

State of California

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Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

April 5, 1977

Mr. Harrison C. Dunning
Staff Director
Commission to Review California
Water Rights
P.O. Box 100
Sacramento, California 95801

Dear Mr. Dunning:

Please excuse the delay in responding to your letter of February 11, 1977, requesting an informal opinion as to whether the Conflict of Interest provisions of the Political Reform Act of 1974, as amended, are applicable to the recently created Commission to Review California Water Rights.

Government Code Section 87300^{1/} requires every "agency" to adopt and promulgate a Conflict of Interest Code. "Agency" means any state or local government agency. Section 82049, in pertinent part, defines "state agency" to mean "...every state office, department, division, bureau, board, and commission..." The Commission has provided further guidelines as to what constitutes a "state agency" in 2 Cal. Adm. Code Section 18249 which provides:

"An agency is a state agency within the meaning of Government Code Section 82049 only if all the following criteria are met:

- (a) The agency is authorized by statute, executive order or the California constitution.
- (b) At least one voting member is an elected state officer or is appointed by an elected state officer or an agency official or a state agency.
- (c) The agency is financed in part by any state funds or is subject to appropriation in the state budget.
- (d) An area larger than one county is included in its jurisdiction."

1/ Unless otherwise indicated, all citations are to the California Government Code.

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As I understand the facts, your Commission is not authorized by statute or the California constitution, so unless the governor issues an executive order authorizing your action, your agency would not satisfy the first regulatory requirement set forth above and hence, would not be a "state agency" within the meaning of the Act.^{2/} Accordingly, your agency would not be required to adopt and promulgate a Conflict of Interest Code pursuant to Section 87300.

Even if your Commission were a "state agency" within the meaning of the Act, however, you would not appear to have any "designated employees" within the meaning of Section 82019, as your Commissioners do not appear to be "members" of a state agency within the meaning of the Act. 2 Cal. Adm. Code Section 18700(a) provides that:

"Member shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decision making authority. A board or commission possesses decision making authority whenever:

- (A) It may make a final governmental decision;
- (B) It may compel a governmental decision or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or
- (C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency."

None of the above would seem to apply to your agency. Accordingly, as your Commission is not an agency with decision-making authority, your Commissioners are not "members" of a state agency within the meaning of the Act and they are not within the definition of "designated employee" contained in Section 82019.

With regard to yourself, as Staff Director, and your staff, you would not appear to "make" or "participate" in the making of decisions within the meaning of the Act as your advice or recommendations, would be subject to intervening substantive review by your own Commission as well as by numerous other persons in the executive and legislative branches of government before a final decision by the decision maker. 2 Cal. Adm. Code Section 18700(c).

Finally, we observe that your Commission possesses the characteristics of an agency that serves a solely advisory function. The Commission is a temporary body. It is designed to do research and prepare background and issue papers,

^{2/} We briefly observe, however, that all other regulatory criteria necessary to be considered a "state agency" would seem to be met by your Commission.

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with regard to Water Rights Law. As a result of these studies, the Commission will prepare and propose recommendations for executive and legislative action. The Commission will then go out of existence. It has no permanent staff, and depends upon staff loaned from other agencies. It has no independent budget and depends upon federal funds granted by the Environmental Protection Agency to the State Water Resources Control Board. The Board will administer these funds for the Commission. Finally, although the Commission may hold hearings around the state to gather information and permit public input into its study and research effort, it has no investigatory or subpoena powers to compel testimony of witnesses or the production of documents.

On the basis of the above facts and analysis, it is our informal opinion that the Commission to Review Water Rights Law:

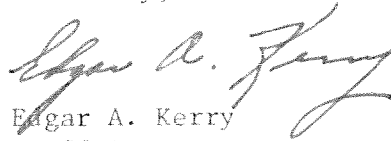
(1) Is not a "state agency" within the meaning of the Political Reform Act of 1974, as amended;

(2) Is not required to adopt and promulgate a conflict of interest code pursuant to Section 87300; and

(3) Is not required to file a request for exemption from Section 87300, pursuant to 2 Cal. Adm. Code Section 18751.

In the event that your existence is subsequently formalized through issuance of an executive order by the Governor, the Commission may wish to formally set a deadline date for submission of a proposed Conflict of Interest Code for your agency. At that time you may wish to consider requesting an exemption. In any event, until the Commission has taken action and set a deadline date for submission of a proposed Code for your agency, no action need be taken by your agency with respect to adopting a Code or requesting an exemption. On the basis of the above advice, the remaining questions raised in your letter are no longer relevant. Please let me know if I can be of further assistance to you.

