

PIA



May 28, 2014

Zackery Morazzini
General Counsel
Fair Political Practices Commission
428 J St., Suite 620
Sacramento, CA 95814-2329
zmorazzini@fppc.ca.gov

Via email and Federal Express

RE: Comments in Support of the FPPC's Order to Add Port Agent to the Conflict of Interest Code of the Board of Pilot Commissioners

Dear Mr. Morazzini,

Please find attached the Comments of the Pacific Merchant Shipping Association in support of the Order to the Board of Pilot Commissioners of February 21, 2014. These comments are offered in response to the Board's request on April 22, 2014 for a hearing regarding this Order before the full Fair Political Practices Commission by the Board under Regulation §18750(h).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Mike Jacob', is written over a light blue horizontal line.

Mike Jacob
Vice President & General Counsel

cc: Dennis Eagan, Dep. Attorney General, counsel for Board of Pilot Commissioners
Diane Fishburn, Olson Hagel & Fishburn LLP

1 Michael Jacob, SBN 232214
2 Vice President & General Counsel
3 Pacific Merchant Shipping Association
4 250 Montgomery St., Suite 700
5 San Francisco, CA 94610
6 Phone: (415) 352-0710
7 Fax: (415) 352-0717
8 Email: mjacob@pmsaship.com

9 Diane Fishburn, SBN 96812
10 Olson Hagel & Fishburn LLP
11 555 Capitol Mall, Suite 1425
12 Sacramento, CA 95814
13 Phone: (916) 442-2952
14 Fax: (916) 442-1280
15 Email: diane@olsonhagel.com

16 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

17 STATE OF CALIFORNIA

18 In the Matter of:

19 Order by the Fair Political Practices
20 Commission of February 21, 2014 Directing
21 the Board of Pilot Commissioners for the Bays
22 of San Francisco, San Pablo, and Suisun to add
23 the position of Port Agent to its Conflict of
24 Interest Code (Government Code § 87307)

25) COMMENTS OF PACIFIC MERCHANT
26) SHIPPING ASSOCIATION IN SUPPORT
27) OF THE ORDER OF FEBRUARY 21, 2014

28) Before the FPPC: July 17, 2014

29 The Pacific Merchant Shipping Association (“PMSA”) respectfully submits these
30 comments in Support of the Order issued by the Fair Political Practices Commission on February
31 21, 2014 (“Order”) directing amendment of the Conflict of Interest Code of the Board of Pilot
32 Commissioners (“Board”) to include the position of Port Agent.

33 The Order concluded as follows (at 3):

1 ... there is no real dispute between the parties as to any fact pertinent to the
2 requested code amendment. However, both parties differ substantially on how to
3 interpret the Political Reform Act ("Act"). Applying the pertinent facts to the
4 Act, I conclude that the Port Agent, in execution of his statutory and regulatory
5 duties, acts [as] an officer or agent of the Board and is a public official who
6 makes or participates in the making of governmental decisions by the Board.

7 Most of the arguments made and facts asserted by the Board in its brief in Opposition to
8 the Order are similar or identical to those raised in earlier communications with the FPPC prior
9 to the issuance of the Order. Therefore, in large measure, PMSA's responses are also the same,
10 or similar to, those in our earlier submissions. For brevity's sake, we respectfully incorporate all
11 of our prior submissions by reference here and rest on all of the facts and evidence previously
12 submitted save for one new exhibit added to this submission. For additional reference regarding
13 any argument, please reference PMSA's original Petition to the FPPC of November 21, 2013 and
14 our supplemental responses of January 17, 2014 and February 7, 2014.

15 Background

16 The State of California has adopted a compulsory harbor pilotage system to aid in the
17 navigation of ocean-going vessels in and out of San Francisco Bay. Division 5, §§ 1100 et seq.,
18 Harbors & Navigation Code ("HNC"). The state Board of Pilot Commissioners is created and
19 tasked with the regulation of this system and licensure of state pilots. HNC §§ 1150, 1154. To
20 regulate this pilotage, the Legislature has mandated that one pilot licensee fill the office of Port
21 Agent, whose job is to carry out the Board's orders, fulfill specific public duties, and supervise
22 the execution of the duties of all licensed pilots. HNC §1130, 7 CCR §218.

23 The Board is a state agency that must adopt a Conflict of Interest Code ("Code"), and
24 amend it as necessary to reflect changed conditions, in order to satisfy the requirements of the
25 Political Reform Act. Title 9, §§ 81000 et seq., Government Code ("Act"). Under the Act, the
26
27
28

1 Board's Conflict of Interest Code must designate all public officials who must file statements of
2 economic interests and disclose to the public all potentially disqualifying financial interests.

3 §87302.¹ Each Conflict of Interest Code must "provide reasonable assurance that all
4 foreseeable potential conflict of interest situations will be disclosed or prevented." §87309.
5

6 The Board has adopted a Conflict of Interest Code which does not include the Port Agent
7 as a designated position. 7 CCR §212.5, App. A.

8 The ultimate responsibility for approving, filing, and ensuring the proper drafting of an
9 agency Conflict of Interest Code rests with a "code reviewing body," and the code reviewing
10 body for all state agencies, including the Board of Pilot Commissioners, is the Fair Political
11 Practices Commission ("FPPC"). The FPPC in this role must approve or disapprove proposed
12 Conflict of Interest Code adoptions and amendments. §§ 87303-87309, 87311; Reg. §18750.
13 When acting in this capacity, the FPPC remains obligated to approve only those Codes and Code
14 amendments which provide for a "reasonable assurance that all foreseeable potential conflict of
15 interest situations will be disclosed or prevented." §87309.
16
17

18 **Procedural History**

19 Pursuant to §87307, on September 16, 2013 PMSA requested that the Board include the
20 Port Agent in its Conflict of Interest Code. On October 24, 2013, the Board denied the request.
21 PMSA appealed this matter to the FPPC for its consideration on November 21, 2013. The FPPC
22 twice sought supplemental correspondence from the Board and PMSA, to which both parties
23 provided additional correspondence and evidence on January 17 and February 7, 2014.
24

25 On February 21, 2014, the FPPC issued its Order in this matter and directed the Board to
26 amend its Conflict of Interest Code to include the Port Agent because the Port Agent is a public
27

28 ¹ All further statutory references to the Political Reform Act are to the Government Code. References to regulations of the FPPC implementing the Act (Cal. Code Regs., Title 2), will be noted as "Reg. ..." in lieu of "2 CCR ..."

