February 7, 2014

Emelyn Rodriguez
Fair Political Practices Commission
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Sacramento, CA 95814-2329

RE: Additional Explanatory Materials and Responses in Support of PMSA's §87307 Appeal Of Denied Petition to Add Port Agent to the Conflict of Interest Code of the Board of Pilot Commissioners

Dear Ms. Rodriguez,

Thank you again for the invitation by letter of February 4, 2014. We understand that this Appeal is taking place in a rarely utilized section of the Conflict of Interest Code statutes, and therefore appreciate the extension of every opportunity for parties to comment and participate.

PMSA respectfully submits this letter principally to address the Brief submitted in Opposition to the Appeal by the Board of Pilot Commissioners ("Board"), on January 17, 2014. Our comments are as follows:

**Code Review by the FPPC is Quasi-Legislative & Subject to Specific Provisions of the Act**

As a threshold issue, the Board objects to PMSA raising the question of whether or not the office of the Port Agent should be evaluated under the Act's "agency" criteria, on the grounds that the issue is "improperly extending the scope of this appeal." Opp. Brief, 2:13-23.

The FPPC's role as the Code Reviewing Body here is simply conducting a Conflict of Interest Code review. Govt. Code §§ 87307, 87311. In so doing, the FPPC is not limited to consideration of the Board's facts or its Denial below (or the arguments of PMSA for that matter), as this review requires consideration of all of the applicable provisions of the Political Reform Act and the final amendments to the Code, if any, may only be approved "pursuant to the provisions of this article." Govt. Code §87300. Because the adequacy of a Conflict of Interest Code concerns every provision of Article 3, it is likewise appropriate for any party to comment on any provision of the Act which it believes may be relevant to any decisions before the code reviewing body.

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The original Petition directed to the Board did not address the question of whether the Port Agent ought to be a separate "agency" apart from the Board. Because of the position taken by the Board in response to the Petition, this question is now raised here because it is an appropriate review function specifically directed to the FPPC. Govt. Code §87301. If there is any question whatsoever of whether the Port Agent should be considered a separate agency, then it must be addressed in this Appeal and it "shall be resolved by the code reviewing body." *Id.*

**Prior Opinions by the FPPC Are Relevant to this Inquiry**

The Board also argues that PMSA's reliance on previous Opinions of the FPPC regarding the public official status of the Port Agent are "irrelevant" because "[t]here was no issue in *Siegel* or *Vonk*, once 'agency' status was determined, whether certain persons were 'designated employees.'" Opp. Brief, 2:13-23.

To the contrary, as discussed in our January 17th correspondence and our Appeal, because there is no strict test for many aspects of a "designated employees" analysis or direct Opinions on point, it is necessary to look to other decisions by the FPPC in order to properly interpret the Political Reform Act and its implementing regulations. *In re Siegel* (1977) 3 FPPC Ops. 62 addresses similar issues with respect to the question of how entities which have private and public characteristics can be addressed. Indeed, the FPPC's own regulations cite the case as providing guidance on how to properly ascertain whether or not a Conflict of Interest exists.

If an office falls under the definition of "agency"[1] in the Act, this is relevant to a "designated employee" determination, since that includes "any officer, employee, member of consultant of any agency." Govt. Code §82019. The "designated employee" definition also reflects the characteristics of each "position with the agency." *Id.* The nature, scope and purpose of a public office are relevant to the definition's reference to "governmental decisionmaking." [2] The intertwining of these two threshold issues for determining whether or not a position has potential conflicts include situations where otherwise private entities "make governmental decisions or act as quasi-employees." *In re Leach* (1978) 4 FPPC Ops. 48, 53.

Likewise, agency status and the relationship of a specific office or official to that agency are relevant to the determination of whether the Code provides a "reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented." Govt. Code §87309. Both *Siegel* and *In re Vonk* (1981) 6 FPPC Ops. 1 are relevant because they are concerned with the application of Conflicts of Interest which will provide this "reasonable assurance" exists even in situations where traditional definitions of "agency" are inapplicable.

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[1] The Act's definition of "state agency" itself broadly includes "every state office, department, division, bureau, board and commission." Govt. Code §82049. Likewise, a "public official" for purposes of the Act "means every member, officer, employee or consultant of a state or local government agency." Govt. Code §82048.

