

May 10, 2013

Michael A.M. Lauffer, Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-13-057

Dear Mr. Lauffer:

This letter responds to your request for advice on behalf of State Water Resources Control Board (SWRCB) Member Dorene D'Adamo regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that because the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice or assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts you have presented. Also, please note that 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 common law conflict of interest or Government Code Section 1090.

QUESTION

(1) May Member D'Adamo participate in a SWRCB workshop where the members will provide direction to the Executive Director concerning a draft report to the California Public Utilities Commission (CPUC) involving a California American Water Company Monterey District (Cal-Am) desalination project that, if built, will enhance water service to residential property that she owns within the water company's service area?

(2) May Member D'Adamo participate in future SWRCB proceedings that may culminate in a governmental decision concerning Cal-Am, when the water company provides water to residential property she owns within the water company's service area?

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.

CONCLUSIONS

(1) and (2) Member D'Adamo may participate in both proceedings because the facts presented do not suggest that the decisions will have a reasonable foreseeable material financial effect on her or on her property, business, or sources of income, as set forth below.

FACTS

Member D'Adamo was appointed to the State Water Board effective April 2, 2013. SWRCB members are required to disclose all investments and business positions in business entities, interest in real property, and sources of income. The jurisdiction of SWRCB is the State of California. Member O'Adamo owns real property in the City of Carmel-by-the-Sea (Carmel). The property is currently a rental, and has a market value greater than \$2,000. There are no known zoning changes or requests for zoning changes, or other expansions of use planned at the property. The water service provider to the rental property is Cal-Am.

Cal-Am is the privately owned, publicly regulated water purveyor for most of the Monterey Peninsula. According to records filed with the CPUC, Cal-Am serves approximately 32,000 residential properties. Adding in non-residential customers, Cal-Am serves approximately 38,000 customers. Cal-Am's service area includes Carmel. Cal-Am's largest source of water to serve its customers is the Carmel River.

Cease and desist order: Cal-Am currently diverts more water from the Carmel River under its appropriative water rights than the rights authorize. In October 2009, the SWRCB adopted a cease and desist order (Order 2009-0060) against Cal-Am. Order 2009-0060 requires Cal-Am to take definite steps to gradually reduce its unlawful diversions from the Carmel River and to cease unauthorized diversions from the Carmel River by December 31, 2016. To comply with this requirement, Cal-Am will have to take a number of steps. Most significantly, because its diversions from the Carmel River are much greater than what its water rights allow, Cal-Am will have to implement a major project to develop an alternative water supply. Until an alternative supply is developed, to ensure that demand on water obtained from the Carmel River does not continue to increase, Order 2009-0060 prohibits Cal-Am from the following:

- Serving water to new service connections while the Order remains in place (this condition does not apply to service approvals granted prior to October 20, 2009, the date the SWRCB adopted Order 2009-0060); and
- Increasing water use at existing-service addresses that result from a change in zoning or use.

Desalination project: Cal-Am has applied to the CPUC for approval of a desalination project in the area. The exact location of the plant has not been determined, but the current proposals place it north of the Monterey Peninsula near the Salinas River. The plant is proposed

to serve 33,000 residential customers. The project is currently undergoing environmental review and a decision by the CPUC is anticipated possibly as early as late 2013. If approved, the project will enhance water supplies available to Cal-Am, thereby providing a path to compliance with State Water Board Order 2009-0060 and enhancing water supply reliability for Cal-Am and its customers. The project's estimated costs range between \$280-390 million, with much of the costs to be passed onto ratepayers through higher water bills.

In September 2012, the CPUC requested that the SWRCB examine several legal and technical issues related to Cal-Am's proposed project. The SWRCB staff produced a report in December 2012 and a follow-up to the report in April 2013 detailing technical and legal issues for the CPUC's consideration of the desalination plant proposal. The SWRCB members will hold a workshop on June 4, 2013, to discuss the report, receive comments from interested parties and the public, and to generally discuss other issues related to Order 2009-0060.

As part of that workshop, the State Water Board members may provide direction to the Executive Director about the final report to the CPUC. The final report will not result in the issuance of any type of permit or license by the State Water Board, but will inform the CPUC as it considers and makes its determination on the project.

