



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 14, 2020

Stephanie Yu
Office of Chief Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Your Request for Advice
Our File No. A-20-073

Dear Ms. Yu:

This letter responds to your request for advice on behalf of Central Coast Region Water Quality Control Board Member Michael Johnston regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Do the Act’s conflict of interest provisions prohibit Central Coast Region Water Quality Control Board Member Johnston from taking part in governmental decisions relating to the adoption, establishment, or implementation of a total maximum daily load (“TMDL”) for certain pollutants in Pinto Lake given that the Board Member owns residential real property abutting the Lake?

CONCLUSION

Yes. The Act’s conflict of interest provisions prohibit the Board Member from taking part in decisions relating to the Pinto Lake TMDL because it is reasonably foreseeable that those decisions would have a material financial effect on the Board Member’s real property interest in his residence abutting Pinto Lake, distinguishable from the decisions’ effect on the public generally.

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 (the “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 AS PRESENTED BY REQUESTER

You are an Attorney III for the State Water Resources Control Board and the authorized representative of the Regional Water Quality Control Board, Central Coast Region (the “Central Coast Water Board”) and Central Coast Water Board Member Michael Johnston.

The Water Quality Control Plan for the Central Coastal Basin (the “Central Coastal Basin Plan”) is the Central Coast Water Board’s master water quality control planning document. The Central Coast Water Board adopts and amends the Plan through a quasi-legislative process and then submits the adopted or amended Plan to the Office of Administrative Law for approval. The Plan is akin to a regulation once approved by the Office of Administrative Law.

Basin plans provide the basis for protecting water quality in California and are mandated by both the federal Clean Water Act and the state Porter-Cologne Water Quality Act. Basin plans designate beneficial uses and water quality objectives for waters of the State, including both surface waters and groundwater, and include program implementation plans to achieve water quality objectives.

Section 303(d) of the Clean Water Act requires states to develop a list of “impaired” waterbodies where existing pollution control mechanisms are insufficient to meet water quality standards applicable to those waterbodies. For each waterbody and pollutant combination on this impaired waterbodies list, states must adopt a total maximum daily load (“TMDL”) to achieve water quality standards. TMDLs identify sources of pollution, to which waste load allocations and load allocations are assigned and implemented by the Central Coast Water Board or another regulatory entity.

TMDLs are not self-implementing. Instead, TMDLs work in conjunction with their associated implementation plans to set into motion the actions undertaken to improve water quality. Additional steps, such as permit issuance or other regulatory action, are conducted by either the regional board or another agency. The Water Code requires the Central Coast Water Board to implement and ensure consistency with basin plans, including basin plans’ TMDLs, when issuing permits. Therefore, the Board has limited discretion in requiring compliance with a TMDL, even though the improvement of water quality requires an intervening event.

Pinto Lake is an important recreational and aesthetic resource for residents of the City of Watsonville. Board Member Johnston owns residential real property that abuts Pinto Lake and is located in the City. The Board Member’s residential real property is one of approximately 30 residences that border the Lake.

Because Pinto Lake is listed as impaired for cyanobacteria toxins, chlorophyll a, and low dissolved oxygen, the Central Coast Water Board is required to adopt a TMDL for those pollutants at the Lake. Once the Board adopts the Pinto Lake TMDL, it will then consider governmental decisions relating to the Pinto Lake TMDL’s establishment and implementation, including decisions regarding the amendment of the Central Coastal Basin Plan to effectuate the Pinto Lake TMDL. Board staff have prepared a draft report in support of the Pinto Lake TMDL which is over 260 pages in length.

The goal for establishing the Pinto Lake TMDL is to rectify Pinto Lake's water quality impairments. Reductions in phosphorus loading are anticipated to reduce the frequency and severity of cyanobacteria blooms and restore the Lake to the desired condition. Cyanobacteria blooms have negative and harmful impacts on aesthetics and wildlife habitat and restrict the ability of humans and pets to safely recreate in the water. There is signage prohibiting human and pet contact with the water posted around the Lake.

The geographic scope of the proposed Pinto Lake TMDL encompasses Pinto Lake and an approximately 1,400-acre catchment drainage area north of the City in the County of Santa Cruz (the "Pinto Lake Catchment Area"). Developed agriculture and residential areas are the current dominant land uses in the vicinity of the Pinto Lake Catchment Area, which has a human population of 2,025 based on 2010 U.S. Census Bureau data.