[2] As this is an issue left unaddressed by the Board in their Denial and Opposition Brief, presumably the Board has not passed judgment on whether or not it would consider *Vonk* relevant to the question of "making a governmental decision" under FCCP §18702.4.

To the extent that the Board believes *In re Siegel* and *In re Vonk* are irrelevant here because it seeks to narrowly apply the definition of "designated employee" in order to prevent disclosure of potential conflicts, such an interpretation is also counter to the FPPC's findings of *In re Alperin* (1977) 3 FPPC Ops. 77, 80. In *Alperin* the FPPC directs that code reviewing bodies must not "adhere rigidly to all the definitions contained in the Act when it passes upon a conflict of interest. In fact, in our capacity as code reviewing body, we have approved codes that deviated in certain respects from the Act's definitions ... in order to ensure that the mandate of Section 87309(a), that all potential conflicts be disclosed, was met." *Alperin* effectuates the Legislature's intended broad statutory construction of the Political Reform Act in favor of disclosure. Govt. Code §81003 (Act is "liberally construed to accomplish its purposes.")

## ***Board of Pilot Commissioners*** **Held that "the Port Agent must be considered a state officer, at least when performing the official duties provided by statute or Board regulation"**

The Court of Appeal decision in *Board of Pilot Commissioners* is not complicated. The Court made one determination as a matter of law (that the Port Agent is a state officer), and then it made determinations regarding questions of fact when it applied the Public Records Act to both the Port Agent and the Board and found that the evidence in the case did not compel disclosure of the records requested.

The sole question of law which was the subject of the Appeal, and which the Court reviewed de novo, was the issue of "Is the Port Agent a Public Officer." *Id.*, at 588-591. Its Holding on that question is as follows (at 591):

> At oral argument, both the Port Agent and the Board sought to distinguish the factual context of *Regal Stone*, and they contended that it would be inequitable to apply the doctrine in this setting.[17] (See *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422-423 [30 Cal.Rptr.3d 755, 115 P.3d 41] ["judicial estoppel is an equitable doctrine, and its application, even where all necessary elements are present, is discretionary" (italics omitted)]; *M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 463 [3 Cal.Rptr.3d 563] [judicial estoppel is an equitable doctrine to protect against fraud on the courts].) But in *Regal Stone*, as in this matter, the Port Agent's role in the assignment of pilots, and whether he acts in an official capacity when doing so, was pivotal. And McIsaac took the unequivocal position before the United States District Court that he was a state official, acting within the course and scope of that capacity, when assigning pilots. We fail to appreciate the inequity in refusing to allow the Port Agent to take an inconsistent position here. The Port Agent fails to explain why one should be permitted to assume the cloak of a state official when it provides protection but to then cast it off in the event it becomes burdensome. We find that the Port Agent must be considered a state officer, at least when performing the official duties provided by statute or Board regulation.[18]

*Board of Pilot Commissioners* thus identified that the touchstone for treatment of Port Agents as state officers is when they conduct public duties on behalf of the public, exclusive of any private capacity which exists on behalf of the SFBP. *Id.*, at 590. Likewise it is only when acting in a public capacity that Port Agents are to be afforded sovereign immunity as "officers or agents of the Board as a 'matter of law'" under *Regal Stone*.

This is why the holding in *Board of Pilot Commissioners* is not limited to the Public Records Act. The Port Agent's status as a "state officer" is to be generally applied because it exists to give him both a "cloak ... when it provides protection" – such as when he is protected by sovereign immunity per *Regal Stone* – but also bestow responsibilities upon him, even if "it becomes burdensome" – such as when he is responsible for Public Records requests.

This umbrella of public official status necessarily reaches other statutes which should be applied to a "state officer," including the disclosure and transparency obligations placed on state agencies under the Political Reform Act.

Indeed, given the Court of Appeal's description that "the Port Agent 'sometimes acts on behalf of the Bar Pilots, and sometimes on behalf of the Board,'" (*Id.*) it is even more important that the Board be vigilant in avoiding potential Conflicts of Interest which are obviously foreseeable from these dual roles. As the Court of Appeal observed, the basis for the imposition of public protections and responsibilities on the office of the Port Agent derives from a "focus on conduct performed on behalf of the Board, not on behalf of the Bar Pilots." *Id.*

**The Holding of *Board of Pilot Commissioners* Is Not "Dicta" and Applies to the Board**

The Board argues that it may ignore the *Board of Pilot Commissioners* holding that the Port Agent is a state officer: "From the Board's perspective, the Port Agent is not a 'state officer' for any purpose, and nothing in the Court of Appeal decision bars it from maintaining that position." Denial at 4. "The court's ultimate conclusion was that the Port Agent was not required to produce the records sought because the evidence established that the records were not 'public records.' (*Id.* at pp. 597-600.) This ruling rendered the court's discussion of the 'state officer' issue dicta." Opp. Brief, 5:26 – 6:4.