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 Member D'Adamo, a public official under Sections 82048 and 87200, wishes to make and participate in future SWRCB decisions as a member the SWRCB. (Regulation 18702 et seq.) Further, you have only identified one economic interest in question:

- *Business, Source of Income and Real Property Interests:* Member D'Adamo owns real property that she operates as a rental. The value of the property is greater than \$2,000. Owning and operating the rental is considered investment in a business entity under the Act's definition (See, Section 82034 and 82005) as well as an interest in real property. (Section 82033.) In addition, since she receives rental income, her rental business is also considered a source of income.
- *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. Thus, the renters of the property are also considered sources of income if they provide the member \$500 or more in the 12 months prior to a decision.

- *Personal Finances:* 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).

Directly or Indirectly Involved in the Decision (Step 4):

Neither Member D’Adamo’s rental business nor her tenants are directly involved in either decision. Regulation 18704.1 provides a person is directly involved in a decision as follows:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, 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.”

Neither Member D’Adamo’s rental business nor her tenants initiated the decisions in question, nor are they the subject of either decision as defined in the regulation.

Regulation 18704.2 provides a list of decisions and circumstances in which an official’s property is considered directly involved in a decision. Member D’Adamo’s property is not directly involved in these decisions since it does not meet the standards in Regulation 18704.2.

With respect to the member’s rental business and tenants, however, if they are not directly involved in a governmental decision, they are considered to be indirectly involved. (Regulation 18704(a).)

Moreover, with respect to the member’s personal finances, personal finances are *deemed* to be directly involved in a governmental decision that will have any financial effect on the official’s personal finances or those of his or her immediate family.

Materiality and Foreseeability (Steps 5 and 6)

Indirectly Involved Interests: Once the degree of involvement is determined, Step 5 of the conflict of interest analysis addresses the applicable materiality standard and whether it is reasonably foreseeable² that the materiality standard will be met. Under Regulation 18705.1(c)(4), the financial effect of a governmental decision on a small business entity is considered material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the value of 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.”

With respect to the real property, the financial effect of a governmental decision on real property that is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property.

None of your facts suggests that Member D’Adamo’s business or property will be foreseeably and materially financially affected by the decisions in question. You noted that the criteria for the Cease and Desist Order does not apply to Member D’Adamo’s property and therefore, will not foreseeably affect the property or business materially. Neither decision would appear to materially affect the value of the real property sufficient to rebut the presumption that it will not be materially affected.

Directly Involved Interests: Finally, a financial effect on an official’s personal finances is material, as stated in Regulation 18705.5(a), if it is at least \$250 in any 12-month period. It is not foreseeable at this time that either decision will increase or decrease water rates for the member by \$250 or more in any 12-month period. Thus, the member will not have a disqualifying conflict of interest in the decision based on personal finances.

² 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.)

Public Generally Exception (Step 7)

While it does not appear there is a conflict of interest for the member after analyzing the facts through the first six steps of the analysis, it would be useful to discuss the application of the public generally exception. Under the Act, 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 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 in 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) provides that a significant segment is as follows:

- For decisions that affect the personal expenses, income, assets, or liabilities of a public official or a member of his or her immediate family, or that affect an individual who is a source of income or a source of gifts to a public official, the decision also affects ten percent or more of the population in the jurisdiction of the official’s agency or the district the official represents; or 5,000 individuals who are residents of the jurisdiction.
- For decisions that affect a public official’s interest in real property, the decision also affects 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 5,000 property owners or residential property owners in the jurisdiction of the official’s agency.
- For decisions affecting business interests, 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.

You noted that Cal-Am serves approximately 32,000 residential properties, and when non-residential customers are factored in, Cal-Am serves approximately 38,000 customers. This figure is far above all the raw-number thresholds set forth above. Nothing in the facts presented suggest that the two decisions, to the extent they have any financial effect on Cal-Am’s customers, will effect segments of the customers in a different manner. Therefore, the public generally exception is met.

We note that as the decisions evolve, this analysis may need to be revised. You should contact us for further advice if the facts change.

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

Tracking Number:	13059
-------------------------	-------

ITEM DESCRIPTION			
Advice Letter No.	13-057	Requestor	Lauffer, Michael A.M.
Regulation Project No.			
Other (describe)			

Received By FPPC On:	05/06/13	Due Date:	06/04/13
Assigned To:	JWW//Keisha	Date To Assignee:	06/07/13

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
Proofed				
Senior	5/10/13	HPW 5/10/13		
TAD Chief (SEI, Campaign, Conflict of Interest Code letters)				
Assistant GC				
General Counsel				
Executive Director (discretion of GC)				
Chair (discretion of GC)				