1 officer with decisionmaking authority. This conclusion was reached in reliance on the large
2 record of relevant facts and law provided to the FPPC by both PMSA and the Board and was
3 consistent with the evidence presented in the original petition and supplemental materials. The
4 FPPC directed the Board to amend its Code under Reg. §18750(f)(2).

5
6 On April 22, 2014, the Board exercised its right to a hearing under Reg. §18750(h). This
7 matter is now set to be heard at the regular meeting of the FPPC of July 17, 2014.

8 **The Order Meets the Political Reform Act Requirement That “All Foreseeable Potential**
9 **Conflict of Interest Situations Will Be Disclosed Or Prevented”**

10 The Political Reform Act is to be construed broadly in favor of disclosure and
11 governmental transparency. §81003. Conversely, all interpretations of the Act in furtherance of
12 withholding information from the public or avoiding accountability should be avoided and, when
13 appropriate, must be very narrowly construed. This principle is codified with respect to Conflict
14 of Interests at §87309, which provides that a proposed Code may not be approved if it:
15

- 16 (a) Fails to provide reasonable assurance that *all foreseeable potential* conflict of
17 interest situations will be disclosed or prevented;
18 (b) Fails to provide to each affected person a clear and specific statement of his
19 duties under the Code; or
20 (c) Fails to adequately differentiate between designated employees with different
21 powers and responsibilities.

22 (emphasis added). Thus, if a reasonably foreseeable conflict of interest situation may occur, then
23 an amendment to require disclosures under the Act is a mandatory part of Code approval.

24 When applied to the consideration of a proposed Code, this statutory provision requires
25 broad construction so as “not [] to suggest that a code reviewing body must adhere rigidly to all
26 the definitions contained in the Act.” *In re Alperin*, (1976) 3 FPPC Ops. 77, 80:

27 [I]n our capacity as code reviewing body, we have approved codes that deviated
28 in certain respects from the Act’s definitions of income and investments in order
to ensure that the mandate of Section 87309(a), that all potential conflicts be
disclosed, was met.

1 *Id.*, at 80. This is necessary to ensure disclosure of the “*opportunity for conflicts of interest*”:

2
3 [S]o long as the [agency’s] operation creates the opportunity for conflicts of
4 interest, the Commission has an obligation to insure that its officers and
5 employees ‘should perform their duties in an impartial manner, free from bias
6 caused by their own financial interests ...’ Section 81001(a).”

7 *In re Vonk* (1981) 6 FPPC Ops. 1, 10.

8 Here, the Order rightly examined the authorizing statutes and regulations governing the
9 Port Agent’s duties and concluded that the position of Port Agent is one where a public official
10 exercises discretion in the execution of his public duties. Thus, once it has established the
11 potential for conflicts under the requirement of §87309, the FPPC is obligated as a matter of law
12 to direct the Board to amend its Conflict of Interest Code to include the position of Port Agent.

13 In its Opposition brief, the Board does not once mention §87309. Rather, the Board
14 suggests that disclosure should be based on an actual conflict standard, where “concrete
15 examples” might be considered applicable and only if “vague allusions to conflicts were real.”
16 Bd. Opp. at 20. This alternative, suggested without citation to any provision of the Act, any
17 case, or any FPPC decision, is not the standard used by the FPPC, it is at odds with the stated
18 purpose of the Act, and would not discourage conflict through affirmative disclosure.² This is a
19 narrow interpretation of the Act, in spite of the requirement that it be construed “liberally.”
20

21 **The Order Directing the Amendment of the Board’s Conflict of Interest Code Is**
22 **Rulemaking, Not A Quasi-Adjudicative Enforcement Action**

23 The Board argues that the Order is “fatally defective” because acts by “administrative
24 agencies in quasi-judicial decisions such as this” must be based on findings, citing *Topanga*
25 *Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506. Board Opp. at 1-2.
26

27 ² Indeed, this type of logic would lead to a chicken-and-egg tautology: we will require disclosure of your actual
28 conflict once we know it exists, but we have absolutely no idea if or when your actual conflict exists because we
have not yet had a basis to require its disclosure.

1 One good reason why the FPPC did not structure its Order as if it were a ruling in a
2 quasi-judicial enforcement action: Conflict of Interest Code promulgation is rulemaking.³

3 Pursuant to §87300, agencies “shall adopt and promulgate” their Conflict of Interest
4 Codes, and once promulgated they shall “have the force of law.” This is an expression of
5 lawmaking not enforcement. Reg. §18750 is the regulatory section which describes the manner
6 in which the FPPC as code reviewing body will proceed with its approval, disapproval or
7 recommended amendment of a Conflict of Interest Code proposed for adoption or amendment,
8 even if over the objection of another state agency. Certainly it is a unique rulemaking process,
9 and one that has multiple-layers of adoption where no code “shall be effective until it has been
10 approved by the code reviewing body,” (§87303) but it is rulemaking nonetheless.

13 As a process in which the FPPC reviews and then either approves, disapproves or
14 changes the work of another state agency, Reg. §18750(f)(2) provides for an iterative process
15 with a state agency to resolve potential disagreements. While the ultimate decision rests with the
16 FPPC, a hearing by the full FPPC before final action is taken is made available to a state agency
17 under Reg. §18750(h). Notably, this option exists in every Conflict of Interest Code
18 promulgation, not just in §87307 petition situations such as this one; in other words, an agency
19 always has a right to a hearing at the FPPC on a proposed Code like the one occurring here,
20 whether the Code’s amendment was proposed via an internal process or from an external party.
21 Also, this hearing option is offered exclusively to an agency which disagrees with an FPPC
22 Order, and is not available to a §87307 petitioner member of the public. Why? Because this is
23 rulemaking - not a quasi-adjudicative process. The public has a right only to fair consideration
24 of a rulemaking petition, not to contest the ultimate decision made by the FPPC.

