

## **Responses to Comments on Amendments to State Water Board's Conflict of Interest Code**

The State Water Board received 14 comments on the proposed amendments to its Conflict of Interest Code. The comments fell roughly into six categories:

1. Comments suggesting corrections to the document – four comments were focused on correcting issues such as adding positions that were left off, being consistent in using singular v. plural, taking out term “chief” – all changes were made.
2. Concerns about having to disclose property interests – three letters expressed concerns about having to disclose property interests, specifically concerns were raised about how this affects staff's privacy interests. Comments were responded to individually, explaining that employees are not required to list their primary residence on the Form 700, but it is still considered an economic interest for conflict of interest purposes. For property interests that have to be listed, such as rental properties within the jurisdiction of the employee for which rental income is received, it is sufficient to use an assessor's parcel number instead of a street address.
3. Questions as to why State Water Board is adding positions to the code – two commenters questioned why the State Water Board is updating its conflict of interest code to include the professional staff, including engineers and scientists. Commenters were responded to (see attached letter to unions), describing the recent decision by the Fair Political Practices Commission (FPPC) that brought to our attention that our current conflict-of-interest code does not include all the positions where staff participate in making decisions.
4. Comments that not all professional staff should be designated in the code – three commenters stated that they did not think that their position should be designated because their work is purely technical or ministerial, or they do not make decisions that have a material effect on a financial interest, and that only seniors or managers do. Employees that participate in making governmental decisions must be designated, unless there is “significant intervening substantive review” of their work. “Significant intervening substantive review” has been interpreted by the FPPC to require more than the mere review by superiors of the recommendations, but rather the independent checking of the results without solely relying on the data or analysis provided by the staff person. Staff is, therefore, considered to participate in a decision, even if it is reviewed by superiors, if: (1) those superiors rely on the data or analysis prepared by the staff person without checking it independently; (2) those superiors rely on the professional judgment of the staff person; or (3) if the staff person in some other way actually may influence the final decision.

5. Questions as to specific situations – three commenters had questions about what economic interests would have to be disclosed in their specific situations. There will be follow-up, including online training and resources, for those who have questions as to what interests should be disclosed.
6. Comment regarding vagueness of disclosure categories – the unions for the Professional Engineers in California Government (PECG) and the California Association of Professional Scientists (CAPS) submitted comments, raising questions about what is required under the disclosure categories 2, 6, and 9. These categories require disclosure of economic interests of the type to contract with or be regulated by the state or regional boards, or to provide research, planning, or environmental impact reporting services related to water supply or water quality. No changes are being proposed to these disclosure categories. None of the language in disclosure categories 2, 6, and 9 is new; it is the language used in the current Water Boards' Conflict of Interest Code, and it comes from template language provided by the FPPC. As explained in the letter to the unions, which is attached, it is not necessary for employees to be aware of every entity that provides services to, or is regulated by, the state and regional boards, or to know which entities provide research, planning, and environmental impact reporting services. Rather, once employees identify their own economic interests, they only need to determine whether their economic interests are "of the type" to provide services to or be regulated by the State Water board or provide research, planning and environmental impact reporting services. If an employee is uncertain whether a particular economic interest fits within the applicable disclosure category, there are resources at the Water Boards that provide guidance to make that determination.

## State Water Resources Control Board

December 23, 2022

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***Sent by Email***

Good Afternoon,

Thank you for attending the joint PECG and California Association of Professional Scientists (CAPS) meet and discuss with the State Water Resources Control Board (Water Boards) on November 22, 2022, for the amendments to the Water Boards' Conflict of Interest Code. During the meeting, we reviewed the questions you provided on November 8, 2022, and answered your questions and concerns. You indicated that you would provide suggestions for language for the disclosure categories.

On November 29, 2022, I followed up on requests you made during the meeting, providing (1) confirmation of an extension to the staff comment period to December 15, 2022; (2) the 2018 decision by the Fair Political Practices Commission (FPPC) involving Stephen Rooklidge, which prompted the Water Boards' decision to expand the its conflict of interest code to designate professional staff; and (3) information on the resources and educational tools provided to Form 700 filers. Additionally, I confirmed that to all Water Boards employees were notified of the Conflict of Interest Code amendment and the staff comment period on October 14, 2022.

