



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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Teresita J. Sablan
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State Water Resources Control Board
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Re: Your Request for Advice
Our File No. A- 21-020

Dear Ms. Sablan:

This letter responds to your request for advice on behalf of Regional Water Quality Control Board, Santa Ana Region member Letitia Clark 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.

QUESTION

Under the Act’s “pay to play” restrictions in Section 84308, must Santa Ana Water Board (“Board”) member Letitia Clark disclose the campaign contributions she received from supporters of a proposed desalination facility and recuse herself from the Board decision concerning the National Pollutant Discharge Elimination System (“NPDES”) permit for the proposed desalination facility?

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. Under the facts provided, none of the contributing organizations meet the definition of a “participant” in the permit proceeding before the Board, and Ms. Clark is not required to disclose the contributions nor disqualify herself from the decision pursuant to Section 84308.

FACTS AS PRESENTED BY REQUESTER

The Santa Ana Water Board (“Board”) is a seven-member, appointed board. It issues permits under the federal Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) program within its region. Specific to desalination facilities, the Board also reviews proposed 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 law.

Proposed Huntington Beach Desalination Facility

In 2006, the Board issued Poseidon Resources (Surfside) LLC (“Poseidon”) an NPDES permit for discharge, related to its proposal to construct and operate a desalination facility in Huntington Beach. The Board renewed the permit in 2012. However, the facility has not been constructed and did not discharge under the previous permits.

In 2016, Poseidon requested a determination that its proposed facility complies with new Board requirements and submitted an application for the renewal of its NPDES permit. Since 2018, the Board has heard several informational items at public meetings regarding various aspects of the proposed facility. The Board also held two workshops on the facility’s tentative NPDES permit. The Board received oral comments from the public during these meetings and provided the public with an opportunity to submit written comments on the Tentative Order between November 2019, and January 2020. The Board publicly noticed a revised Tentative Order on June 30, 2020 and held a hearing for the Tentative Order on July 30, July 31, and August 7, 2020.

Ms. Clark was appointed to serve on the Board on October 20, 2020. Her appointment became effective October 28, 2020 and is pending confirmation by the Senate. At the time of her appointment, Ms. Clark was a candidate for the City Council of Tustin. Ms. Clark was elected to the City Council on November 3, 2020. During her election campaign, Ms. Clark received contributions of more than \$250 from the following entities that have commented on the permit for the proposed Huntington Beach Desalination Facility pending before the Board:

Table 1

Date	Contributor	Amount
02/10/2020	UA Plumbers & Steamfitters Local Union 582*	\$1,500
08/04/2020	Laborers International Union of North America Local 652*	\$2,000
08/19/2020	Los Angeles/Orange Counties Building and Construction Trades Council PAC	\$1,000
09/18/2020	IBEW PAC Educational Fund	\$500
09/29/2020	Sheet Metal Workers International Association Local Union 105	\$1,000
10/30/2020	Southwest Regional Council of Carpenters	\$2,000
11/03/2020	Southern California Edison	\$1,000

*Affiliated with the Los Angeles/Orange Counties Building and Construction Trades Council

For the six union organizations listed above, you indicated that each of the organization's representatives made oral comments supporting the approval of the Tentative Order for the proposed facility in Board proceedings. Southern California Edison's representative provided positive comments regarding its working relationship with Poseidon, and its support of Edison's Green Energy Program in the Board proceedings but did not take a position on the Board decision.

Ms. Clark also received contributions from four entities that have not commented on the pending permit but are union affiliates of the contributor noted above, Los Angeles/Orange Counties Building and Construction Trades Council ("LA/OC Trades Council"):

Table 2

Date	Contributor	Amount
04/30/2020	International Union of Operating Engineers Local 12	\$1,500
06/30/2020	UA Journeymen & Apprentices Local 250	\$2,000
08/04/2020	Southern California Pipe Trades District Council 16	\$2,000
10/30/2020	Southern California District Council of Laborers	\$2,000

Additionally, you became aware that Poseidon and the LA/OC Trades Council, including its affiliated union organizations, have a Memorandum of Understanding ("MOU") in which Poseidon agrees to have the successful construction bidder for the project enter into a Project Labor Agreement with the Trades Council. You and the Board were not aware of this MOU at the time of the comments made before the Board by LA/OC Trades Council. However, this agreement is consistent with the oral and written comments presented by LA/OC Trade Council in its support of the project commencing in February 2019 and continuing until the July 2020 meeting.

For example, you provide Mr. Medrano's comments on behalf of LA/OC Trade Council at the July 30, 2020 hearing, as part of Poseidon's coordinated presentation to the Board:

The building trades represents 48 local unions and district councils, as well as the 14 trades. We are in the business of creating good jobs and long life [sic] middle- class careers for our 100,000 members. This project is important for our skilled and trained workers, and will create more than 3,000 jobs for three years during the construction. As I'm sure you're aware of, California has double digit unemployment levels. And as COVID-19 continues to ravage us both medically and economically, California needs public-private infrastructure projects that will guarantee jobs and tax revenue for California. . . .

And importantly, once this is built, we'll create billions of gallons of drinking water for Orange County. Our members are not only workers, they are homeowners, PTA 6 members, little league coaches and consumers. Local men and women skilled in trained labor will build the most technologically advanced energy efficient and environmentally sound desalination plant in the world.

The proposed permit your staff is recommending you approve ensures that this project will be fully compliant with the new Desalination Policy of the Ocean Plan. We stood you -- we stood before you in 2006 when the Regional Board followed the science of their first step and approved this project. We stood before you again in 2012, when the Regional Board again followed the science and their staff and approved this project. And here I am again in 2020, asking you to, again, to follow the science and trust your staff and approve this project.