28 ³ Another good reason: the Order determined that the Port Agent was a public officer as a matter of law, rendering any factual findings unnecessary. See next section.

1 The promulgation and review of a Conflict of Interest Code also is required to be
2 undertaken subject to the Administrative Procedures Act (“APA”). §87311. Per Reg. §18750,
3 code adoption and amendments are done consistently with Chapter 3.5 (§§ 11340 et seq.) of the
4 APA for rulemaking, including the publishing and interaction of the rule with the Office of
5 Administrative Law and enrollment at the Secretary of State. This includes Reg. §18750(h),
6 which retains the hallmark of a typical rulemaking hearing. Conversely, a “hearing” under Reg.
7 §18750(h) has none of the hallmarks of an administrative adjudication as required by Chapter 4.5
8 (§§11400 et seq.) or Chapter 5 (§§ 11500 et seq.) of the APA.
9

10
11 Again, the Board offers no citation to the Political Reform Act, no reference to any case
12 law based on the Act, nor any opinion of the FPPC as a basis for its assertion that the Code
13 promulgation process is a quasi-judicial one, and *Topanga* does not define or distinguish quasi-
14 judicial from quasi-legislative acts.⁴ Seemingly, this argument rests solely on the fact that this
15 matter is considered an “appeal” to the FPPC as code reviewing body under Reg. §18750(f)(2).
16 Given that the FPPC adopts Codes in all circumstances under Reg. §18750, whether a hearing on
17 the issue is requested by an agency or not, an “appeal” for a hearing alone does not transform
18 this rulemaking into a quasi-adjudicatory process. Considering the APA requirement of §87311,
19 the better interpretation is that the appeal processes of both §87307 and Reg. §18750(h) should
20 be viewed as analogous to the petition and reconsideration provisions of §11340.7 of the APA.
21
22

23 ⁴ As it is, even the Board’s reliance on *Topanga* is overstated, as the *Topanga* court held only that descriptive
24 findings are necessary in proceedings regarding the granting of land use variances to the degree that is “sufficient
25 both to enable the parties to determine whether and on what basis they should seek review,” *Id.*, at 514, or to keep a
26 court from having “to grope through the record.” *Id.*, at 516. Thus, here, even if *Topanga* were to apply, there is a
27 succinct Order which plainly renders its opinions based on a record of substantial facts, and which addresses only
28 two distinct questions of law and application. The parties are two state agencies who know the issues and know
exactly what was decided and on what bases in law. Moreover, while *Topanga* requires additional enunciations of
decisionmaking, it is a requirement in the context of the application of a “substantial evidence standard where a
‘reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.’” *Sierra Club*
v. Gilroy City Council, (1990) 222 Cal.App.3d 30, 40. Applying the *Sierra Club* interpretation here, any
reasonable doubts regarding the FPPC’s Order would necessarily be resolved in favor of the FPPC over the Board.

1 Indeed, upon examination of the Act it seems quite clear that the Legislature intended
2 exactly the opposite of what the Board argues. This is because the power of review and final
3 adoption of all Conflict of Interest Codes is actually a grant of quasi-legislative authority directly
4 to the FPPC. “Quasi-legislative rules are the substantive product of a delegated *legislative*
5 power conferred on the agency. ... Because agencies granted such substantive rulemaking
6 power are truly ‘making law,’ their quasi-legislative rules have the dignity of statutes.” *Yamaha*
7 *Corp. of America v. St. Bd. of Equalization* (1998) 19 Cal.4th 1, at 8, 10.
8

9 The FPPC as code reviewing body is granted authority to make and adopt conflict of
10 interest law in such a substantive manner that it is not simply acting in an interpretive capacity.⁵
11 Therefore, the FPPC’s Orders with respect to Code promulgation are due the highest level of
12 deference by the courts and other state agencies, because “a quasi-legislative rule: “... must
13 prevail because it is neither ‘arbitrary, capricious or without rational basis’ (*Culligan Water*
14 *Conditioning v. State Bd. of Equalization, supra*, 17 Cal.3d 86, 92) nor is it ‘clearly erroneous or
15 unauthorized’ (*Rivera v. City of Fresno* [(1971)] 6 Cal.3d 132, 140 ...).” (*Ibid.*)” *Id.*, at 10.
16

17 Here, the FPPC is both exercising a quasi-legislative, discretionary rule-making power
18 (directing the amendment of the Board’s Conflict of Interest Code) and asserting its regulatory
19 expertise in the interpretation of the Political Reform Act (finding that the Port Agent is a public
20 official with reasonably foreseeable potential conflicts of interest). The Order is NOT arbitrary,
21 capricious or without rational basis, nor is it clearly erroneous or unauthorized, and therefore it
22 should be upheld. Moreover, as an agency with subject matter expertise, the FPPC is
23

24
25
26 ⁵ *Yamaha* also explains that the higher standard of deference for quasi-legislative standard of review “‘is
27 *inapplicable* when the agency is not exercising a discretionary rule-making power, but merely *construing* a
28 controlling statute.” *Id.*, at 12. But, when an agency is “interpreting a statute within its administrative jurisdiction,
it may possess special familiarity with satellite legal and regulatory issues. It is this ‘expertise,’ expressed as an
interpretation (...), that is the source of the presumptive value of the agency’s views.” *Id.*

1 interpreting and applying its own self-promulgated regulations when it applies Reg. §§ 18700 et
2 seq. to the Port Agent, and it is doing so here in a manner which is consistent with its earlier
3 interpretations of the Act and its rules as expressed in *Alperin, Vonk, and Siegel*.⁶
4

5 **The Order Correctly Concludes that the Port Agent is a Public Official Subject to the Act**

6 In its interpretation of the terms of the Act and pilotage statutes, the Order correctly
7 concludes that the Port Agent is an “officer” when he discharges his public duties as a matter of
8 law, and that in the discharge of these duties the Port Agent is making governmental decisions.
9