On November 30, 2022, you asked "how the department will protect employee's home address since per Cat 4, they have to provide that info." In response, I provided a link to the [Form 700 FAQ's](#), specifically questions 17 and 19, to answer your question. Filers do not have to list their primary residence on the Form 700, but it is still considered an economic interest for conflict of interest purposes. Question 21 also notes that it is sufficient to use an assessor's parcel number instead of a street address.

The Water Boards will pursue approval of the current version of the Conflict of Interest Code amendments provided to PECG and CAPS on October 13, 2022. Per your December 7, 2022, letter on behalf of PECG, below are written responses to the questions you submitted on November 8, 2022.

## **1. Why the State Water Board is Adding Positions to the Conflict of Interest Code**

Section 87302 of the Government Code requires that state agencies' conflict of interest codes specify positions that involve "the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." Staff who are serving in positions that are designated in the conflict of interest code must file a Form 700 annually. The current, 2016 version of the conflict of interest code includes most of the positions that *make* decisions (for example, those that sign orders or letters or issue permits), but a 2018 Advice Letter by the Fair Political Practices Commission (FPPC) brought to our attention that our current conflict of interest code does not include all the positions where staff *participate* in making decisions. (FPPC Adv. A-18-224, Stephen Rooklidge, Nov, 6, 2018.) We are, therefore, expanding the conflict of interest code to cover those positions.

The FPPC Advice Letter does not directly address who must file, and instead is focused on whether an engineer who left the Water Boards and went to work for a drinking water system, was subject to the post governmental employment provisions of the Political Reform Act. Because the water system was coming to the Water Boards for a grant, the question before the FPPC was whether Mr. Rooklidge could participate in the proceedings for entering into an agreement for the grant on behalf of the water system, or whether he was subject to the one-year ban, which prohibits an employee of a state agency from appearing before that agency for a year after leaving the agency. However, who is subject to the one-year ban is generally tied to who is designated in the conflict of interest code.

Section 87406(d)(1) of the Government Code prohibits a "designated employee" of a state administrative agency from acting as a paid agent for, or otherwise represent, any other person before any state administrative agency for which he or she worked during the 12 months before leaving employment, if the appearance is made for the purpose of influencing an administrative or legislative action, or influencing any action or proceeding, including the issuance of a grant. Here, the employee was not designated in the conflict of interest code, and so would normally would not be subject to the one-year ban. But the FPPC concluded that this staff person was involved in participating in making governmental decisions that could affect a financial interest. The FPPC concluded that the engineer position involved more than gathering or calculating data; it involved the analysis and recommendation of actions in response to data. The staff person's superiors relied on his reports, analyses and professional judgements. Even though the supervisors - a Senior Engineer and Principal Engineer – were the signatories on the notices and letters that went out to the regulated water systems, they relied on the staff person's recommendations, and there was no "significant intervening substantive review."

“Significant intervening substantive review” has been interpreted by the FPPC to require more than the mere review by superiors of the recommendations, but rather the independent checking of the results without solely relying on the data or analysis provided by the staff person. Staff is, therefore, considered to participate in a decision, even if it is reviewed by superiors, if: (1) those superiors rely on the data or analysis prepared by the staff person without checking it independently; (2) those superiors rely on the professional judgment of the staff person; or (3) if the staff person in some other way actually may influence the final decision.

