



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 29, 2020

Teresita J. Sablan
Office of Chief Counsel
State Water Resources Control Board
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Sacramento, CA 95814
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Re: Your Request for Advice
Our File No. A-20-083

Dear Ms. Sablan:

This letter responds to your request for advice on behalf of Regional Water Quality Control Board, Santa Ana Region (the “Santa Ana Water Board,” or “Board”) member Kris Murray regarding the conflict of interest and “pay-to-play” 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. Lastly, the Commission does not provide advice with respect to past conduct and this advice letter applies only to prospective actions. (Regulation 18329(b)(6)(A).)

QUESTIONS

1. Does Ms. Murray have a conflict of interest under Section 87100 in the Santa Ana Water Board’s decision concerning a waste discharge permit renewal application by Poseidon Resources LLC for a proposed desalination facility due to campaign contributions Ms. Murray received from Poseidon Resources LLC and other groups that support construction of the facility?
2. Under the Act’s “pay-to-play” restrictions in Section 84308, must Ms. Murray disclose the contributions she received from supporters of the proposed desalination facility and

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.

recuse herself from the Santa Ana Water Board's decisions concerning the proposed desalination facility?

CONCLUSIONS

1. No. Section 87100 governs only financial conflicts of interest, such as gifts and income. The Act specifically exempts campaign contributions from the definitions of "gift" and "income."
2. No. Because more than 12 months have passed since Ms. Murray received the contributions in question from any party or participant in the upcoming decision, Section 84308 is not implicated.

FACTS AS PRESENTED BY REQUESTER

You are an attorney with the Office of Chief Counsel of the State Water Resources Control Board ("State Water Board"). In this capacity, you represent the Santa Ana Water Board, one of nine Regional Water Quality Control Boards (Regional Boards) across the state, and its members. All members of the Santa Ana Water Board are appointed. Kristine ("Kris") Murray was appointed to the Santa Ana Water Board in November of 2018. At the time of Ms. Murray's appointment to the Santa Ana Water Board, she was also a candidate in a special election for a vacant seat on the Orange County (OC) Board of Supervisors. Ms. Murray lost the election, and her candidacy ended on March 11, 2019. Prior to her appointment on the Santa Ana Water Board, Ms. Murray served on the Anaheim City Council from December 2010 to December 2018.

The Santa Ana Water Board is responsible for issuing waste discharge permits under the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES), which limits the amount of pollutants that may be discharged into U.S. waters. In addition, the Santa Ana Water Board reviews proposed desalinization facilities to determine whether they use the best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life in compliance with California water law. Poseidon Resources LLC ("Poseidon") has proposed to construct and operate a new and expanded desalination facility in Huntington Beach (the "Facility") that would require renewal of its NPDES permit and a determination by the Santa Ana Water Board that the Facility complies with other relevant state water laws (together, the "Tentative Order"). Poseidon applied for the current permit renewal pending before the Santa Ana Water Board on June 30, 2016.

The Santa Ana Water Board has heard several informational items at public meetings regarding Poseidon's proposed Facility, as well as two workshops regarding Poseidon's proposed Facility's Tentative Order—one on December 6, 2019, and another on May 15, 2020—at which the Board received oral public comment. The Tentative Order is now pending before the Santa Ana Water Board, with the Board scheduled to approve, disapprove, or continue consideration on the proposed Facility's Tentative Order on July 30-31, 2020, with a third hearing day scheduled for August 7, 2020, if needed.

In December of 2019, the Santa Ana Water Board received a letter from the California Coastkeeper's Alliance (CCKA), asking Ms. Murray to recuse herself from the Board's proceedings regarding the proposed Facility because CCKA believes she has a disqualifying conflict of interest. Specifically, CCKA asserts that campaign contributions Ms. Murray received during her campaigns for the Anaheim City Council and the Orange County Board of Supervisors in 2018 and 2019 constitute either sources of income or gifts to Ms. Murray. CCKA takes issue with 12 contributions, ranging from \$250 to \$2,000, received between April 2014 and March 2019 as follows:

Date	Contributor	Amount
03/08/2019	UA Journeymen & Apprentices Local 250	\$2,000
03/01/2019	OC Tax PAC	\$2,000
02/08/2019	Sprinkler Fitters UA Local 709	\$2,000
02/08/2019	So. California Pipe Trades District Council 16	\$2,000
02/08/2019	Building Industry Assoc. of So. California	\$2,000
12/27/2018	UA Plumbers & Steamfitters Local Union 582	\$2,000
02/08/2017	US Plumbers & Steamfitters Local Union 584	\$1,900
09/28/2016	US Plumbers & Steamfitters Local Union 582	\$1,900
06/22/2015	Poseidon	\$650
06/06/2014	Poseidon	\$1,000
04/23/2014	UA Plumbers & Steamfitters Local Union 582	\$1,000
04/01/2014	Lear Pierce	\$250