10 The submissions and evidence provided to the FPPC to consider when issuing this Order
11 establish that the Port Agent meets the hallmarks of a public officer consistent with *In re Siegel*
12 (1977) 3 FPPC Ops. 62: The Port Agent occupies an office created by the Legislature and given
13 specific duties by the Board to achieve specific public purposes. The Port Agent is to carry out
14 specific public duties at the direction of the Board and in furtherance of public safety and the
15 environment. The Port Agent supervises and oversees pilot licensees, not as a licensee but as the
16 occupant of a specific office created solely for the purpose of oversight and management. This
17 office exercises powers that an individual licensee does not otherwise possess – telling others
18 when and where they may or may not work, telling others when they may or may not take
19 vacation, ordering drug and alcohol tests for pilots as part of incident investigation, keeping pilot
20 medical records (which are otherwise confidential and not disclosable to the public), and closing
21 all navigation across the San Francisco bar channel. And, the Port Agent is treated as a public
22 officer under other statutes, including the Public Records Act and the extension of the protection
23 of the sovereign immunity of the State.
24
25
26
27

28 ⁶ Again, the Board fails to address or even acknowledge any FPPC interpretations or applications in these cases.

1 In its Opposition, the Board asserts *arguendo* that the declarations of the Port Agent and
2 Executive Director of the Board establish facts to the contrary of the Order’s legal conclusions
3 and that, under *Topanga*, the Order has not embraced facts in evidence to support its conclusion.
4 Indeed, the thrust of their argument on this point is that the plain reading of the statutes and
5 regulations should be ignored because, in practice, the Board treats the Port Agent as if he is just
6 another pilot licensee who goes about his business on the Bay as if it were the year 1850.⁷
7 Alternatively, the Board argues that the Order is wrong because the “[p]rovision of pilotage is
8 not an innate aspect of sovereignty, nor is it a function exclusively of government.”
9

10 Both of these arguments misconstrue the Order. The FPPC does not assert that the Board
11 itself provides pilotage – rather it observes the exact opposite: that the Port Agent “assists the
12 Board in the exercise of its statutory duties, such as insuring proper pilot licensing, discipline,
13 investigations and safety of the pilots.” Order at 9. The Order simply directs that when the Port
14 Agent is exercising his public duties as designated by the State, he should be treated as a public
15 official and that means he should avoid potential conflicts of interest like a public official.
16

17 This is the same logic which was utilized by the Court in *Regal Stone* (and argued for by
18 the Port Agent himself in that case as he was seeking the protection of sovereign immunity as a
19 public officer of the Board): when the Port Agent is acting in a “supervisory” capacity he is not
20 acting as just a private pilot licensee, but in a regulatory capacity on behalf of the public as its
21 officer or agent of the Board. This finding in no way precludes the Port Agent from acting in a
22 proprietary capacity in addition to the fulfillment of his public duties – it simply requires him to
23 disclose his potential conflicts of interest when doing so. As was made clear by the FPPC in *In*
24

25
26
27 ⁷ The Board’s opposition extensively cites the law of 1850, when the first pilotage statutes were adopted in
28 California. As an interpretation of the modern pilotage statutes is readily achievable, we respectfully suggest that
the analysis of prior statute is irrelevant to the present application of the Political Reform Act to the Port Agent.

1 *re Vonk*, even entities which are created with a specific business purpose must make such
2 “business subordinate to its overriding public purposes.” *Id.*, at 10.

3
4 It is uncontroverted that, as a matter of law, the one pilot who is the designated Port
5 Agent exercises authority at the direction of the Board and the State. HNC §1130, 7 CCR §218.
6 Even if the Board exercises absolutely no control over the day-to-day activities of the Port
7 Agent, as here where the Board turns a blind eye to the manner in which he completes his public
8 duties, the Port Agent still meets all of the tests of *In re Siegel* and exercises public authority.

9
10 The declarations of the Port Agent and Board’s Executive Director, in which both state
11 that the Port Agent is not treated as a public official, are not a substitute for interpretation of the
12 Act as a matter of law, nor are they supported by any independent evidence. However, they are
13 instructive of the fact that the office of Port Agent represents numerous potential conflicts of
14 interest. Indeed, the Board’s arguments highlight that the Port Agent remains a business partner
15 to those other licensees over whom he now exercises the authority to assign to the jobs, approve
16 their vacation, or report to authorities in the case of incidents. And while the determination of
17 the public nature of the position of Port Agent is considered as a matter of law, it is these facts
18 which confirm that the Port Agent has regular and foreseeable potential conflicts.
19

20
21 **The Order Correctly Concludes that the Port Agent Acts With Discretionary Authority
and Not In a Ministerial Capacity**

22
23 Potential conflict of interest situations occur when a public official is placed in a position
24 of making decisions or acting with the force of law in a manner which is not purely ministerial.
25 Reg. §§ 18700 et seq. As the Order rightly points out, and as the Board’s continued arguments
26 disclaiming oversight of the Port Agent’s activities confirm, there is nothing ministerial about the
27 actions taken by the Port Agent.
28

1 "A ministerial act is an act that a public officer is required to perform in a
2 prescribed manner in obedience to the mandate of legal authority and without
3 regard to his [or her] own judgment or opinion concerning such act's
4 propriety or impropriety, when a given set of facts exists."

5 *Kavanaugh v. West Sonoma Co. Union High School Dist.*, (2003) 29 Cal.4th 911 (citing
6 *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501).

7 "On the other hand, discretion is the power conferred on public functionaries
8 to act officially according to the dictates of their own judgment."

9 *Morris v. Harper*, (2001) 94 Cal.App.4th 52 (citing *Rodriguez* at 501-502; *Transdyn/Cresci JV v.*
10 *City and Co. of San Francisco* (1999) 72 Cal.App.4th 746,752.) Given that the Board's open-
11 ended rules do not direct the Port Agent with detail regarding how to achieve his public duties,
12 there is no reasonable basis to conclude that the Port Agent acts in a ministerial capacity.

