



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 31, 2023

Molly MacLean
District General Counsel
Marin Municipal Water District
220 Nellen Avenue
Corte Madera, CA 94925

Re: Your Request for Informal Assistance
Our File No. I-23-115

Dear Ms. MacLean:

This letter responds to your request for advice on behalf of Marin Municipal Water District Board Director Monty Schmitt regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, *et seq.*¹ Because your inquiry is general in nature, we are treating your request as one for informal assistance.²

Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090 and not under other general conflict of interest prohibitions such as common law conflict of interest. Agencies are required to have a “statement of incompatible activities” which also may be implicated. As stated above, the Commission’s advice is limited solely to matters arising under the Act. We also offer no opinion on the application, if any, of agency restrictions on employees’ incompatible activities.

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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Marin County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of

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 18104 through 18998 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTIONS

1. Under the Act, does Director Schmitt have a prohibitive financial interest in Marin Municipal Water District (“District”) Board decisions pertaining to the Russian River Water Forum (“Water Forum”) or the Sonoma County Water Agency (“Sonoma Water”) due to his employment with The Nature Conservancy, a 501(c)(3) organization?

2. Does Section 1090 prohibit Director Schmitt from participating in District decisions pertaining to water supply contracts with Sonoma Water?

CONCLUSION

1. The facts do not identify any decisions before the District Board to determine whether Director Smith is disqualified from taking part in the decision under the Act. As a general matter, Director Schmitt is potentially prohibited under the Act from taking part in any decision if it is reasonably foreseeable that the decision will have a material effect on his financial interest in The Nature Conservancy as a source of income. Generally, we caution that Director Smith is likely disqualified under the Act from taking part in District Board decisions concerning the work of the Water Forum, as well as District Board decisions involving Sonoma Water operations within the Russian River system because of the impermissible nexus between the decisions and income he receives from his employer, The Nature Conservancy, for work that is very closely tied to advancing the interests of the employer.

2. For purposes of Section 1090, you have not identified a particular contract between the District and Sonoma Water and we cannot provide specific advice regarding Section 1090 at this time. Generally, Section 1090 prohibits Director Schmitt, as well as the District, from entering a contract in which the Director has a financial interest unless an exception applies.

However, while we can express no specific opinion regarding an unidentified contract, we do note that Section 1091(b)(1) provides that an officer or employee of a nonprofit corporation or Internal Revenue Code Section 501(c)(3) entity has only a remote interest in the nonprofit entity. Under this exception, the governing board of an agency is not prohibited from entering a contract if the member with a financial interest discloses the interest to the board, the interest is noted in the board’s official records, and the official abstains from the contracting process.

FACTS AS PRESENTED BY REQUESTER

The Marin Municipal Water District (“District”) is a public utility that provides high-quality and safe drinking water to central and southern Marin County, California, excluding west Marin. The District’s 147-square-mile service area includes the cities and towns of San Rafael, Mill Valley, Fairfax, San Anselmo, Ross, Larkspur, Corte Madera, Tiburon, Belvedere, and Sausalito. The District serves over 191,000 residents through over 60,000 accounts. The District’s water system includes 7 reservoirs, 3 treatment plants, 97 pump stations, 130 storage tanks, and 908 miles of pipelines. The District is comprised of five geographical divisions for purposes of Board

elections, and directors are elected within each division for staggered four-year terms. Director Schmitt serves on the District Board of Directors and represents Division II.

The District has local water supply from seven reservoirs, five of which are located on the District's Mt. Tamalpais watershed lands, comprised of approximately 22,000 acres, and the other two reservoirs, Nacasio and Soulajule reservoirs, are located in northwest Marin County. These reservoirs serve as the District's primary sources of water supply. In addition to its local water supply, the District has water supply contracts with the Sonoma County Water Agency (Sonoma Water) to the north, which serves several municipalities and the North Marin Water District in addition to the District. The District relies on Sonoma Water for approximately 25 percent of its annual water supply. The District's water contracts are set to expire June 30, 2025, prior to which date, the District anticipates negotiating extension agreements with Sonoma Water. The District also anticipates upcoming decisions involving Sonoma Water on how much water to take from Sonoma Water (Lakes Mendocino and Sonoma and the Russian River) in any given year as well as contractual issues and future negotiations with Sonoma Water to ensure and/or enhance future water supply to the District.