Therefore, even though the employee was not designated, the FPPC concluded that he should have been, noting, “the determining factor in applying the one-year ban is whether the employee holds a position that ‘entails making or participating in making decisions that may foreseeably have a material effect on any financial interest.’ ***This applies whether or not the employee’s position has been properly designated by the agency’s conflict-of-interest code.***” (FPPC Adv. A-18-224, p. 3 (emphasis added, and citing section 18746.1, subd. (a)(4) of the Code of Regulations).) The FPPC then went on to analyze how the work performed by the engineer demonstrated that he “participated in making governmental decisions,” even though his work was reviewed by his supervisors. This analysis made clear to the Water Boards that it is likely that all of its professional staff, including not only its engineers, but also its environmental scientists and other professional staff, are participating in making governmental decisions, and therefore should be identified in the conflict of interest code, consistent with Government Code section 87302.

When the Water Boards made the decision to expand the Water Boards’ conflict of interest code to designate professional staff, it left the final determination up to the head of the organizational unit to determine whether a position makes or participates in making governmental decisions. Management was advised that if activities performed by a position are “purely technical or ministerial,” such that there is no discretion as to the outcome, that position need not be designated. This may be appropriate, for example, where a position analyzes whether data meet criteria that were previously determined by others, and there is no discretion in the exercise of that duty. Similarly, a position that implements a preapproved set of guidelines or rules without the exercise of discretion does not make or participate in making a governmental decision. Note, however, that the exception does not apply to “technical tasks, such as most data gathering or analysis,” where professional judgments are made that can affect the ultimate decision in question. The example given by the FPPC is where there are several “right” answers to a question, and the employee not only does an analysis and calculation, but also decides or advises as to which is the “best” right answer – in such a situation the task is no longer ministerial. If the choice of which “right” answer to use will influence the governmental decision, the employee is participating in the decision.

Management did not exempt any of the professional staff. If staff believe that their position should not be designated, they have the ability to talk to their management to see if the work they do is purely technical or ministerial. However, it should be noted that assignments often shift and change, and so even though an employee may not be participating in making decisions daily, management needs to ensure that staff are available to fill those roles as needs arise.

## **2. Disclosure Categories**

Note that none of the language in disclosure categories 2, 4, 6, and 9 is new, it is the language used in the current Water Boards' Conflict of Interest Code, and it comes from template language provided by the FPPC. None of it has been problematic in the past. One reason we have not had issues with employees not understanding their reporting requirements is because we provide training and resources to assist employees in understanding what economic interests need to be disclosed. Another reason is that we typically do not find employees to have economic interests in the types of disclosures being requested. Although many people have a home, income from a spouse, and perhaps retirement funds, no one is required to disclose their personal residence or stocks that are held in a diversified mutual fund or a defined contribution plan 401(k) or exchange traded fund (ETF). Only investments worth \$2,000 or more in a business entity located in or doing business in the jurisdiction must be disclosed if the employees' disclosure categories requires that the investments be reported.

The questions that you submitted November 8, 2022, expressed concerns related to how employers are supposed to know or understand if they have economic interests that are "of the type" that contracts with, provides services for, or are regulated by the Water Boards. The questions and hypotheticals that you offered during our meeting on November 22, 2022, focused on what the words in the disclosure categories mean, and how employees are expected to know whether they have the interests that are of similar types. Instead of trying to figure out what the categories mean in abstract, each person must consider their own economic interests, and then compare those with the disclosure categories.

When each employee considers their different economic interests, the list is not usually very long. Typically, economic interests include the source of their spouse's income and any additional income that they receive outside of their job at the Water Boards, including secondary employment or from rental properties; individual stocks worth over \$2,000; any business entity that they have a business position in; and the source of any gifts, including food, worth over \$50 if it is from a source the employee would have to report. Gifts from family and friends are not reported. Once the list of discrete assets is complete, the employee can then consider whether the asset fits within the applicable disclosure category.

By focusing first on what economic interests a person has, it is not necessary for employees to know all of the entities that contract with, provide services for, or are regulated by the Water Boards. Instead, they only need to determine whether their economic interests are “of the type” to do so, and if an employee is uncertain whether a particular economic interest fits within the applicable disclosure category, there are resources at the Water Boards that could provide guidance for them to make that determination. Going through this exercise of identifying economic interests is helpful in thinking about potential conflicts and avoiding becoming involved in decisions that could affect their economic interests. Note too that if an employee realizes that they forgot to list an economic interest, it is easy to file an amended Form 700.