13 As the Order rightly concludes, even though he is granted discretion to decide how and
14 when his activities are performed, the Port Agent is not a "free agent" and the Board is not able
15 to wash its hands of its "general oversight responsibility." By acknowledging the discretion
16 granted to the Port Agent, the Order also methodically assesses the manner in which decisions
17 made by the Port Agent may end up obligating the Board to an action under Reg. §18702.4. The
18 Board argues that the Port Agent's activities do not obligate it to take specific actions or dictate
19 the outcome of these actions – focusing, for example, on cases of pilot discipline – but the Order
20 does not prejudge the outcome of an action as a result of the Port Agent's exercise of his
21 authority, only that the Board will be required to act in some capacity as a result of the Port
22 Agent's exercise of his authority. This is a mechanical application of the Board's regulations.

23 Finally, the Order's application of Reg. §18702.2 is consistent with the test of
24 "governmental decisions" the FPPC has applied to determine when private third parties can fall
25 under the Political Reform Act if they exercise authority or act as quasi-employees under *In re*
26
27
28

1 *Leach* (1978) 4 FPPC Ops. 48. Under *Leach* the FPPC directs that in non-traditional situations,
2 it is important to evaluate the nature of the actual relationship which exists. Here, the Board's
3 own Opposition confirms (through a copy of a recent Port Agent's report, which demonstrates
4 his participation without significant intervening substantive review) that he has access to the
5 confidential medical information of individual licensed pilots that is otherwise prohibited from
6 being distributed to the public under penalty of law. HNC §1157.3. The Port Agent's ready
7 access to pilot medical records which are "confidential and not open to public inspection," (HNC
8 §1157.1), further demonstrates that the Port Agent is not simply regulated like other pilot
9 licensees. Similarly, the Order notes that the Port Agent participates in Board meetings in the
10 same manner as Board staff as a relevant fact to evaluation of the actual nature of the office.

11
12
13 **The Order Reflects the FPPC's Delegated Responsibility to Determine Which Conflict of**
14 **Interest Code Is Best to Include the Port Agent**

15 One component of the FPPC's job as code reviewing body is to assure that the policy of
16 decentralized formulation of proposed Conflict of Interest Codes does not become so thin as to
17 "preclude intra-departmental review." §87301. The Legislature directed that "[a]ny question of
18 the level of a department which should be deemed an 'agency' for purposes of Section 87300
19 shall be resolved by the code reviewing body." *Id.* Such a question exists here.

20
21 The Order specifically considers whether the Port Agent should be included in the
22 Board's Conflict of Interest Code when it concludes that "[t]he Port Agent is not a free agent
23 who has independent authority ... without supervision or oversight. ... the Board has general
24 oversight responsibility..." Order, at 10. In coming to this conclusion the Order relies in part on
25 HNC §1154, which provides that all functions and duties necessary to administer the pilotage
26 statutes are vested in the Board.
27
28

1 While the Board seeks to avoid responsibility for the Port Agent in its Code, the Order
2 correctly aligns the Political Reform Act with the APA and pilotage statutes when it places the
3 Port Agent in the Board's Conflict of Interest Code. Since "the preparation of proposed Conflict
4 of Interest Codes by state agencies shall be subject to the Administrative Procedures Act,"
5 (§87311) the best entity to conduct such rulemaking is the Board, as it has the exclusive stand-
6 alone authority to implement the pilotage statutes pursuant to the APA. HNC §1154(b).
7

8 **Legislative and Legal Context for Consideration of the "Officer" Status of the Port Agent**

9 Finally, this Order is also consistent with the recent holdings of courts in separate
10 proceedings regarding the public officer status of the Port Agent.
11

12 This issue is now in front of the FPPC as a result of various recent incidents and
13 accidents on the Bay involving state licensed pilots over the past several years, bringing the roles
14 of the Board and its Port Agent additional legislative and legal scrutiny. These incidents include
15 the allision of the M/V COSCO BUSAN with the Bay Bridge in 2007 while the vessel was under
16 compulsory state pilotage, which resulted in a spill of thousands of gallons of fuel from that
17 vessel into the Bay and significant environmental damage.
18

19 The Legislature reformed state pilotage after COSCO BUSAN, declaring "that providing
20 transparency and accountability to the Board of Pilot Commissioners is in the public interest and
21 it is the intent of the Legislature to enhance, preserve, and continue the state's commitment to
22 state licensure of pilotage ... in order to ensure safe navigation, promote commerce, and protect
23 the environment." SB 1627, §1 (Statutes of 2008, Chap. 567). And HNC §1130(b) was added
24 by the Legislature to give the Port Agent responsibility for "supervision and management of all
25 matters related to the business and official duties of pilots licensed by the board." *Id.*, §4.
26
27
28

1 In COSCO BUSAN-related litigation which alleged negligence on behalf of the Port
2 Agent in assigning the pilot responsible for the accident, a Federal District Court found that
3 when a Port Agent's actions are in a "supervisory role" that this constitutes "conduct performed
4 on behalf of the Board," and therefore "as a matter of law, [Port Agents] were acting as officers
5 or agents of the Board." *Regal Stone Ltd. v. Cota* (N.D. Cal. Sept. 7, 2010, Civ. A. No. 08-
6 5098-SC) 2010 WL 3504846, at 11-12. (*Regal Stone*). As a result, the Court in *Regal Stone*
7 dismissed Port Agents from potential liability resulting from the execution of their public duty to
8 assign pilots to vessels, since "the Board is a state agency immune from suit under the Eleventh
9 Amendment... the Court concludes that the [Port Agents] are immune from suit under the
10 Eleventh Amendment." *Id.* at 16.

13 In litigation which arose under the California Public Records Act after a separate pilot
14 assignment controversy which is noted in the Order, the California Court of Appeal found "that
15 the Port Agent must be considered a state officer, at least when performing the official duties
16 provided by statute or Board regulation." *Board of Pilot Commissioners for the Bays of San*
17 *Francisco, San Pablo and Suisun et al. v. Superior Ct.* (2013) 218 Cal.App.4th 577, 591.

