

Meeting Date: May 25, 2016
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1450 Halyard Drive, Suite 6
West Sacramento, CA 95691
www.deltaconservancy.ca.gov

Conflict of Interest Policy
May 25, 2016 *CONSENT CALENDAR*

During the April 27, 2016 Program and Policy Subcommittee meeting, it was determined that the Conflict of Interest Code and Board Member Letter are sufficient for the Conservancy's purposes, and that a Conservancy-specific Conflict of Interest policy is not required.

This recommendation is included for approval on the Consent Calendar for the May 25, 2016 Board meeting and the Conflict of Interest Code and Board Member Letter are attached for your review.

Contact Person:

Brandon Chapin, Board Liaison
Sacramento-San Joaquin Delta Conservancy
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March 23, 2016

Sacramento-San Joaquin Delta Conservancy Board members
Via email to individual members

RE: Sacramento-San Joaquin Delta Conservancy – Introductory Letter
Confidential Attorney-Client Communication

Dear Board member:

As a new member of the Delta Conservancy (“Conservancy”) Board (“Board”), I want to provide you with information regarding certain legal requirements that apply to you as a Board member and to the Conservancy as a whole. The Conservancy’s enabling statute, Public Resources Code Sections 32300 – 32380, generally defines the Conservancy’s authority and jurisdiction. The Conservancy and its Board is also subject to other general legal requirements, including those regarding oaths of office, open meetings, conflicts of interest, ethics, and public records. This letter is not a comprehensive discussion of the legal requirements that apply to you as a Board member, but should provide you with a basic understanding of these rules and assist you in identifying potential issues that may affect your actions as a Board member. The legal requirements outlined in this letter apply equally to voting and non-voting members, except for the requirements outlined in the last section of the letter titled “Additional Requirements For Voting Members.”

Oath of Office

In order to serve as a Board member you are required to take an oath of office. (Gov. Code § 1360.) You must perform the responsibilities of your office consistent with that oath. Typically, the Deputy Attorney General representing the Conservancy will administer the oath and provide an executed copy of the oath to the Secretary of State, the Conservancy, and you. In addition, when you depart from office, the Conservancy, or the Deputy Attorney General representing the Conservancy, shall report your departure to the Secretary of State. (Gov. Code, § 1363.)

Open Meetings

The Conservancy is subject to the Bagley Keene Open Meeting Act (“Bagley Keene”). (Govt. Code § 11120 et. seq.). A copy of the Attorney General Office’s manual regarding

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Bagley Keene can be found here: http://www.ag.ca.gov/publications/bagleykeene2004_ada.pdf. Broadly speaking, Bagley Keene requires that the Board properly notice and hold open meetings. All meetings must be noticed ten days in advance and must be open to the public unless Bagley Keene authorizes the Board to meet in closed session. Permissible subjects for discussion in closed session may include certain personnel matters, pending litigation, or real estate transactions. Non-voting members are not permitted to participate in closed sessions. In some limited circumstances, the Conservancy may also notice special or emergency meetings.

As a Board member, you should be particularly aware of Bagley Keene's prohibition on serial meetings. Serial meetings typically involve a series of communications, directly or through an intermediary, each of which involves less than a quorum of the Board, but when taken as a whole involve a majority of the members discussing an item within the Board's jurisdiction. This could include, for example, a series of e-mail exchanges or communications with the Executive Officer where the Executive Officer is acting as an intermediary to convey the questions or opinions of Board members with other Board members. These serial communications are prohibited. Importantly, though, Bagley Keene does not prohibit staff, including the Executive Officer, from having individual conversations with Board members to answer questions or provide them with information regarding matters within the Conservancy's jurisdiction, as long as the staff members do not convey the views or comments of other Board members.

Conflicts of Interest

In addition to the open meeting law requirements, as a Board member you will be required to comply with conflict of interest laws. Here are some resources for assisting you with understanding your obligations under these conflict of interest laws:

- The Fair Political Practices Commission (FPPC) provides a quick guide for compliance, which can be found here <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/conflict-of-interest.html>.
- The FPPC also provides a more detailed guide here: <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Conflicts%20of%20Interest/Conflicts-Guide-August-2015-Jan-2016-Edits.pdf>.

I have also attached a copy of the Board's conflict of interest policy.

Generally speaking, these laws and policies require that you disclose certain economic interests and recuse yourself from any matters in which you have a financial interest or in which you may have a perceived conflict of interest. You are also prohibited from holding incompatible offices. If you have any questions regarding a potential conflict, you may ask me or, for a formal opinion, consult the FPPC. You should understand that the Attorney General's

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Office advises the body as a whole, not individual members, so any advice we provide you may be disclosed to the Board, the Board Chair, and/or the Executive Officer. Also, please note that conflicts of interest issues can be quite complex and should be addressed well in advance of the meeting where the conflict-creating action may be taken.