Sincerely,



Edgar A. Kerry
Staff Attorney
Conflicts of Interest Division
916/322-6444

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GOVERNOR'S COMMISSION
TO REVIEW CALIFORNIA WATER RIGHTS LAW

P. O. BOX 100 • SACRAMENTO, CALIFORNIA 95801

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Legal Division
Fair Political Practices Commission
1100 K Street
P. O. Box 807
Sacramento, CA 95804

REQUEST FOR INFORMAL OPINION ON APPLICATION OF THE
POLITICAL REFORM ACT OF 1974, AS AMENDED, TO THE
GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER
RIGHTS LAW

The Water Rights Commission

On December 31, 1976, Governor Brown announced the creation of a Governor's Commission to Review California Water Rights Law.

This Commission will review California water rights law and evaluate proposals for modifications in the law. The Commission will prepare a report of its activities and submit it to Governor Brown by January 16, 1978. It is expected that this report will include recommendations for legislation. The Commission will be discontinued after submitting its recommendations to the Governor.

The Commission will consist of leaders in the water law, agricultural, and scientific communities. It is anticipated that Governor Brown's appointments to the Commission will be made in the near future.

Commission members will be reimbursed for their reasonable expenses. Members who are not State employees will receive an honorarium of one hundred dollars per meeting day. The Commission is not required to meet at specific times, but it is anticipated that the Commission will schedule approximately twelve meetings.

The Commission will have a staff consisting of a staff director and three staff attorneys. The staff director and one of the staff attorneys will be under contract with the State Water Resources Control Board. The second staff attorney will be employed by the Department of Water Resources and will work for the Commission on a training and development assignment. The third staff attorney will be employed by the legal division of the State Water Resources Control Board and will be assigned to the Commission.

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State Agency

It is intended that the Commission be an autonomous body. It is not a part of the State Water Resources Control Board. Its recommendations will not in any way be approved by the Board prior to submittal to the Governor. The Board will, however, provide the Commission with substantial administrative services and general support.

The Commission will be funded with a portion of the funds granted by the Environmental Protection Agency to the Board for planning in accordance with Section 208 of the Federal Water Pollution Control Act Amendments of 1972 (P. L. 92-500), which the Board will administer for the Commission. The Board will receive \$150,000 as part of its 208 nondesignated funds which must be used for the Commission's activities.

Designated Employee

"Designated employee" is defined at Government Code Section 82019:

Designated Employee. "Designated employee" means any officer, employee, member or consultant of any agency whose position with the agency

(a) Is exempt from the state civil service system by virtue of subdivisions (a), (c), (d), (e), (f), (g), or (m) of Section 4 of Article XXIV of the Constitution, unless the position is elective or solely secretarial, clerical or manual;

(b) Is elective, other than an elective state office; or

(c) Is designated in a Conflict of Interest Code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. "Designated employee" does not include an elected state officer or any unsalaried member of any board or commission which serves a solely advisory function.

The California Constitution Article XXIV Section 4(d) states that "members of boards and commissions" are exempt from civil service. Commission members are, therefore, apparently "designated employees."

Sections 87302 (a) and 87302 (b) of the Political Reform Act pertain to the listing of designated employees in a Conflict of Interest Code and the determination as to what interests must be disclosed by each designated employee. Section 87302 (a) requires a listing

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of "all positions within the agency which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." The list required by Section 87302 (a) becomes the list of "designated employees" for the agency, and, according to Section 87302 (b), each of the employees designated in accordance with subsection (a) must disclose reportable interests.

There is no requirement in Section 87302 (a) that those persons made designated employees by Section 82019 (a) or (b) be listed unless their positions involve "making or participation in the making of decisions which may foreseeably have a material effect on any financial interest."

The meaning of the above-quoted phrase has been clarified by the Fair Political Practices Commission in its regulations and, after consideration of these regulations, it does not appear that the Commission members need be designated under the Section 87302 (a) criteria for designated employees.

For example, the definition of "member" contained in the Fair Political Practices Commission regulations, Title 2, California Administrative Code, Section 18700 (a) (1), set forth below, indicates the type of "decision" intended to be covered by the Act. That section reads, in pertinent part, as follows:

"A board or commission possesses decision-making authority whenever:

- (a) It may make a final governmental decision;
- (b) It may compel a governmental decision by any agency;
- (c) Its action, recommendation, or consideration is a legal prerequisite to a final governmental decision; or
- (d) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency."

