



## FAIR POLITICAL PRACTICES COMMISSION

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June 16, 2004

John W. Stovall  
Neumiller & Beardslee  
Post Office Box 20  
Stockton, CA 95201-3020

**Re: Your Request for Advice  
Our File No. A-04-111**

Dear Mr. Stovall:

This letter is in response to your request on behalf of Dr. Michael Panzer, a member of the governing body of Reclamation District No. 1608 ("the District") for advice on the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTION

Do the Act's conflict of interest provisions disqualify Dr. Panzer from taking part in a decision by the District to fund the dredging of 14-Mile Slough?

### CONCLUSION

Under regulation 18704.2(b)(2), public officials like Dr. Panzer may take part in decisions concerning the maintenance or repair of facilities like 14-Mile Slough, even if they own real property abutting the slough. We are aware of no grounds for denying the benefit of this exceptional rule to Dr. Panzer.

### FACTS

The District is a reclamation district organized under California Water Code section 50000 et seq. The District lies within the boundaries of the City of Stockton, and covers an area of approximately 2.5 square miles, or 1,600 acres. This property was originally agricultural land, but over the last four decades it has become fully urbanized, and now consists of commercial areas, public uses (schools and parks) and, primarily,

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

residential properties. The area is subdivided into 2,980 separate parcels. Although the population is not known exactly, you believe that it is more than 5,000 persons.

The governing board of the District is a three member board of trustees. The members are elected by landowner voting, and each member must be a landowner, or the representative of a landowner. Although a reclamation district's powers could include such matters as irrigation, its primary purpose is to reclaim land, and thereafter keep it from being flooded. In the District, the land has long ago been drained and reclaimed, and the District's sole function now is to maintain the levees which protect the district from flooding, and to maintain one small pump for drainage. The major internal storm water drainage system has been turned over to the City of Stockton.

The District is roughly square in outline. The eastern edge lies on comparatively higher ground, and is not protected by a levee. The northern edge borders 5-Mile Slough, which runs east-west. A District levee runs along the southern edge of 5-Mile Slough to prevent waters in the slough from flooding the District. At its western end, 5-Mile Slough connects to 14-Mile Slough through a weir and gate structure owned and operated by the County of San Joaquin.

At its eastern end, 5-Mile Slough dead-ends, and storm water enters it from the east naturally, and through discharge pipes from the City of Stockton's storm water system; storm water thus flows westward through the weir and into 14-Mile Slough, which runs north-south along the District's western edge, until it bends eastward, running along the southern border of the District. These two sloughs, through various waterways, connect to the Sacramento-San Joaquin Delta. 14-Mile Slough is a major path for boats engaging in recreational use of the Delta.

There is a District levee running along the eastern edge of 14-Mile Slough. Over the years, the part of 14-Mile Slough that bends around the southern edge of the District has silted up. About fifteen years ago the District employed a barge to place rip-rap (blocks of stone designed to prevent the outer slope of the levee from eroding) on the levee slope. The barge deformed the bottom of the slough in certain areas, pushing mud and bottom silt to the sides of the slough. The net result of the two processes is that, at certain places along the edge of the levee, 14-Mile Slough is only one to two feet deep.

Because the District is not the fee owner of the levee on 14-Mile Slough where it runs eastward, there are forty-six lots whose owners have rights of access to the levee, who have erected certain structures thereon, including boat docks under permits obtained some twenty years ago from the Army Corps of Engineers.

Due to the silt and mud problem, some of these docks have become essentially useless. The east-west portion of 14-Mile Slough will need to be dredged to make these docks useful. Some of the forty-six lot owners have approached the District with a proposal that the District, or one of the lot owners, obtain permits and let contracts to have 14-Mile Slough dredged. These lot owners request that the District fund the costs of the work. All three members of the board of trustees are landowners within the District.

Dr. Panzer is one of the forty-six lot owners with a boat dock on the slough. His dock, however, is not one of those put out of service by the buildup of silt and mud; it remains fully useable.

The District has no statutory duty to maintain 14-Mile Slough. However, if it is to the benefit of the District in carrying out its primary flood control function, the District could (with appropriate permission) dredge the slough. There are, in fact, flood control benefits to be gained in dredging the slough. First, the District's engineers would have improved access by water, if the slough were dredged, to inspect the levee from the waterside, which is the best way to check for erosion. Second, if there is a need for access to the levee by barges, such access would not be delayed by last-minute dredging. Third, and most important, in the event of heavy rainfall or suddenly increased storm water inflow into 14-Mile Slough, the surge of water into a shallow slough could cause overtopping of the levee and consequent flooding. If the slough is dredged it will have a greater capacity to accept storm water surges, reducing the risk of floods.

### ANALYSIS

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. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; reg. 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

#### **Step One: Is Dr. Panzer a Public Official?**

The Act's conflict of interest rules apply only to "public officials." (Sections 87100, 87103; regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency...." (Section 82048.) As a member of the District's board of trustees, Dr. Panzer is clearly a public official.