You request if any of the above contributors meet the definition of a “participant” and thus require Board member Clark to disclose the contribution and recuse herself under Section 84308.

ANALYSIS

Known as the “pay to play restriction,” 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.² This section was added to address the potential for bias or influence on appointed board members, who may receive contributions when campaigning for an elective office. Section 84308 imposes a restriction on receiving contributions from a party or participant

² Regulation 18438.1(d) defines an “officer of an agency” for purposes of Section 84308, as including only those who serve as members of governmental boards and commissions; or serve as the agency head.

while a proceeding is pending.³ It also requires disclosure and disqualification where contributions were received within 12 months of a proceeding, as detailed below.

An officer must disclose contributions in excess of \$250 received from a party, participant or agent thereof within a 12 month period prior to the date a decision is to be rendered by an agency under Section 84303(c):

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.

Additionally, Section 84308(c) requires disqualification if the officer knows or has reason to know that the participant has a financial interest under the Act in the decision:

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.

It is not at issue that Ms. Clark, as a Board member, is subject to Section 84308 and that the proceeding involves the NPDES permit decision.⁴ It is not at issue that Ms. Clark

³ Section 84308(b) prohibits contributions over \$250 from a party or participant to an appointed board member, as follows:

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.

⁴ Section 84308(a)(5) defines "license, permit, or other entitlement for use" as "all business, professional, trade and land use licenses and permits and all other entitlements for use, including all

received campaign contributions within the past 12 months from organizations that support the permit before the Board relating to the Poseidon facility proceeding. At issue is whether these contributors meet the definition of a “participant” in the proceeding, such that Ms. Clark is required to disclose the contributions. And, if so, whether she must disqualify herself from participating in the decision because she knew or had reason to know that the participant has a financial interest in the decision. First, we must examine whether these contributors meet the definition of a “participant” under Section 84308.

Participants under Section 84308

Section 84308 defines a “participant” in a two-part test requiring (1) the person actively supports or opposes a particular decision, and (2) has a financial interest in the decision. Section 84308(a)(2) states that a “participant” 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 described in Article 1 (commencing with Section 87100) of Chapter 7.” Section 84308(a)(2) states that a person “actively supports or opposes a particular decision in a proceeding” if the person “lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.”

The six union organizations in Table 1, UA Local 582, LIUNA Local 652, LA/OC Trades Council, IBEW, Local Chapter 441, Sheet Metal Workers Local 105, and Southwest Regional Council of Carpenters, meet the first part of the “participant” test, as each had representatives make comments in support of the NPDES permit at Board meetings. Southern California Edison’s representative testified in person before the Board in support the applicant, Poseidon. Southern California Edison also meets the first part of the “participant” test, due to its in person testimony to influence the Board positively towards the applicant.

The four union organization contributors to Ms. Clark in Table 2, International Union of Operating Engineers Local 12, UA Journeymen & Apprentices Local 250, Southern California Pipe Trades District Council 16, and Southern California District Council of Laborers, have not made comments before the Board. They are affiliates of active supporter, LA/OC Trades Council. You request whether the active support of LA/OC Trades Council is attributable to the four union affiliates. Regulation 18438.3 states that for purposes of Section 84308, a person is an “agent” of a participant “only if he or she represents that person in connection with the proceeding.” You note that the LA/OC Trades Council spokesperson stated it “represents 48 local unions and district councils, as well as the 14 trades.” However, this general reference, absent additional facts, does not sufficiently identify LA/OC Trades Council as an “agent” for the four non-commenting affiliate union organizations at the Board hearing. We note that two of the “actively

entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises.”

supporting” unions that are also affiliates of the Trades Council, had their own individual representatives at the Board meetings. Therefore, these union organizations are not participants, and we need not further consider the contributions of the four non-commenting union organizations.

Next, we examine the second part of the “participant” test: whether the six union organization supporters or Southern California Edison have a “financial interest” in the Board decisions under the Act. Section 87103 provides that an official has a financial interest in a decision 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 or the official’s specified economic interests. Those specified interests include a business entity interest, real property interest or source of income interest. (Section 87103.) We apply this standard to the seven entities.

These entities are not explicitly involved in the NPDES permit decision, as they are neither parties to, nor the subject of, the Board’s decision. (Regulation 18701.) The appropriate standard for determining whether a financial effect is reasonably foreseeable for entities not explicitly involved, is if the financial effect of the decision can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).) The most applicable materiality standard, relative to determining materiality for decisions affecting union organizations, is found in Regulation 18702.3(a)(3), relating to nonprofit organizations. For Southern California Edison, the most applicable materiality standard for a business entity is found in Regulation 18702.1(a)(2). Each of these provisions provide the same standard: the reasonably foreseeable financial effect of a decision is material if the decision may affect the organization’s annual gross receipts, or value of its assets or debts, by an increase or decrease of at least \$1,000,000, or by five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than \$10,000. Materiality is also found if the decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses of at least \$250,000; or one percent of the organization's annual gross receipts and the change in expenses is equal to or greater than \$2,500.

You note that for the union organizations, their support related to the jobs the approval of the permit would likely bring to their members. There are no facts indicating that the union organizations themselves would experience an increase or decrease in annual gross receipts in excess of the materiality thresholds identified above. Similarly, you note that there is no indication that Southern California Edison will financially benefit from this decision, related to its collaboration with Poseidon on renewable energy alternatives. Absent facts to the contrary, neither the union organization nor Southern California Edison will meet the applicable materiality standard and would not have a “financial interest” in the decision under the Act. Therefore, none of the entities listed in Table 1 meet the definition of a “participant” under Section 84308. Ms. Clark is not required to disclose these contributions, nor is she required to disqualify herself from the proceeding as a result.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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