Sonoma County Water Agency (Sonoma Water)

Sonoma Water operates within the Russian River system. There are two major reservoirs that provide water supply for the Russian River watershed: Lake Mendocino on the East Fork of the Russian River and Lake Sonoma on Dry Creek. The Potter Valley Project ("PVP"), a hydroelectric project owned and operated by PG&E, provides an inter-basin water transfer to the East Fork of the Russian River. Its operations are not coordinated with the operation of Coyote Valley Dam at Lake Mendocino. PG&E releases water from Lake Pillsbury to meet minimum instream flow requirements on the Eel River and to divert water through the Potter Valley Project to generate electricity and maintain minimum instream flow requirements in the East Fork Russian River. The water diverted through the Potter Valley Project flows into the East Fork of the Russian River. The Potter Valley Irrigation District diverts a portion of the released water for irrigation, with the remaining eventually flowing to Lake Mendocino. Sonoma Water also operates groundwater wells to help augment supplies, especially in the event of emergency or water shortages due to drought.

PG&E has decided not to relicense the Potter Valley Project for hydroelectric use and is currently in the process of preparing a decommissioning plan under the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

In a follow-up email, you provided a copy of a press release, dated August 7, 2023, which states that Sonoma Water, in conjunction with The Mendocino County Inland Water and Power Commission and the Round Valley Indian Tribes, submitted a proposal to PG&E to include in its final license surrender application a request that the FERC issue a nonpower license to the New Eel-Russian Facility ("Facility"), which would preserve components of the modified Potter Valley Project diversion facilities and authorize the construction of the Eel-Russian facility.

The proposal submitted to PG&E would provide for the creation of a regional entity that has the legal and financial capacity to own, construct and operate a new water diversion facility near PG&E's Cape Horn Dam on the Eel River. Water diversions from the Eel River have been

vital to the Russian River basin for more than 100 years. The Facility would preserve water diversions into the Russian River through the Potter Valley Project site.

In a follow-up telephone conversation, you stated that the water supply contracts with Sonoma Water would not involve The Nature Conservancy, which would not be a party to the contracts. However, you also stated that Sonoma Water's ability to continue to deliver water to the District is tied to the continued diversions from the Potter Valley.

Russian River Water Forum (Water Forum)

Sonoma Water has been involved in ongoing discussions, including studies and analysis, related to the Potter Valley Project, with a view to maintaining diversions to the Russian River. Pursuant to one recent grant received by Sonoma Water from the Department of Water Resources, Sonoma Water undertook outreach to regional stakeholders and formed the Russian River Water Forum (Water Forum) to study and engage the interests of various stakeholders who rely on water from the Russian River. It is understood that what happens with the decommissioning and interim operation of the Potter Valley Project is of import to this group. The Water Forum does not appear to be a formal legal entity, but rather an association of agencies and nongovernmental organizations, including water users, agricultural, and environmental interests. According to the website:

The Russian River Water Forum is a collaborative effort initiated by Sonoma Water and a collection of regional partners with funding from the California Department of Water Resources. The Water Forum seeks to identify water-supply resiliency solutions that respond to PG&E's planned decommissioning of the Potter Valley Project while protecting Tribal interests and supporting the stewardship of fisheries, water quality, and recreation in the Russian River and Eel River basins. More broadly, the Water Forum supports ongoing regional collaboration on water supply and watershed restoration issues in the Russian River and Eel River basins.

The structure and work of the Water Forum has begun to crystalize and is formally organized into a Leadership Council, to be comprised of elected representatives of the various stakeholder agencies, including Sonoma Water and possibly the District, and a Planning Group, comprised of agency staff, including District staff, who will engage in technical workgroups to bring forward concepts and proposals to the Leadership Council. It is anticipated that the Leadership Council will evaluate proposals presented by the Planning Group, by taking these back to their respective agencies and then bringing back agency input to the Leadership Council to develop positions and possible future collaboration on actions that might grow out of the work of the Water Forum.