These characterizations misapply the holding of the case. First, the decision in *Board of Pilot Commissioners* has been published, and it is now settled California law for everyone – whether they were a party to the action or not. Secondly, it also applies to the Board as the lead appellant in this case. Central to the Board's position was its argument that the Port Agent was not a state officer as a matter of law. The Court of Appeal clearly considered the Board's arguments (in addition to the Port Agent's), and the Court made a definitive ruling on this very issue. No party sought further appeal from this ruling and as such all are barred from re-litigating the question on principles of res judicata and collateral estoppel.

The Board argues that because the Court applied the doctrine of "judicial estoppel" to the Port Agent (preventing him from arguing that he was not a public official in this case), that somehow the holding of *Board of Pilot Commissioners* is now inapplicable to the Board.[3] But the Board's arguments were not estopped – they were properly before the Court, they were

[3] These arguments rely on Footnote 17 as the basis for its attempts to distinguish the holding of this case from its application to the Board. However, the Court of Appeal itself differentiates its ruling as a question of law from its application of the facts to the Board in Footnote 17 since: "We discuss ***separately***, *post*, the Board's obligations under the CPRA." *Id.*, at 591. (emphasis added) Of course, while the legal status of the Port Agent is a question of law, the actual application of the CPRA to documents in his possession turns on questions of fact. Footnote 17 confirms that these questions of fact are "separate" and apart from the question of to whom the CPRA should be applied as a matter of law, regardless of the application of "judicial estoppel" to the Port Agent.

considered, and then summarized in detail by the Court of Appeal when it nonetheless found in favor of PMSA and determined that the Port Agent was a "state officer."

The Board likewise argues that the Court of Appeal's holding can be ignored with respect to their responsibilities and duties because "the Legislature has never given the Board the authority to make pilot assignments *or to direct them.* (Italics added.)" Opp. Brief, 9:12-13. But the Board omits from its recitation the very next sentence from the Court's ruling – which directly refutes its interpretation that the Court's holding may be ignored: "The Port Agent has always been allocated that responsibility, ***and we have already held that he serves as a state officer in doing so***." *Board of Pilot Commissioners*, at 599. (emphasis added)

**_Board of Pilot Commissioners_ Did Not Make Conclusions that Contradict its Holding**

The Board Denial and Opposition Brief both assert that *Board of Pilot Commissioners* actually came to conclusions during its inquiry which are contrary to its holding – alleging that, in fact, the ruling stands for the proposition that the Port Agent is not an "officer," "employee," or "member" of the agency. Opp. Brief, 3:15-16, 4:20-21, 6:11-12. Yet, in these citations the Court of Appeals in *Board of Pilot Commissioners* only includes a recitation of background "facts"[4] regarding the Board's regulations (at 583), and it also summarizes the Board's arguments for why it believed the Port Agent was not a state officer. *Id.,* at 588-589.

None of these recitations of background or arguments are explored in detail, analyzed or put forward as findings of the court. Taken together, if these were the Court's conclusions, then the Port Agent would not have fallen under any of the definitions of a "state agency" under the CPRA. These assertions also contradict the Court's ultimate holding at the end of its analysis that the Port Agent is indeed a "state officer" (*Id.* at 591) and the Court's recitation that it "held that he serves as a state officer." *Id.* at 599.

**The Board Confuses the Provision of Pilotage Services with Duties to Supervise Pilotage**

As discussed in detail in our letter of January 17th, the nature of the relationship between the Port Agent and the Board is not one of an arm's length licensing agency and a mere licensee. The Legislature established that the Port Agent shall "carry out the orders of the Board" and the Board has directed that when "carrying out his or her [public] duties, the Port Agent shall be primarily guided by the need for safety of persons, property, vessels and the marine environment." 7 CCR 218 (a), (c). These duties exist independent of any private duties or roles.