19 The Board and Port Agent argued that the decision in *Regal Stone* should be
20 distinguished, but the Court of Appeal concluded that "the Port Agent fails to explain why one
21 should be permitted to assume the cloak of a state official when it provides protection, but to
22 then cast it off in the event it becomes burdensome," and found that the conclusion that the Port
23 Agent is an officer or agent of the Board in *Regal Stone* was persuasive authority. *Id.*

25 Likewise, the Board here thinks that *Board of Pilot Commissioners* is inapplicable; it
26 argues that the holding of the case is "dicta" (Bd. Opp. at 10) and that the case's conclusion that
27 "the Legislature has never given the Board the authority to make pilot assignments or to direct
28

1 them” (Bd. Opp. at 6, 8) gives the Port Agent a pass. Both of these arguments improperly recite
2 the case and should be ignored by the FPPC now, just as they were when it issued the Order.

3
4 First, the holding of the case is most definitely not “dicta,” as it was the central holding
5 on the only question of law presented to the Court of Appeal. The Board recently made this
6 same argument to the San Francisco Superior Court in an attempt to avoid paying an award of
7 attorneys fees to PMSA regarding this very question. The Board was roundly rebuffed, as the
8 Court agreed that PMSA prevailed on this central holding of the case:

9
10 The motion is granted as to Respondent Port Agent. The Court of Appeal held
11 that the Port Agent is a public official subject to Public Record Act (“PRA”) requests. (*Board of Pilot Commissioners for the Bays of San Francisco, San*
12 *Pablo and Suisun et al. v. Superior Ct.* (2013) 218 Cal.App.4th 577, 591, “We
13 find that the Port Agent must be considered a state officer at least when
14 performing the official duties provided by statute or Board regulation.”) Although the Court of Appeal held that PMSA did not establish that the “Pilot
15 Logs” were public documents, PMSA “succeed[ed] on [a] significant issue in the
16 litigation and achieve[d] some of the benefit sought in the lawsuit.” (*Garcia v.*
17 *Governing Board of Bellflower Unified School District* (2013) 220 Cal.App.4th
18 1058, 1065.)

19 Order Granting Attorney’s Fees, 1:12-20. (Decl. of M. Jacob, Exhibit 1).

20 Regarding the Board’s citation multiple times of the language that “the Legislature has
21 never given the Board the authority to make pilot assignments or to direct them,” (*Board* at 599),
22 the Board consistently and purposefully omits the next sentence of the paragraph cited, wherein
23 the Court declared: “*The Port Agent has always been allocated that responsibility, and we*
24 *have already held that he serves as a state officer in doing so.*” *Id.*, at 599 (emphasis added).

25 These two cases support the Order’s conclusions regarding the Port Agent and his role as
26 an “officer” and public official when he is conducting his official duties. Both *Regal Stone* and
27 *Board of Pilot Commissioners* acknowledge that the Port Agent acts in a public capacity when
28 executing his public duties, and that he also acts in a private capacity and that he has private

1 duties aside from those which are governed by statute and regulation. These conclusions not
2 only satisfy the *In re Siegel* test for public officer status, but they highlight the Port Agent's
3 potential conflicts of interests. Public officials who have competing public and private interests
4 require the attention of the FPPC and are subject to the provisions of the Political Reform Act;
5 here, as the co-existence of private interests will consistently raise foreseeable potential conflicts,
6 the Port Agent must be included in the Board's Conflict of Interest Code.
7

8 **Conclusion**

9 PMSA supports the Order as the proper interpretation of the Act and other applicable law
10 based on the thorough briefing of the parties and the evidence presented. The Board in its
11 Opposition has not relied on any authority within, or in cases or opinions derived from, the Act
12 and has not proposed an alternative which would equally satisfy the requirement that all
13 foreseeable potential conflicts of interest involving the Port Agent will be avoided.
14

15 PMSA appreciates the work done by FPPC General Counsel and his staff on this matter
16 and looks forward to participating in the meeting on July 17th. Please do not hesitate to contact
17 either myself or Diane Fishburn with any additional questions or correspondence.
18
19
20

21 Dated this 28th of May, 2014
22 At San Francisco, California

23 

24 Michael Jacob
25 General Counsel
26 Pacific Merchant Shipping Association
27
28

1 Proof of Service

2 I, Michael Jacob, declare under penalty of perjury that I am General Counsel and Vice
3 President of the Pacific Merchant Shipping Association ("PMSA"), 250 Montgomery St., Suite
4 700, San Francisco, CA 94104.

5 On May 28, 2014, I have caused to be served the attached COMMENTS OF PACIFIC
6 MERCHANT SHIPPING ASSOCIATION IN SUPPORT OF THE ORDER OF
7 FEBRUARY 21, 2014 and the related DECLARATION OF MICHAEL JACOB by
8 delivery via electronic mail to each person addressed on the "Service List" below.

9 On May 28, 2014, I have caused to be served the attached COMMENTS OF PACIFIC
10 MERCHANT SHIPPING ASSOCIATION IN SUPPORT OF THE ORDER OF
11 FEBRUARY 21, 2014 and the related DECLARATION OF MICHAEL JACOB by
12 delivery via Federal Express by placing a true copy thereof enclosed in a sealed envelope
13 with delivery costs thereon fully paid and placed it for collection and mailing on May 28,
14 2014 for delivery of May 29, 2014 to each person addressed on the "Service List" below.

15 SERVICE LIST:

16 Zackery Morazzini
17 General Counsel
18 Fair Political Practices Commission
19 428 J St., Suite 620
20 Sacramento, CA 95814-2329
21 Email: zmorazzini@fppc.ca.gov

Diane Fishburn
Olson, Hagel & Fishburn LLP
555 Capitol Mall, Suite 1425
Sacramento, CA 95814-4602
Email: diane@olsonhagel.com

22 Dennis M. Eagan
23 Deputy Attorney General
24 1515 Clay St., 20th Floor, PO Box 70550
25 Oakland, CA 94612-0550
26 Email: dennis.eagan@doj.ca.gov

27 I declare under penalty of perjury that the foregoing is true and correct and that this
28 declaration is executed on May 28, 2014 at San Francisco, California.



Michael Jacob
General Counsel
Pacific Merchant Shipping Association

Decl of Michael Jacob
in support of comments ...