Six of these contributions, including the two from Poseidon, were received more than 12 months before Ms. Murray was appointed to the Santa Ana Water Board and six of them were received while she has been serving on the Santa Ana Water board. All 12 contributions were received more than 12 months before the Santa Ana Water Board's scheduled July 30-31, 2020 decision on the Tentative Order. Nevertheless, Ms. Murray disclosed the contributions she received from Poseidon on the record at a previous Santa Ana Water Board meeting at which the proposed Facility was discussed.

Of the six contributions received after Ms. Murray was appointed to the Santa Ana Water Board—five of which are from labor and trade organizations—none of the contributors are a named applicant for the Facility, though two have expressed support for the Santa Ana Water Board's approval of the Tentative Order for the proposed Facility on the record before the Board: Sprinkler Fitters UA Local 709 ("UA Local 709") and UA Plumbers & Steamfitters Local Union 582 ("Local Union 582"). On February 9, 2018, speaking on on behalf of UA Local 709 during an informational item at a Santa Ana Water Board meeting, Roy Afusia publicly commented "there's a need for a project like this," and "desalination not only provides local water, but also provides thousands of jobs and millions of tax money." At the Board's March 15, 2020 workshop, speaking on behalf of Local Union 582, Luis Andres Perez publicly commented "as we're getting more dense and more populated, we need to look towards other aspects of importing our water or, rather, in this case through the desalination project with Poseidon. And I think more than anything, if we're investing in our water infrastructure at the moment, we are able to mitigate those costs and long-term effect." Both contributions to Ms. Murray from UA Local 709 and Local Union 582 were made over 12

months from the time these entities' representatives provided public comment before the Santa Ana Water Board.

CCKA asserts that "it is well known and documented that at least one of these labor unions stand to benefit from the Poseidon—Huntington Beach ocean desalination project." In addition, CCKA asserts that OC Tax PAC, who contributed \$2,000 to Ms. Murray's Board of Supervisors campaign on March 1, 2019, is "a well-known supporter for the Poseidon—Huntington Beach ocean desalination project."

You note that the Orange County Chapter of the Building Industry Association of Southern California has expressed support for the approval of the Tentative Order for the proposed Facility. However, the Building Industry Association of Southern California, the umbrella organization to which the Orange County Chapter belongs, has not expressed support for the Facility. The Building Industry Association of Southern California contributed to Ms. Murray's Board of Supervisors campaign over 12 months ago, while the Orange County Chapter did not contribute to Ms. Murray. Similarly, the Los Angeles/Orange Counties Building and Construction Trades Council—with which several of Ms. Murray's contributors are affiliated—has expressed support for the approval of the permit for the proposed Facility at several Santa Ana Water Board meetings, but has not made campaign contributions to any of Ms. Murray's campaigns and the entities it represents that you have noted made contributions to Ms. Murray made those contributions over 12 months before the Los Angeles/Orange Counties Building and Construction Trades Council expressed support according to the facts you provided. Ms. Murray's other contributors you have mentioned: UA Local 250, OC Tax PAC, and Southern California Pipe Trades District 16, have not publicly supported or opposed the proposed Facility in person or in writing in proceedings before the Santa Ana Water Board and again their contributions to Ms. Murray were made over 12 months prior to the upcoming decision.

On behalf of Ms. Murray, you now seek guidance on whether Sections 87100 and 84308 of the Act, respectively, prohibit Ms. Murray from participating in the Santa Ana Water Board's decisions concerning the proposed Facility.

ANALYSIS

Section 87100: Conflicts of Interest

You have asked whether campaign contributions received by Ms. Murray give rise to a conflict of interest under Section 87100 of the Act. Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

Section 87103 provides that an official has a "financial interest" in a decision if it is reasonably foreseeable that the decision will have material financial effect on one or more of the official's interests identified in that section. In addition, Section 87103 identifies five types of interests that may give rise to a disqualifying conflict of interest:

1. An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner,

trustee, employee, or holds any position of management (Section 87103(d)).

2. An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
3. An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c)).
4. An interest in a source of gifts to the official if the gifts aggregate to \$500 or more within 12 months prior to the decision. (Section 87103(e).)
5. An interest in the official's personal finances, including those of the official's immediate family, also known as the "personal financial effects" rule. (Section 87103.)