Both courts in *Regal Stone* and *Board of Pilot Commissioners* found, and the Port Agent has acknowledged, the individual serving as Port Agent may have "dual roles" but his public duties are "performed on behalf of the Board, not on behalf of the Bar Pilots." *Board*, at 590. [5]

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[4] Similar to the situation here, the "facts" which were in the record were based on the self-serving and untested declarations of the Port Agent and Executive Director, which also included numerous conclusory statements with respect to legal interpretation.

[5] The Board's Denial and Opposition Brief effectively rejects the argument that the Port Agent can have dual roles as it rejects any treatment of the Port Agent as anything other than merely a licensee with additional reporting requirements. Here they make the argument again that the Port Agent is just "a single point of contact." Opp. Brief,

The logic of *Regal Stone*[6] is as applicable to the Political Reform Act here just as it was to the Public Records Act. When the Port Agent acts on behalf of the public he is not simply providing pilot services to vessels under his license as a private individual – he is exercising exclusive authority and responsibilities by the State to regulate the activities of the other licensees. The execution of these duties places him in a "supervisory role ... on behalf of the Board." *Id.* at 12.

The Board misunderstands the importance of this "supervisory role ... on behalf of the Board." The supervision of pilots is a public duty which is "primarily guided by the need for safety of persons, property, vessels and the marine environment" per 7 CCR §218(c), not an obscure duty based on "the insupportable premise that the Board itself is providing pilotage services." Opp. Brief, 4:3-5, 7:17, 7:20-21. At no point in time in this Petition or Appeal has PMSA argued for the Port Agent to be considered a public official because he "provides pilotage services" or under the "assumption that it is government, not private business, that provides pilotage services" as the Board suggests. Opp. Br., 7:16-17, 7:20-21.

The sole issue before the FPPC here is whether the Port Agent is a public official when performing public duties as set out in state statute and Board-promulgated regulations and therefore covered by the Political Reform Act.

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9:16-19. The Board already made this argument in *Board of Pilot Commissioners* - that this office should be viewed solely as one of a "liaison" between the Board and the SFBP as a private association – and lost. (at 587):

> While the Port Agent in his capacity as president of Bar Pilots, may have many entirely private duties and serve as "liaison" with the Board, he also has responsibilities imposed by statute and by administrative regulation. The Port Agent is charged with responsibility "for the general supervision and management of all matters related to the business and *official duties* of pilots." (Harb. & Nav. Code §1130, subd. (d); Regs., § 218, subd. (b), italics added.) The Port Agent's enumerated duties include assigning pilots to vessels. (Regs., § 218, subd. (d)(1).)

[6] The Port Agent is not simply a "liaison" conducting private business affairs. *Regal Stone* (at 10:4-12:8):

> Moving Defendants [Port Agents] contend that they are state officials immune from suit. ... Plaintiffs [Regal Stone] focus on the [Port Agents]' role as Bar Pilots or Chief Executives of the Bar Pilots... suggest Port Agents function as "liaisons" between the Bar Pilots and the Board... [as] Port Agents of the Bar Pilots, not Port Agents of the Board.
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> The relevant statutes and regulations do not support Plaintiffs' contentions.
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> ...
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> However, it is also clear that the Port Agent sometimes acts on behalf of the Bar Pilots, and sometimes on behalf of the Board. ... The Port Agent "[r]epresents pilots before the Board and its committees." Id. §218(3). When doing so, the Port Agent is acting on behalf of the pilots. ... It is not inaccurate, therefore, for Plaintiffs to describe the Port Agent as a liaison between the Bar Pilots and the Board.
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> However, Plaintiff's allegations against [Port Agents] focus on conduct performed on behalf of the Board, not on behalf of the Bar Pilots. ... Plaintiffs essentially argue that [Port Agents] were negligent in their supervision of Cota, and in this supervisory role, [Port Agents] were acting on behalf of the Board. There is no need for discovery regarding this issue. The Court finds, as a matter of law, that [Port Agents] were acting as officers or agents of the Board when they engaged in the conduct complained of in Plaintiffs' FAC.

Since the Port Agent is considered a public official when he conducts his public duties, and because when he exercises a public duty to supervise pilots his role is one which is directed by the regulator and licensor of the business activity (the State), rather than in his private role as that of licensee and President of a private unincorporated association,[7] his potential conflicts in these two roles should be disclosed.