#### **Step Two: Will Dr. Panzer Be Making, Participating In Making, Or Using His Official Position To Influence a Governmental Decision?**

The Act's conflict of interest provisions come into play only when a public official makes, participates in making, or in some way attempts to use his or her official position to influence a governmental decision in which the official knows – or has reason to know – that he or she has a financial interest. (Section 87100.)

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Your question presupposes that Dr. Panzer would at least, as a member of the board, make or participate in making a governmental decision on funding the dredging of 14-Mile Slough.

### **Step Three: What Are Dr. Panzer’s Economic Interests?**

You have advised us of one economic interest which might potentially disqualify Dr. Panzer from the upcoming District decision – his economic interest in residential real property on 14 Mile Slough. (Section 87103(b); regulation 18703.2.) For purposes of this letter, we presume that Dr. Panzer has an interest in this property worth at least the statutory threshold of \$2,000 in fair market value. We note also that a public official has an economic interest in his or her personal finances, including those of his or her immediate family – this is the “personal financial effects” rule. (Section 87103; regulation 18703.5.) However, in considering reasonably foreseeable financial effects on a public official’s personal finances, financial effects on the value of real property owned by the official are not considered. (Regulation 18705.5(a).) It does not appear that the decision at issue could have a financial effect on Dr. Panzer separate and apart from any effect on the value of his residential real property, and therefore we confine our analysis to possible financial effects on this real property.

### **Step Four: Will Dr. Panzer’s Economic Interest Be Directly or Indirectly Involved in the Governmental Decision?**

The Act’s conflict of interest rules distinguish between economic interests which are directly involved in governmental decisions, and those which are only indirectly involved. Regulation 18704.2(a)(1) provides that the real property in which the official has an interest is directly involved in a governmental decision if any part of the property lies within 500 feet of the property which is the subject of the decision. Dr. Panzer’s real property is presumably located, at least in part, within 500 feet of the slough since he owns a boat dock on the slough. Ordinarily, then, Dr. Panzer’s real property interest would be directly involved in a governmental decision to dredge the slough. You suggest, however, that an express exception at regulation 18704.2(b)(2) would operate to reverse that conclusion in this particular case. We agree.

Regulation 18704.2(b) provides as follows:

“(b) Notwithstanding subdivision (a) above, real property in which a public official has an interest is not directly involved in a governmental decision, but is indirectly involved if:

¶...¶

(2) The decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage or similar facilities.”

As you describe it, 14-Mile Slough is, like other sloughs throughout the Delta region, a channel which drains waters into or out of other bodies of water, and into or out of surrounding basins. 14-Mile Slough is improved by levees designed to safely channel potential floodwaters which enter the slough naturally, and through pipes emptying storm waters from the City of Stockton’s storm drainage system. We conclude that 14-Mile Slough is therefore a “storm drainage or similar facilit[y]” within the meaning of regulation 18704.2(b)(2). Further, notwithstanding sponsorship of the dredging proposal by landowners whose motivation may be to regain use of their boat docks, we cannot say that dredging a silted-up slough is not a “repair or maintenance” activity by the District. A decision to fund such dredging therefore is a decision which falls within the exception of regulation 18704.2(b)(2), and Dr. Panzer’s real property interest is indirectly involved in such a governmental decision.

**Steps Five and Six: At What Point Does The Effect Of a Governmental Decision On These Economic Interests Become Material, and is it Reasonably Foreseeable That the Effects Will Be Material?**

We next must determine the materiality standard applicable to Dr. Panzer’s economic interest, as defined by regulations 18705 et seq. Because Dr. Panzer’s real property interest is indirectly involved in the decision on dredging 14-Mile Slough, the financial effect on this interest is presumed not to be material. (Regulation 18705.2(b)(1).) That presumption may be rebutted by specific circumstances regarding the decision, its financial effect, or the nature of the real property, which make it reasonably foreseeable that the decision *will* have a material financial effect on the real property, as described in regulation 18705.2(b)(1). You reviewed this regulation at some length in your request for advice, and have not suggested that there are any facts or evidence which might rebut the presumption. Thus we assume for purposes of this letter that a material financial effect on this property is not reasonably foreseeable.

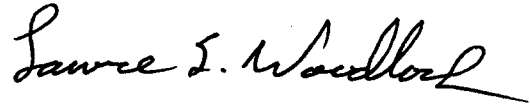
**Steps Seven and Eight: Exceptions.**

An official who might otherwise have a conflict of interest in a particular decision may still participate in that decision if the circumstances are such that an exception to the conflict of interest rules might apply. Since it does not appear that Dr. Panzer would have a conflict of interest in a decision to dredge 14-Mile Slough, we end our analysis at this point.

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

Sincerely,

Luisa Menchaca  
General Counsel



By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

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