

May 28, 2014

BRUNICK, McELHANEY & KENNEDY  
Professional Law Corporation  
William J. Brunick  
1839 Commercenter West  
San Bernardino, CA 92408

Re: Your Request for Advice  
**Our File No. A-14-080**

Dear Mr. Brunick:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTION

Does a water board member have a conflict of interest that would preclude him from participating in decisions regarding a settlement agreement for a class action lawsuit in which he is a class member?

### CONCLUSION

Yes. The board member does have a disqualifying conflict of interest, but based on the application of the "public generally" exception, he may participate in the decisions.

### FACTS

You represent the Antelope Valley-East Kern Water Agency ("AVEK") in a general groundwater rights adjudication for the Antelope Valley Groundwater Basin involving

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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.

approximately 1,300 square miles. You write on behalf of Keith Dyas who is a member of the Board of Directors of AVEK and owns real property including two parcels in the adjudicated area with water wells that support his residence. There are several consolidated lawsuits, including a class action of which Mr. Dyas is a member, involving the water rights of the Antelope Valley Groundwater Basin users. AVEK will be participating in developing a general Stipulated Judgment in this water rights adjudication.

The parties to the consolidated actions include water and irrigation districts in the surrounding counties and cities, a class of water users who are on a city system, a class of water users who pump from their own wells (“small pumpers”), the federal government, farmers, and others. Any settlement or stipulated judgment will be a “comprehensive adjudication of all rights” per the federal government’s stipulation when waiving sovereign immunity, and will include all landowners not pumping and all Small Pumpers in the 1,300 square mile Antelope Basin. The two class actions together include thousands of water users in the Antelope Valley Groundwater Basin.<sup>2</sup> In the coming months, the parties will work to develop a general physical solution in the Valley, which will establish a management regime for all groundwater use in the Basin. The Santa Clara Superior Court must approve any class action settlement.

In its complaint, the small pumpers named: California Water Service Company, Desert Lake Community Services District, Littlerock Creek Irrigation District, Los Angeles County Waterworks District No. 40, North Edwards Water District, Palm Ranch Irrigation District, Palmdale Water District, Phelan Hills Community Services District, Rosamond Community Services District, Quartz Hill Water District, and the Cities of Lancaster and Palmdale. No cause of action is pled against AVEK or other land owners in the Valley. The small pumpers’ class action seeks declaratory relief and money damages.

AVEK is a party to the consolidated actions, but does not have any cause of action plead against the Willis (city water system users) or Wood Classes (small pumpers). AVEK filed a cross-complaint seeking declaratory and injunctive relief and claiming overlying rights and rights to pump the supplemental yield attributable to return flows from State Water Project water imported to the Basin.

Mr. Dyas has two small wells that potentially could supply his domestic demands. The water is not used for business purposes and the wells pump less than three acre feet per year.

## 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 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).) Typically,

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<sup>2</sup> The exact number is unknown, but even conservative estimates would put the total over 5,000.

we apply a standard analysis to determine whether an individual has a disqualifying conflict of interest.

You have already identified that Mr. Dyas is a public official for purposes of the Act by virtue of his position on the AVEK Board. (See Section 87200.) You have also stated that AVEK will be making the decision regarding the settlement agreement. (Regulation 18702.2.) Mr. Dyas has an interest in his real property and we assume that the decision regarding the water supply to that property will have a financial impact on the real property interest. (Regulation 18703.2.)

**Is it reasonably foreseeable that the decisions will have a material financial effect on Mr. Dyas's financial interest?**

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated interests. (Section 87103; Regulations 18703-18703.5.) The Act presumes a material financial effect when the property is the subject of the settlement.<sup>3</sup> Consequently, Mr. Dyas has a disqualifying conflict of interest.

**Does an exception to the conflict-of-interest rules apply?**

*Public Generally Exception*

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Under the basic public generally rule, Mr. Dyas must meet a two-part test by showing that the decision would affect a "significant segment" of the public in "substantially the same manner" as it financially affects his interest. For decisions that affect a public official's real property, "significant segment" is defined as either 5,000 property owners or residential property owners in the jurisdiction or 10-percent or more of all property owners or all residential property owners in the jurisdiction. Under the terms of the agreement with the federal government, which is a party to the action, any settlement agreement that AVEK would sign onto must apply to every water user in the Antelope Valley Groundwater Basin. Because it would affect well over 10% of all property owners, the decision would affect a significant segment of the jurisdiction.

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<sup>3</sup> A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. (See also, Regulation 18705.2(a)(11).)

Additionally, the decision must affect the significant segment of property owners in “substantially the same manner.” The small pumpers and the individual users not pumping are likely to be affected in substantially the same ways – the settlement agreement will develop a general physical solution that will affect their rights regarding and access to the water they use to maintain their residential properties. While there will be some variation in the rights that apply to each class, the overall effect is similar. This prong of the test is also met.

While Mr. Dyas does have a conflict of interest that would preclude him from participating in AVEK’s decisions regarding the settlement agreement, he may participate in those decisions because the decision will not affect him any differently than it will the public generally.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Heather M. Rowan  
Senior Counsel, Legal Division

HMR:jgl