**Pilotage Statutes Confirm the State's Interest in Transparent and Accountable Regulation**

The Board's reliance on the original intent of the statutes of 1850, while interesting, does not reflect the current pilotage statutes which have evolved and been reformed over time. For example, after the allision of the COSCO BUSAN under the control of a state pilot with the Bay Bridge and its subsequent oil spill, the law surrounding pilotage was brought into additional focus. This incident spawned not only the litigation in *Regal Stone*, and its subsequent ruling that the Port Agent was protected by the 11th Amendment in federal court, but also new legislation which declared that "***providing transparency and accountability to the Board of Pilot Commissioners is in the public interest***..." SB 1627 (Chap. 567, Statutes of 2008), §1 (emphasis added). In conjunction with this declaration, the Legislature significantly amended Harb. & Nav. Code §1130 to require that "[t]he Port Agent shall be responsible for the general supervision and management of all matters related to the business and official duties of pilots licensed by the Board." *Id.*, §4.

**The Board's Approved Denial Cannot be Contradicted by Its Opposition Brief**

The Board's Opposition brief submits new arguments or different theories which are contrary to the Denial itself. For instance, with respect to the Board's treatment of the case of *Board of Pilot Commissioners* (2013) 218 Cal.App.4th 577 ("*Board of Pilot Commissioners*"), the Board's Denial labeled this case "inapposite" and claimed that it "has no application here." Denial, at 4. Board's Brief in Opposition takes a completely opposite view, and attempts to specifically rely on *Board of Pilot Commissioners* for a number of propositions which it says are directly applicable. Opp. Brief, 3:15-16, 4:13-14, 5:21, 6:11, 6:13, 9:7-8.

As between the formal Denial - which was approved by vote of the majority of the full membership of the Board of Pilot Commissioners upon reading the Petition, receiving staff's recommendation, and conducting a public hearing, and upon which this Appeal was filed – and the Board's Opposition Brief - submitted by Board counsel alone - the weight of the Board's voice falls squarely in the former. Thus, any arguments which are contradictory to the Denial in the Board's Opposition Brief should be ignored.

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[7] As noted in our previous correspondence, there is no requirement that the Port Agent also serve as President of the San Francisco Bar Pilots Association. While pilots have traditionally nominated the same individual to act as Port Agent and as President of their unincorporated association, the only salient question here remains whether the Port Agent, when fulfilling his public duties as such, is a public official. To the extent this practice creates blurred lines it is of the pilots' own private making, and as such a relationship also creates reasonably foreseeable conflicts, this practice does not establish any rational basis for exemption from the Act.

**The Board's Submitted Declarations of Fact Cannot Be Substituted for Legal Analysis**

With respect to the question of whether the Port Agent could be an "officer," "employee," or "member" under the Act, we note here that the Board attempts to make these legal determinations in part through the submission of declarations from its Executive Director and Port Agent which each state conclusions regarding the legal status of the Port Agent.[8] Declarations may properly attest to facts to be put forward in a matter, but these go further. To the extent that the Board attempts to include legal interpretations of the terms of the Political Reform Act in these declarations, they should be ignored by the FPPC.

In any event, while Code review is not a legal "opinion" sought of the FPPC, the question here regarding a position's inclusion in a Code is one which addresses prospective conflicts as a matter of law, not an application of the Code in an examination of actual conflicts or the facts surrounding a particular individual. In this regard, we surmise the FPPC will act in a manner which is consistent with its policy that "[t]he Commission does not act a finder of fact when it issues legal opinions." *In re Oglesby*, (1975) 1 FFPC Ops. 77, Fn. 6.

If at any time you have any additional questions or need more information from us in this or any other matter please do not hesitate to contact me at mjacob@pmsaship.com or (415) 352-0710 or to contact Diane Fishburn who is authorized in this Appeal to act on our behalf.

We appreciate your time and attention to this matter.

Sincerely,

Mike Jacob
Vice President & General Counsel

cc: Zackery Morazzini, General Counsel
Dennis Eagan, Board of Pilot Commissioners
Allen Garfinkle, Board of Pilot Commissioners
Diane Fishburn, Olson Hagel & Fishburn

[8] McIsaac Declaration, 2:22, 3:17-19; Garfinkle Declaration, 1:12-13, 1:22-23, 2:3-4.