The Water Forum website presents the Planning Group as follows:

The Water Forum Planning Group is being convened to discuss and evaluate options for a local solution that responds to the planned decommissioning of the Potter Valley Project and can inform future negotiations with PG&E. The Planning Group is comprised of approximately 30 members

representing a cross-section of interests in Sonoma, Mendocino, Lake, and Humboldt Counties. Goals for the Planning Group include:

- Bring together interested parties in the Russian River and Eel River basins in a collaborative, solutions-oriented process.
- Improve understanding of water reliability uncertainties in the Russian River and Eel River basins.
- Problem-solve around the future of the Potter Valley Project, water supply resilience, and fisheries in both river basins.
- Identify funding sources to support water supply resiliency solutions and environment benefits in response to the planned decommissioning of the Potter Valley Project.

The Water Forum will consider what should become of the PVP facilities, specifically whether there should be a removal of Cape Horn Dam, or whether some of the facilities should be preserved to facilitate continued water diversions from the Eel River to the Russian River, as well as looking at sources of funding for any future work. There are likely to be divergent perspectives, and the group has determined that it will consider a majority vote for purposes of moving concepts or proposal forward.

The Nature Conservancy/Professional Work

Director Schmitt is employed by The Nature Conservancy, a multinational nonprofit corporation³ with the mission of environmental stewardship and conservancy, which derives its revenue from private as well as public donations. Director Schmitt is a Senior Project Manager, a salaried position, within the Water Program of the California Chapter of The Nature Conservancy. In that role, Director Schmitt is the Director of the Healthy Rivers Project and regularly engages on issues involving the Russian River on behalf of his employer under the direction of the Water Program Director and in accordance with a conservation strategy developed by the organization.

His work may include attendance at Water Forum Planning Group meetings, interaction with other stakeholders regarding possible outcomes for the PVP facilities, and future water diversions from the Eel River to the Russian River. As a stakeholder representative, Director Schmitt may help to develop policy positions regarding the PVP and provide oral or written comments to the Water Forum on behalf of The Nature Conservancy, either individually or as a signatory to collectively submitted comments.

Additionally, Director Schmitt, in his professional role as Senior Project Manager with the Nature Conservancy, is engaged with stakeholders, primarily landowners and agricultural interests, in the Alexander Valley region of Sonoma County along the northern reach of the Russian River. This region is not served by Sonoma Water but is substantially dependent upon the Russian River

³ We note that The Nature Conservancy is a U.S. nonprofit, tax-exempt charitable organization (tax identification number 53-0242652) under Section 501(c)(3) of the U.S. Internal Revenue Code.

as a primary water source. Schmitt has been asked to help provide guidance on sustainable water management, including groundwater management, flood recharge, drought planning, and the possible creation of a special district to serve the interests in this region and to help fund future projects.

Lastly, as Senior Project Manager with the Nature Conservancy, Director Schmitt has been a technical and policy advisor to Sonoma County regarding the recent adoption of a new well ordinance aimed at addressing a recent court decision applying the Public Trust Doctrine to groundwater wells that have an adverse impact on navigable surface waters. The Sonoma County Board of Supervisors adopted a new well ordinance on April 18, 2023. The ordinance considers potential adverse impacts on public trust resources, such as habitat for Coho salmon, when approving well permits. The amended ordinance also includes requirements for water conservation measures for all new wells, and requirements for well meter installation and water use reporting of new non-residential wells. Currently, Director Schmitt's role is to engage in the adaptive management process, which includes modeling and data collection that will help to inform planning and management tools going forward.

ANALYSIS

Under Section 87100, a public official may not make, participate in making, or use 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 decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).)

Among those specified economic interests is "[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made." (Section 87103(c).)

Director Schmitt has a source of income interest in his employer, The Nature Conservancy, a 501(c)(3) nonprofit organization. As such, he will be disqualified from governmental decisions where it is reasonably foreseeable that the decision would have a material financial effect on The Nature Conservancy. No specific decisions with accompanying facts as to the possible effect of the decision on The Nature Conservancy are provided for a full analysis. The following is provided for general information.