1. Political Reform Act

Under the Political Reform Act (“PRA”) (Gov. Code section 81000 et seq.), a public official may not “make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” (Gov. Code, § 87100.) If it is reasonably foreseeable that the decision will have a material financial effect on one or more of a Board member’s “economic interests,” as defined in the PRA, then the interested Board member must refrain from any participation in the decision. The “economic interests” covered by the PRA include, but are not limited to, certain interests in real property, including those interests of your spouse and children; business investments, including serving as a director, officer, or employee of a for-profit entity; and sources of income and gifts over specified limits. The FPPC links above provide the current limits. If an economic interest exists, a fact specific analysis will need to be done to determine whether a decision’s impact on that interest is foreseeable and material, and to determine whether any exceptions apply. Violations of the PRA can result in administrative, civil, and criminal penalties, as well as a potential four-year ban on becoming a candidate for elective office or a lobbyist.

2. Government Code Section 1090

Government Code section 1090 et. seq. prohibits a public official from being financially interested in a contract made by the Conservancy. This prohibition applies to grants made by the Conservancy. A Board member only has a financial interest in a contract or grant, for purposes of Government Code section 1090, if there is a direct nexus between the contract and the individual member’s compensation or his or her spouse’s compensation. Mere employment with a contracting entity has not been held to be a sufficient financial interest to trigger Government Code section 1090. (*Eden Tp. Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, 226.)

If, however, there is a direct nexus between a member’s financial benefit and a contract or grant being considered by the Conservancy, the Board member may not participate in the development, negotiation, or execution of the contract or grant. The prohibition has been interpreted broadly to apply to the early phases of negotiating a contract including the “planning, preliminary discussion, compromises, drawing of plans and specifications, and solicitation of bids.” (See *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 570.) If the member fails to recuse him or herself, the entire Board is disqualified from entering into the contract, unless the financial interest qualifies as a “remote interest” under the statute. Also, note that depending on the timing and sequence of events, recusal may not be an effective option. Board members with potential conflicts under Government Code section 1090 are, therefore, strongly encouraged to consider

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the potential for a conflict early, and if possible, before becoming involved with the contracting party or any of the Board's discussions regarding the contract.

The statute defines, in detail, when a financial interest is remote. A Board member whose interest falls into one of the statutorily defined remote interest categories must refrain from any negotiation, discussion, or decision on the contract, and follow certain procedural steps, but the interest would not prevent the Conservancy from entering into the contract or grant.

Violations of section 1090 can result in voiding the contract, forfeiture of any benefits received under the contract, criminal penalties, as well as a potential permanent ban on holding any public office in the state.

3. Common Law Conflict of Interest Requirements

The common law conflict of interest doctrine requires that a public officer exercise the "powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) A conflict of interest may be found if a public official, rather than acting on a matter with dispassion, is acting to enhance his or her own private interest. Unlike the PRA and Government Code section 1090, the common law doctrine of conflicts of interest applies to situations involving nonfinancial personal interests as well as financial interests. Where a common law conflict of interest exists, disclosure of the interest and disqualification from the decision making process are required. (26 Ops.Cal.Atty.Gen. 5, 7 (1955).)

4. Doctrine of Incompatible Offices

The common law doctrine of incompatible offices arises when a potential clash in duties or responsibilities occurs between two public offices and prevents a single officeholder from entirely fulfilling the responsibilities of one or both positions. The doctrine is premised on the theory that the officeholder cannot "serve two masters." A public officeholder who assumes an incompatible office is deemed to have vacated his or her first office. Notably, the doctrine does not apply where the legislature has expressly authorized the incompatibility. (90 Ops.Cal.Atty.Gen. 24 (2007); (78 Ops.Cal.Atty.Gen. 60 (1995).)

Public Records

Finally, you should note that the Conservancy is subject to the Public Records Act (Govt. Code § 6250 et. seq.). Under the Public Records Act, public records must be accessible to the public for review. The Public Records Act defines public records to include any writing that is "prepared, owned, used or retained any state or local agency." Whether communications executed with your own personal device or email address are considered public records is an open question that is currently up for review by the California Supreme Court. (*City of San Jose v. S.C.* (Cal. 2014) 173 Cal.Rptr.3d 46). You should be aware that until the issue is resolved,

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communications made using your phone, personal computer, or email account *may* be subject to disclosure under the Public Records Act.

These requirements can be quite complex as applied to any particular situation. My office is here to assist you and the Conservancy with these issues, so please do not hesitate to contact me if you have any future questions.