1 Michael Jacob, SBN 232214
2 Vice President & General Counsel
3 Pacific Merchant Shipping Association
4 250 Montgomery St., Suite 700
5 San Francisco, CA 94610
6 Phone: (415) 352-0710
7 Fax: (415) 352-0717
8 Email: mjacob@pmsaship.com

9 Diane Fishburn, SBN 96812
10 Olson Hagel & Fishburn LLP
11 555 Capitol Mall, Suite 1425
12 Sacramento, CA 95814
13 Phone: (916) 442-2952
14 Fax: (916) 442-1280
15 Email: diane@olsonhagel.com

16 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

17 STATE OF CALIFORNIA

18 In the Matter of:)
19)
20 Order by the Fair Political Practices)
21 Commission of February 21, 2014 Directing)
22 the Board of Pilot Commissioners for the Bays)
23 of San Francisco, San Pablo, and Suisun to add)
24 the position of Port Agent to its Conflict of)
25 Interest Code (Government Code § 87307))
26)
27) Before the FPPC: July 17, 2014
28)

29 I, Michael C. Jacob, declare as follows:

- 30 1. I am General Counsel and Vice President of the Pacific Merchant Shipping
31 Association ("PMSA"). I have personal knowledge of the facts set forth in this
32 Declaration and am competent to testify to the matters set forth herein.

- 1 2. I make this declaration in support of PMSA's Comments in Support of the Order by
2 the Fair Political Practices Commission of February 21, 2014 directing the Board of
3 Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun to add the
4 position of Port Agent to its Conflict of Interest Code pursuant to Government Code
5 Section 87307.
6
- 7 3. After the Court of Appeal decision of *Board of Pilot Commissioners for the Bays of*
8 *San Francisco, San Pablo and Suisun et al. v. Superior Ct.* (2013) 218 Cal.App.4th
9 577, PMSA moved for an award of its attorneys fees as a prevailing party under Govt.
10 Code §6259(d). §6259(d) of the Public Records Act provides that a "court shall
11 award court costs and reasonable attorney fees to the plaintiff should the plaintiff
12 prevail in litigation filed pursuant to this section." The Board of Pilot Commissioners
13 and Port Agent opposed PMSA's motion for an award of attorney fees.
14
- 15 4. On May 22, 2014, the San Francisco Superior Court entered an order granting an
16 award of PMSA's attorneys fees with respect to the Port Agent. The Order found:
17 "The Court of Appeal held that the Port Agent is a public official subject to Public
18 Record Act ("PRA") requests. (*Board of Pilot Commissioners for the Bays of San*
19 *Francisco, San Pablo and Suisun et al. v. Superior Ct.* (2013) 218 Cal.App.4th 577,
20 591, 'We find that the Port Agent must be considered a state officer, at least when
21 performing the official duties provided by statute or Board regulation.') Although the
22 Court of Appeal held that PMSA did not establish that the 'Pilot Logs' were public
23 documents, PMSA 'succeed[ed] on [a] significant issue in the litigation and
24 achieve[d] some of the benefit sought in the lawsuit.' (*Garcia v. Governing Board of*
25 *Bellflower Unified School District* (2013) 220 Cal.App.4th 1058, 1065.)"
26
27
28

1 5. Attached as Exhibit 1 is a true and correct copy of the ORDER GRANTING
2 PETITIONER PMSA'S MOTION FOR AWARD OF ATTORNEY'S FEES AND
3 COSTS as entered on May 22, 2014 by the San Francisco Superior Court. I received
4 this copy personally as counsel of record for PMSA in this matter.
5

6
7 Dated this 28th of May, 2014
8 At San Francisco, California

9
10 
11 _____
12 Michael Jacob
13 General Counsel
14 Pacific Merchant Shipping Association
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

DAVIS WRIGHT TREMAINE LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Conte Cicala (SBN 173554)
FLYNN, DELICH & WISE LLP
343 Sansome Street, Suite 540
San Francisco, CA 94104
Telephone: (415) 693-5562
Facsimile: (415) 693-0410
Email: contec@fdw-law.com

Michael Jacob (SBN 232214)
PACIFIC MERCHANT SHIPPING ASSOCIATION
250 Montgomery Street, Suite 700
San Francisco, CA 94104
Telephone: (415) 352-0710
Facsimile: (415) 352-0707
Email: mjacob@pmsashipcom

Thomas R. Burke (SBN 141930)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
Email: thomasburke@dwt.com

Attorneys for Petitioner
PACIFIC MERCHANT SHIPPING ASSOCIATION

SUPERIOR COURT, STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

PACIFIC MERCHANT SHIPPING ASSOCIATION,

Petitioner,

v.

BOARD OF PILOT COMMISSIONERS, ETC.,
ET AL.,

Respondents.

) Case No. CPF-12-512320

) ORDER GRANTING PETITIONER
) PMSA'S MOTION FOR AWARD OF
) ATTORNEYS' FEES AND COSTS

) Hearing Date: May 9, 2014
) Time: 9:30 a.m.
) Dept.: 302

ENDORSED
FILED
San Francisco County Superior Court

MAY 22 2014

CLERK OF THE COURT
BY: GINA GONZALES
Deputy Clerk

DAVIS WRIGHT TREMAINE LLP

1 On May 9, 2014, Petitioner Pacific Merchant Shipping Association's ("PMSA") Motion to
2 Recover Attorneys' Fees and Costs incurred in connection with its California Public Records Act
3 petition came on for hearing before this Court in Department 302. Thomas R. Burke of Davis
4 Wright Tremaine LLP appeared on behalf of PMSA. Christiana Tiedemann, Supervising Deputy
5 Attorney General of the State of California, appeared on behalf of Respondent Board of Pilot
6 Commissioners and Port Agent ("Respondents").

7 The Court, having read and considered the supporting points and authorities and evidence,
8 having heard the argument of counsel, orders as follows:

9 Petitioner PMSA's motion is granted in part and denied in part.

10 The motion is denied as to Respondent Board of Pilot Commissioners (the "Board").
11 Petitioner PMSA has not established that it prevailed against the Board.