**a. Disclosure of Interests in Real Property**

Actions taken by the Water Boards may have an affect on real property. There are many potential examples of ways decisions regarding the regulation of water rights, water quality, and drinking water could affect property interests. For example, decisions by engineers in regulating public water systems that supply drinking water or publicly owned treatment works that treat waste water could result in a water system needing to install additional treatment, which could affect costs to homeowners served by those facilities. Similarly, decisions by the Division of Financial Assistance to issue grants to public water systems could affect property values served by those systems. Note that for regional board staff, the Water Boards’ conflict of interest code limits disclosures to the jurisdiction of the regional board that a person works for. The jurisdiction of reporting for the rest of the staff is state-wide, as the State Water Board’s jurisdiction is state-wide.

The FPPC’s FAQ on filing the Form 700 notes that “Generally, any personal residence occupied by an official or their family is not reportable if used exclusively as a personal residence. However, a residence for which a business deduction is claimed is reportable if the portion claimed as a tax deduction is valued at \$2,000 or more. In addition, any residence for which an official receives rental income is reportable if it is located in the jurisdiction.” (FPPC Form 700 FAQ, Ques, 19 - [Form 700 FAQs \(ca.gov\)](#).) For rental properties, the FAQ also only requires reporting if the residence is located in the official’s jurisdiction and rental income is received (including from a family member). If the residence is used exclusively for personal purposes and no rental income is received, it is not reportable; however, it would still be considered an economic interest for conflict of interest purposes. (FPPC Form 700 FAQ, Ques. 20). Note too that if a residence is required to be reported that one can use the assessor’s parcel number rather than the street address in identifying the property. (FPPC Form 700 FAQ, Ques. 21.)

**b. Responses to Questions related to Disclosure Category 2**

Disclosure category 2 relates to entities of the type to contract with the Water Board for “services, supplies, materials, machinery and equipment.” The Business Operations Branch of the Division of Administrative Services maintains a current list of the entities that contract with the Water Boards and procurement purchase order log of supplies, materials, machinery, and equipment on the intranet; these two logs are available to all staff and may be viewed at the Water Boards’ regional/organizational level or at the statewide level. In addition, people in the offices generally know of the types of services, supplies, materials, machinery, and equipment that the Water Board contracts with just by looking around and being familiar with the services, supplies, materials, machinery and equipment that they see used. “Of the type” means of a similar kind, and the terms have their plain meaning; there are no definitions set out elsewhere. Once employees identify their economic interests, a person should be able to determine whether they have any economic interests that would need to be reported.

**c. Responses to Questions related to Disclosure Category 6**

Disclosure category 6 relates to entities that provide research, planning or environmental impact reporting services related to water supply or water quality. These types of entities are generally engineering firms and environmental consulting firms, and they generally provide their services to entities that the Water Boards regulate, such as cities and public water systems. This economic interest most often comes up related to a spouse’s salary. Employees are not expected to know which entities provide this type of services. Instead, they need to know what economic interests they have, and whether any of those economic interests provide research, planning or environmental impact reporting services.

**d. Response to Questions related to Disclosure Category 9**

Disclosure category 9 relates to entities that are of the type to be regulated by the Water Boards. “Of the type regulated by the board,” means those types of entities that the board licenses, permits, certifies, accredits, or registers. As noted previously, employees do not need to know every type of person that applies for any license, permit, certificate, accreditation, or registration; rather the employee just needs to be aware of their economic interests, and then consider whether any of those economic interests are of the type that the Water Boards regulate. If an employee is not sure, there are resources at the Water Boards to provide guidance to help the employee determine whether they need to disclose an economic interest because it is the type regulated by the Water Boards.



Water Boards Conflict of Interest Code Amendment  
December 23, 2022

If you have any questions, please contact me at [Anissa.Kotey@waterboards.ca.gov](mailto:Anissa.Kotey@waterboards.ca.gov).

Sincerely,

<original signed by>

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