None of the above interests is implicated in Ms. Murray's situation. Moreover, the Act expressly exempts campaign contributions from the definitions of "income" and "gift." (Sections 82030(b)(1) and 82028(b)(4).) Therefore, campaign contributions received by Ms. Murray do not give rise to a conflict of interest under Section 87100.

Section 84308: Members of Appointed Boards and Commissions, "Pay to Play"

You have also asked whether Ms. Murray has a conflict of interest under the "pay-to-play" restrictions of Section 84308 of the Act. Section 84308 imposes contribution limitation, disclosure, and disqualification requirements on members of appointed boards and commissions who make decisions involving licenses, permits or other entitlements for use.

While a matter is pending before an agency, Section 84308(b) provides:

No officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250) from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer knows or has reason to know that the participant has a financial interest, as that term is used in Article 1 (commencing with Section 87100) of Chapter 7.

Prior to the date a decision is to be rendered by an agency Section 84308(c) provides:

Prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars (\$250) from a party or from any participant shall disclose that fact on the record of the proceeding. No officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or

other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars (\$250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision, as that term is described with respect to public officials in Article 1 (commencing with Section 87100) of Chapter 7.

For purposes of Section 84308, an “officer” is defined as an elected or appointed member of a boards or and commission or an agency head. (Regulation 18438.1(d).) An officer who receives a contribution exceeding \$250 from a party or participant within the 12 months prior to rendering a decision in a proceeding involving a license, permit, or other entitlement for use must disclose that fact on the record of the proceeding. (Section 84308(d)). In addition, an officer may not make, participate in making, or in any way attempt to use his or her official position to influence a decision concerning a permit or other entitlement for use if the officer has willfully or knowingly received a contribution during this 12 month period from a party or his or her agent; or a participant or his or her agent, if the officer knows or has reason to know that the participant has a “financial interest” in the decision. (Id.)

In this case, the Santa Ana Water Board is an appointed board member and thus subject to Section 84308. (Section 84308(a)(3).) Likewise, Ms. Murray meets the definition of an appointed “officer” under Section 84308(a)(4), and the decision at issue clearly concerns a “license, permit, or other entitlement for use” under Section 84308 (a)(5), the NPDES permit requested by Poseidon. Thus, as a member of the Santa Ana Water Board Ms. Murray is subject to the “pay-to-play” restrictions of Section 84308.

Section 84308(a)(1) defines a “party” to a decision as a person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use. Poseidon is a “party” since Poseidon has “filed an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.”

A “participant” for purposes of Section 84308 is any person who is not a party, but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision, as defined in Section 87100, et seq. (Section 84308(a)(2).) A person “actively supports” a decision if they lobby an agency’s officials or employees in person, testify in person before an agency, “or otherwise act to influence officers of the agency.”

Both UA Local 709 and Local Union 582 have had representatives testify before the Santa Ana Water Board in support of the Facility. On February 9, 2018 and May 15, 2020, respectively. However, both of these entities made contributions to Ms. Murry over 12 months before their participation in this matter. As noted above Section 84308(b) prohibits the acceptance of a contribution of more than \$250 while a proceeding involving a license or permit is pending before the agency and Section 84308(c) prohibits an officer of an agency from making, participating in making, or in any way attempting to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the

officer has willfully or knowingly received a contribution in an amount of more than \$250 within the preceding 12 months from a party or participant (or their agents) if the officer knows or has reason to know that the participant has a financial interest in the decision.

With respect to the upcoming decision, because no contributors have contributed to Ms. Murray within 12 months prior to the decision Ms. Murray is not required to disclose the contributions at issue, nor must she recuse herself from the Santa Ana Water Board's decisions concerning the Tentative Order to be heard on July 30-31 or August 7, 2020 for the proposed Facility, including renewal of its NPDES permit.

We do note that the facts indicate the permit application renewal was submitted by Poseidon on June 30, 2016, and the matter has been pending since at least that date. There have already been meetings held by the Santa Ana Water Board where Poseidon's permit renewal was discussed since Ms. Murray was appointed to the Board. Additionally, Ms. Murray has accepted a number of campaign contributions over 12 months ago. However, we only advise on whether Ms. Murry is permitted to participate in the upcoming decision and do not advise on past conduct. (Regulation 18329(b)(6)(a).) Therefore, we cannot advise on whether it was permissible for Ms. Murry to accept contributions from the parties and participants you have noted since her appointment to the Santa Ana Water Board or whether it was permissible for her to participate in previous meetings on this pending matter.

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

Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in black ink, appearing to read 'T. Lewis', with a stylized flourish at the end.

By: Toren Lewis
Counsel, Legal Division

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