12 The motion is granted as to Respondent Port Agent. The Court of Appeal held that the
13 Port Agent is a public official subject to Public Record Act ("PRA") requests. (*Board of Pilot*
14 *Commissioners for the Bays of San Francisco, San Pablo and Suisun et al. v. Superior Ct.* (2013)
15 218 Cal.App.4th 577, 591, "We find that the Port Agent must be considered a state officer, at least
16 when performing the official duties provided by statute or Board regulation.") Although the Court
17 of Appeal held that PMSA did not establish that the "Pilot Logs" were public documents, PMSA
18 "succeed[ed] on [a] significant issue in the litigation and achieve[d] some of the benefit sought in
19 the lawsuit." (*Garcia v. Governing Board of Bellflower Unified School District* (2013) 220
20 Cal.App.4th 1058, 1065.)

21 PMSA has presented evidence showing that prior to the litigation, the Port Agent
22 responded to only one of five PRA requests, with the following disclaimer: "[T]his production of
23 information is done without conceding that all of the materials provided are, in fact, subject to the
24 obligations arising out of your request under the Public Records Act." (Ex. E to PMSA's original
25 verified petition, attached as Exhibit A to the Port Agent's opposition brief.) After the litigation,
26 the Port Agent produced voluminous documents in response to PMSA's requests. (Declaration of
27 Michael Jacob, par. 5.) "Cases denying attorney fees to a plaintiff under the act have done so
28 because substantial evidence supports a finding that the litigation did not cause the [agency] to

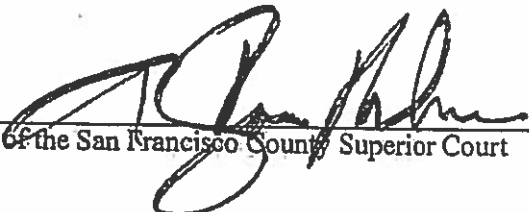
DAVIS WRIGHT TREMAINE LLP

1 disclose any of the documents ultimately made available." (*Los Angeles Times v. Alameda*
2 *Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1391, citations omitted.) The
3 evidence supports the finding that the Port Agent responded to PMSA's PRA requests once the
4 Court of Appeal declared the Port Agent a public official.

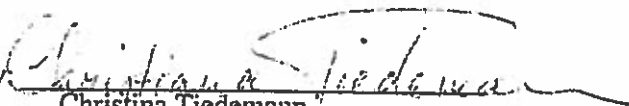
5 The Court, in its tentative ruling, ordered Respondents Port Agent and Board of Pilot
6 Commissioners to provide the Court, in advance of the hearing, evidence of the amount of hours
7 spent defending this action by counsel for Respondents. According to the summary sheet
8 submitted to the Court by Ms. Tiedemann, counsel for Respondents spent a total of 842.50 hours
9 defending this action (696.25 hours during the period 2012-2013; 146.25 hours during the period
10 2013-2014).

11 ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the
12 Motion is GRANTED, and that PMSA is the prevailing party. Respondent Port Agent shall pay to
13 PMSA the sum of \$258,080.00 in attorneys' fees and \$2,528.00 in costs, for the total sum of
14 \$260,608.00. Respondent Port Agent shall make such payment within 60 days after entry of this
15 Order.

16
17 DATED: May 22, 2014

18 
19 _____
20 Judge of the San Francisco County Superior Court
21 JAMES ROBERTSON, II

22 APPROVED AS TO FORM:
23 Attorney General of California

24 By: 
25 Christina Tiedemann
26 Supervising Deputy Attorney General
27 Attorneys for Petitioner Board of Pilot
28 Commissioners and Peter McIsaac in his
capacity as Port Agent

DAVIS WRIGHT TREMAINE LLP

Proof of Service

I, Mari Reyes, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111. I caused to be served the following document:

ORDER GRANTING PETITIONER PMSA'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

I caused the above document to be served on each person on the attached list by the following means:

- I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on May 22, 2014 following the ordinary business practice.
(Indicated on the attached address list by an [M] next to the address.)
- I enclosed a true and correct copy of said document in an envelope, and placed it for collection and mailing via Federal Express on _____, for guaranteed delivery on _____, following the ordinary business practice.
(Indicated on the attached address list by an [FD] next to the address.)
- I consigned a true and correct copy of said document for facsimile transmission on _____
(Indicated on the attached address list by an [F] next to the address.)
- I enclosed a true and correct copy of said document in an envelope, and consigned it for hand delivery by messenger on _____.
(Indicated on the attached address list by an [H] next to the address.)
- A true and correct copy of said document was emailed on _____.
(Indicated on the attached address list by an [E] next to the address.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business. Executed on May 22, 2014, at San Francisco, California.



Mari Reyes

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Service List

Key:	[M] Delivery by Mail	[FD] Delivery by Federal Express	[H] Delivery by Hand
	[F] Delivery by Facsimile	[FM] Delivery by Facsimile and Mail	[E] Delivery by Email

[E] Kamala D. Harris
 Attorney General of California
 John Saurenman
 Sr. Assistant Attorney General
 Christiana Tiedemann
 Supervising Deputy Attorney General
 1515 Clay Street, 20th Floor, P. O. Box 70550
 Oakland, CA 94612-0550
 Facsimile: (510) 622-2270
 Email: Chris.Tiedemann@doj.ca.gov

Attorneys for Respondent Board
 of Pilot Commissioners and Peter
 McIsaac in his capacity as Port
 Agent

[E] Conte C. Cicala
 FLYNN, DELICH & WISE LLP
 343 Sansome Street, Suite 540
 San Francisco, California 94104
 Telephone: (415) 693-5562
 Facsimile: (415) 693-0410
 Email: contec@fdw-law.com

Attorneys for Pacific Merchant
 Shipping Association

[E] Michael Jacob
 PACIFIC MERCHANT SHIPPING ASSOCIATION
 250 Montgomery Street, Suite 700
 San Francisco, California 94104
 Telephone: (415) 352-0710
 Facsimile: (415) 352-0717
 Email: mjacob@prnsaship.com

Attorneys for Pacific Merchant
 Shipping Association