ANALYSIS

Sections 87100 and 87103 of the Act prohibit a public official from making, participating in making, or attempting to use his or her official position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. An official's financial interests that may give rise to a disqualifying conflict of interest under the Act are identified in Section 87103. Of those interests, the facts presented indicate Board Member Johnston has the following interests with respect to decisions relating to the adoption, establishment, and implementation of the Pinto Lake TMDL:

- A real property interest in his residential real property that abuts Pinto Lake assuming that real property is worth \$2,000 or more. (See Section 87103(b).)
- An interest in his personal finances and those of immediate family members. (See Section 87103.)

Foreseeability and Materiality

Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest.

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision, and provides that the effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

Regulation 18702.2 sets forth the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's real property interest. As pertinent to the facts presented, Regulation 18702.2(a) provides that the effect is material if the decision:

(1) Involves the adoption of or amendment to a development plan or criteria applying to the parcel;

[¶...¶]

(7) Involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property.

The Porter-Cologne Water Quality Control Act requires each regional board to formulate and adopt water quality control plans for all areas within the region (Water Code Section 13240), and authorizes a regional board, in a water quality control plan or in waste discharge requirements, to specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted (Water Code Section 13243). A regional board's ability to establish waste discharge limitations or prohibitions on a real property within the area of a water quality control plan can result in the application of criteria on a real property within the area of the plan that limit that real property's development.

The Board Member's residential real property at issue abuts Pinto Lake. The Central Coast Water Board is required to adopt the Pinto Lake TMDL to improve the Lake's water quality and will soon consider governmental decisions relating to establishing and implementing the Pinto Lake TMDL. Based on the facts presented, decisions relating to adoption, establishment, and implementation of the Pinto Lake TMDL involve Pinto Lake and may result in waste discharge controls being imposed on that real property. Further, the property is within 500 feet of the lake and the Board Member has not provided evidence indicating the decision will not have a measurable impact on the property.

Therefore, it is reasonably foreseeable that the decisions relating to the adoption, establishment, and implementation of the Pinto Lake TMDL would have a material financial effect on the Board Member's real property interest in his residential real property that abuts Pinto Lake.²

Public Generally Exception: Limited Neighborhood Effects

Under Section 87103, the Act's prohibition against an official taking part in a decision that would have a disqualifying financial effect on an official's financial interest only applies if the decision's effect on that interest is "distinguishable from its effect on the public generally." (Section 87103.) This is commonly referred to as the Public Generally Exception. Regulation 18703(e) sets forth specific rules for applying the Public Generally Exception in special circumstances. Under Regulation 18703(e)(3), a decision's financial effect on an official's financial interest is

² Regulation 18702.5(a) sets forth the materiality standard applicable to a decision's effect on an official's interest in his or her personal finances. Regulation 18702.5(c), however, provides that if the decision would have a reasonably foreseeable financial effect on the official's real property interest, any related effect on the official's personal finances is not considered separately, and the effect is only analyzed under Regulation 18702.2. Because we have already determined that the decisions relating to the establishment of the Pinto Lake TMDL would have a disqualifying effect on the Board Member's financial interest in his residential real property abutting the Lake, we do not further analyze the Board Member's interest in his personal finances.

indistinguishable from the effect on the public generally if the official can establish that the decision:

[A]ffects residential real property limited to a specific location, and the decision establishes, amends, or eliminates ordinances that restrict on-street parking, impose traffic controls, deter vagrancy, reduce nuisance or improve public safety, provided the body making the decision gathers sufficient evidence to support the need for the action at the specific location.

This Limited Neighborhood Effect Exception for decisions regarding public nuisances and public safety, permits an official to take part in a decision as a matter of public policy where there is sufficient evidence supporting the public purpose for the action, and the action widely applies to a specific location with no unique effect on the official. (*Gibson* Advice Letter, No. A-17-188.)

Based on the facts presented, the decisions relating to the adoption, establishment, and implementation of the Pinto Lake TMDL would have a unique effect on the Board Member's financial interest in his residential real property abutting Pinto Lake due to that property's proximity to the Lake and the potential for the TMDL to improve the Lake's aesthetics and the safety of recreation in the Lake. The effect is unique because these improvements would have a more significant effect on the residential real properties abutting the Lake, such as that of the Board Member, than those located farther away from the Lake in the Pinto Lake Catchment Area. Therefore, the Limited Neighborhood Effects Exception of Regulation 18703(e)(3) does not apply.

Thus, the Act prohibits the Board Member from taking part in decisions relating to the Pinto Lake TMDL because it is reasonably foreseeable that those decisions would have a material financial effect on the Board Member's real property interest in his residence abutting Pinto Lake distinguishable from those decisions' effect on the public generally.

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

Sincerely,

Dave Bainbridge
General Counsel

Matthew F. Christy

By: Matthew F. Christy
Counsel, Legal Division

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