

November 24, 1997

Jean McCrae  
Department of Fish and Wildlife  
2040 SE Marine Science Drive  
Newport, OR 97365

Dear Ms. McCrae:

This letter is in response to your correspondence, dated October 27, 1997, concerning the Developmental Fisheries Board chair's request for a clarification of his obligation as a member of the board regarding conflicts of interest.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION  
NO. 97S-032**

STATED FACTS: The Developmental Fisheries Board (DFB) was established by the legislature (ORS 506.450-506.465) to make recommendations to the Oregon Fish and Wildlife Commission (OFWC) as to what species should be considered developmental and their harvest program (number of permits, qualifications, restrictions, etc.). The DFB is appointed by the OFWC and is comprised of members of the fishing industry (harvesters and processors).

The current chair of the DFB holds the position representing general commercial fishing interests [ORS 506.465(2)(c)] and is mostly involved with the crab and black cod fisheries. The chair is interested in proposing to add a fishery for the mechanical harvest of bay clams to the developmental list of fisheries. If the proposal is approved, the chair would like to apply for a permit to operate a fishery. If the OFWC were to approve this fishery, there would be a lot of interest in the permits. Permits would very likely be issued through a lottery.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (7) of this section.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

ORS 244.020(7): Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

ORS 244.120: Methods of handling conflicts; generally; application to elected officials

or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

ORS 244.120(2): An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

ORS 506.465 Developmental Fisheries Board; members; qualifications; expenses.

(1) The Developmental Fisheries Board is established in the State Department of Fish and Wildlife. The board shall consist of members appointed by the commission after consultation with commercial fishing industry representatives to insure representation on the board of a broad range of fishing interests.

(2) The commission (OFWC) shall appoint:

(c) One member who represents commercial fishing interests in general.

QUESTION #1: Is the chair, or any member of the DFB who desires to make a proposal that they are personally interested in, required to step down or resign from the board or abstain from voting on the issue?

OPINION: Pursuant to the stated facts, ORS 506.465(2) requires the State Department of Fish and Wildlife to appoint members to the DFB that represent commercial fishing interests (harvesters and processors). Accordingly, those members are clearly exempt from actual conflict of interest or potential conflict of interest definitions in ORS 244.020(1) and ORS 244.020(7) and are not required to declare conflicts of interest pursuant to ORS 244.120(2). They may participate in all discussions and actions of the DFB.

The GSPC has interpreted the language to obtain financial gain in ORS 244.040(1)(a) to require the gain to be of a nature which is not expressly authorized by the industry representative exemption of ORS 244.020(1) and 244.020(7). If the statute were applied otherwise, it would be virtually impossible for persons serving in such a capacity to take

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official action on the board or commission on which they serve.

The purpose for publicly announcing conflicts of interest is to disclose such circumstances for the benefit of other voting members of the government body and the public at large. Although the chair, serving as an industry representative, would not be required to disclose a conflict of interest, proposing to add a fishery to the developmental list and then apply for a permit if the proposal is approved would give rise to an actual conflict of interest without the exemption. Accordingly, in order to avoid the appearance of a conflict of interest, GSPC staff suggests that the chair make a public disclosure before taking any action on the proposal.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.**

Sincerely,

L. Patrick Hearn  
Executive Director

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