Additional Requirements For Non-Liaison Members

Gift Limitations and Form 700 Filing

The Political Reform Act requires state agencies to adopt a conflict of interest code that identifies those Board members and employees that are required to disclose economic interests, including gifts, income, investments, etc. (e.g., Gov. Code §§ 89503(c)). The Delta Conservancy has adopted a conflict of interest code that requires only voting members to file a statement of economic interest or "Form 700." Information about the Form 700 can be found here: <http://www.fppc.ca.gov/Form700.html>. The current gift limit for designated officials of state agencies is \$460.00 per calendar year from a single source. In addition, officials and employees of state agencies are subject to a \$10 per calendar month limit on gifts from lobbyists and lobbying firms registered with the Secretary of State.

State Agency Ethics Training

Government Code section 11146 et seq. requires Board members that are required to file economic disclosures to attend an orientation course on the relevant ethics statutes and regulations that govern the official conduct of state officials. (Gov. Code, §§ 11146 and 11146.1.) Board members must attend the orientation course within six months of the date they take office, and at least once during each consecutive two calendar years thereafter. (Gov. Code, § 11146.3.) The training is available by videotape and on the Internet. The Internet sites are at: www.caag.state.ca.us/ethics/index.htm and <http://www.fppc.ca.gov>. You must submit confirmation that you have completed the required course to the Conservancy, which will keep your record of attendance on file for five years. (Gov. Code § 11146.2.)

Sincerely,

NICOLE U. RINKE
Deputy Attorney General

Enclosures
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SACRAMENTO-SAN JOAQUIN DELTA CONSERVANCY

CONFLICT-OF-INTEREST CODE

The Political Reform Act (Government Code Section 81000, et seq.) requires state and local government agencies to adopt and promulgate conflict-of-interest codes. The Fair Political Practices Commission has adopted a regulation (2 Cal. Code of Regs. Sec. 18730) that contains the terms of a standard conflict-of-interest code, which can be incorporated by reference in an agency's code. After public notice and hearing, the standard code may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act. Therefore, the terms of 2 California Code of Regulations Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission are hereby incorporated by reference. This regulation and the attached Appendices, designating positions and establishing disclosure categories, shall constitute the conflict-of-interest code of the **Sacramento-San Joaquin Delta Conservancy (Conservancy)**.

Individuals holding designated positions shall file their statements of economic interests with the **Conservancy**, which will make the statements available for public inspection and reproduction. (Gov. Code Sec. 81008.) Upon receipt of the statements for the **Members of the Board and the Executive Officer** of the Conservancy, the **Conservancy** shall make and retain copies and **forward the originals to the Fair Political Practices Commission**. All other statements will be retained by the **Conservancy**.

SACRAMENTO-SAN JOAQUIN DELTA CONSERVANCY

CONFLICT-OF-INTEREST CODE

Appendix A

Designated Positions

<u>Designated Positions</u>	<u>Assigned Disclosure Category</u>
Member, Delta Conservancy	1
Executive Officer	1
Assistant Executive Officer (Program Manager II)	1
Program Manager I	1
Board Liaison (Assoc. Gov't Program Analyst)	2, 3
Associate Government Program Analyst	2, 3, 4
Staff Environmental Scientist	1
Executive Assistant	2
Consultant	*

*Consultants shall be included in the list of designated positions and shall disclose pursuant to the broadest disclosure category in the code subject to the following limitation:

The Executive Officer may determine in writing that a particular consultant, although a "designated position," is hired to perform a range of duties that is limited in scope and, thus, is not required to comply fully with the disclosure requirements described in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Executive Officer's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict-of-interest code. (Gov. Code Section 81008.)

**SACRAMENTO-SAN JOAQUIN DELTA CONSERVANCY
CONFLICT-OF-INTEREST CODE**

Appendix B

Disclosure Categories

Category 1

Every person in this category must report: All interests in real property in the State of California, as well as investments, business positions in business entities, and sources of income, including gifts, loans and travel payments.

Category 2

Every person in this category must report: Investments, and business positions in business entities, and sources of income, including gifts, loans and travel payments, from sources of the type that which provide services, supplies, materials, machinery or equipment of the type utilized by the Conservancy.

Category 3

Every person in this category must report: All interests in real property in the State of California.

Category 4

Every person in this category must report: Investments, business positions, and income, including gifts, loans and travel payments, if the source is of the type to receive grants, loans or scholarships, from or through the Conservancy.

NOTE: Authority cited: Sections 32300, et seq., Public Resources Code; and
Sections 87300 and 87304 Government Code.

Reference: Sections 87300, et seq., Government Code.

This is the last page of the conflict-of-interest code for the **Sacramento-San Joaquin Delta Conservancy**.



CERTIFICATION OF FPPC APPROVAL

Pursuant to Government Code Section 87303, the conflict-of-interest code for the **Sacramento-San Joaquin Delta Conservancy** was approved on April 15, 2011.

A handwritten signature in black ink, appearing to read "Roman G. Porter", written over a horizontal line.

Roman G. Porter
Executive Director
Fair Political Practices Commission

Pursuant to Government Code Section 11346.2:

Secretary of State Filing Date: May 12, 2011

Effective: June 11, 2011