Presumably, the "governmental decision" referred to in the above regulation is an ultimate action of some sort which, in and of itself, could affect financial interests. The Commission itself has no authority to make any such decisions.

Ultimately, the Legislature may make governmental decisions based upon the Commission's recommendations. Hence, one might argue that Commission members may "participate in the making of governmental decisions" and, thus, have the kind of authority to affect financial interests intended to be covered by Section 87302 (a). However, the

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Fair Political Practices Commission has defined "participates in the making of a governmental decision" in a way which, again, seems to exclude the Commission members. Section 18700 (c) of the Fair Political Practices Commission regulations reads as follows:

(c) A public official or designated employee "participates in the making of a governmental decision", when, acting within the authority of his or her position, he or she:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

The debates surrounding recent amendments to the above definition indicated that the insertion of the words "without significant substantive review" in subsection (c) (1) and the words "without significant intervening substantive review" in subsection (c) (2) was intended to limit coverage of Conflict of Interest Codes prepared in accordance with Article 3 of Chapter 7 of the Political Reform Act to people in positions which have some actual control over an ultimate governmental decision. Certainly, any recommendations made by the Commission will be subject to "significant substantive review" as a part of the legislative process, if not also at the level of the Governor's office.

Further assistance can be found in the provisions in the Fair Political Practices Commission regulations, Title 2, California Administrative Code, Section 18700 (a) (2), which define "consultant." A person is not a consultant, and therefore is not subject to conflict of interest provisions, if that person "possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel" Section 18700 (a)(2)(B). This is precisely the position of Commission staff and members.

Disclosure Category

The chief counsel to the State Water Resources Control Board has indicated that the Board would be willing to include Commission members and staff in its Code if the Fair Political Practices Commission decides that they must be covered by a Conflict of Interest Code.

Even if these positions are included in a Code, however, it is not clear in what type of disclosure category they should be placed.

In preparing its Code, which has now been submitted to the Fair Political Practices Commission for approval, the State Board made every effort to prepare disclosure categories which limited the disclosure required by each class of designated employees as closely as possible to those interests which could foreseeably be affected by decisions made or participated in by members of that class. This careful drawing of disclosure categories appeared to be mandated by Section 87302 (a) and (b) and 87309 (c) of the Political Reform Act. There is potential that the proposals contained in the report prepared by the Commission could have economic effects on a wide range of business, real estate and other kinds of financial interests. This would indicate that Commission members should be placed in disclosure category 1, requiring disclosure of all of their financial interests. On the other hand, as discussed above, we do not know whether recommendations for substantial changes in the State's water laws, if made by the Commission, will be accepted by the Governor or by the ultimate decision-maker, the Legislature. Further, there will surely be substantial review of the Commission's recommendations prior to any action by the Legislature. Under these circumstances, taking into account the criteria contained in Section 87302 (a) and (b), it does not appear appropriate to place Commission members in any disclosure category.

Request for Informal Opinion

We understand that the California Law Revision Commission, which performs a function similar to the function which will be performed by the Governor's Commission to Review California Water Rights Law, has requested an exemption from the requirement to prepare a Conflict of Interest Code under Section 18751 of the Fair Political Practices Commission's regulations and that the Commission on Uniform State Laws has requested and been granted such an exemption.

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We would like an informal opinion from the Fair Political Practices Commission concerning the following questions:

- (1) Must members and/or staff of the Water Rights Commission be included as designated employees in a Conflict of Interest Code?
- (2) If not, should the Water Rights Commission file an application for an exemption under Section 18751 of the Fair Political Practices Commission regulations?
- (3) If designation is required, may Commission members and/or staff be included in the State Water Resources Control Board's Conflict of Interest Code even though the Commission is a separate entity?
- (4) Could Water Rights Commission members be listed as designated employees under the State Water Resources Control Board's Code and placed in disclosure category 1 assuming there is no legal requirement to do so?
- (5) Is it legally possible to list designated employees in a Conflict of Interest Code and not place them in any disclosure category?
- (6) If members and/or staff of the Water Rights Commission are designated employees who must be placed in a disclosure category, to which disclosure category should they be assigned?

The Commission's work may ultimately have a substantial impact on California's water industry. Whatever approach is taken, it is of the utmost importance that Commission members have complied with the requirements of the Political Reform Act.

The State Water Resources Control Board's Conflict of Interest Code has been submitted for review and approval by the Fair Political Practices Commission. The Chief Counsel to the Board has no objection to the Fair Political Practices Commission's delaying approval of the Board's Code until it can be determined whether Water Rights Commission members should be included in that Code.


Harrison C. Dunning
Staff Director