Foreseeability and Materiality

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial 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 financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)."

1. District Decisions Where The Nature Conservancy is Explicitly Involved

Regulation 18702.3 provides the applicable standard for determining whether the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a nonprofit source of income is material. If The Nature Conservancy is a claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding, it will be reasonably foreseeable that the decision will have a material effect on Director Schmitt's financial interest and Director Schmitt may not participate in the decision. (Regulation 18702.3(a)(1).)

2. District Decisions Where The Nature Conservancy is Not Explicitly Involved

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

Regulation 18702.3(a)(3) provides the applicable materiality standard for a nonprofit source of income not explicitly involved in a decision. It requires the examination of three areas of possible impacts on the nonprofit entity as a result of the decision: annual gross receipt or asset/liability changes, changes to expenses, and impacts on a real property interest. For the first category, the financial effect is material if the decision may result in an increase or decrease of the nonprofit organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or greater than \$1,000,000; or five percent of the organization's annual gross receipts and the increase or decrease is at least \$10,000. (Regulation 18702.3(a)(3)(A).) For the second, the effect is material if the decision may cause the entity to incur or avoid additional expenses, or to reduce or eliminate expenses, in an amount equal to or greater than \$250,000; or one percent of the organization's annual gross receipts and the change in expenses is at least \$2,500. (Regulation 18702.3(a)(3)(B).) For the third, the financial effect is material if the organization has an interest in real property and the property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) through (6); or there is clear and convincing evidence the decision would have a substantial effect on the property. (Regulation 18702.3(a)(3)(C).)

If The Nature Conservancy is affected in any of the above manner, it will be reasonably foreseeable that the decision will have a material effect on Director Schmitt's financial interest, and he may not participate in the decision. (Regulation 18702.3(a)(1).)

Nexus Test

In addition to the materiality standard described above, there is also a separate materiality standard that applies in cases where there is a "nexus" between duties owed to a source of income and to the official's public agency.

Under the nexus test, any reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).)

The rationale for the nexus test is that, when an employee earns a salary to accomplish a purpose that may be advanced by what they do as a public official, we presume that the private employer is benefiting from the actions of the employee in their official capacity. (*Garza* Advice Letter, No. A-17-207; *Tran* Advice Letter, No. A-16-024; *Maltbie* Advice Letter, No. A-15-243.) Typically, a "nexus" is found in situations where the official is also a high-level employee with direct influence and control over their employer's management or policy decisions. (*Tran* Advice Letter, *supra*; *Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-305.)

While you have not provided any specific decisions, it is likely Director Schmitt would generally be disqualified under the Act from taking part in District Board decisions relating to the work of the Water Forum, and Sonoma Water's operations within the Russian River system, because of the nexus between the decisions and the income he receives for work as a paid employee of The Nature Conservancy. Without facts concerning a specific decision, we can only provide this general information. If Director Schmitt needs additional assistance regarding matters in which The Nature Conservancy is not explicitly involved and whether the nexus test may apply, he should seek further advice identifying the specific decision.

Section 1090

Section 1090 presents a separate set of prohibitions from the Act and requires a separate analysis. Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Section 1090 concerns financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) "[A]n official has a financial interest in a contract if he might profit from it." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.)

As you have not limited your question to an identified contract, we cannot provide advice regarding the application of Section 1090 to Director Schmitt and the facts presented. However, we can generally advise that, to the extent Director Schmitt has a financial interest in a decision, Section 1091(b)(1) provides that an officer or employee of a nonprofit corporation or Internal

Revenue Code Section 501(c)(3) entity has only a remote interest in the contracts involving the nonprofit entity. Moreover, if a “remote interest” is present, the contract may be made if (1) the official in question discloses their financial interest in the contract to the public agency, (2) the interest is noted in the entity’s official records, and (3) the official abstains from any participation in the making of the contract. (Section 1091(a).) Please note that if Director Schmitt is prohibited from participation in a decision under the Act, he must also leave the room prior to the consideration of the item.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
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