; or

(ii) 5,000 property owners or residential property owners in the jurisdiction of the official’s agency.

⁴ We have not addressed the legally required participation exception (Step 8) since it does not appear that the exception would apply to your facts.

The only group of property owners that will that is affected in “substantially the same manner” as Dr. Wolff are those property owners in Tier 1. As you noted, the businesses on those properties will be affected identically.⁵ You noted that there were only 1,739 separately owned businesses in Tier 1 (some owning multiple farms). We assume this means that there are only 1,739 property owners in Tier 1. This does not meet the total number of businesses in needed for the exception in Regulation 18707.1(b)(1)(B)(ii).

Moreover, it is not likely that 1,739 separate properties would constitute 10 percent of all the properties in the CCWB’s jurisdiction (Santa Clara county south of Morgan Hill, the southern portion of San Mateo County, the counties of Santa Cruz, San Benito, Monterey, Kern [small portions], San Luis Obispo, Santa Barbara, and Ventura [northern portion]).

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

⁵ 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, however, the Tier in which the business is placed appears to have dramatically different effects and could not be considered as part of the same segment.