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ATTACHMENT TO COMPLAINT OF CENTRAL COAST FISHERIES CONSERVATION COALITION

AGAINST

**GEORGE MICHAEL SUTTON, a member of THE CALIFORNIA FISH AND GAME
COMMISSION**

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

I. INTRODUCTION

On February 7, 2008, Commissioner Sutton, as a member of the California Fish and Game Commission (Commission) voted to adopt the Revised Draft Master Plan for Marine Protected Areas. His action in doing so was a violation of the Political Reform Act of 1974 (PRA) because it was reasonably foreseeable that the decision would have a material financial effect on his own income and on his employer and source of income, the Monterey Bay Aquarium Foundation (Aquarium). As Vice President and founding director of the Aquarium's Center For the Future of the Oceans, Commr. Sutton is paid a salary to influence policy and to support efforts to create a network of marine protected areas (MPAs) in California and offshore waters, including fully protected marine reserves. This is stated in unequivocal terms on the Aquarium's website.

The adoption of a Master Plan for MPAs is an integral and essential part of the process of establishing MPAs under the Marine Life Protection Act (MLPA) in that the Master Plan sets forth the procedure for adopting MPAs, including the roles to be played by various entities in the process, and also establishes the procedure for monitoring and review after MPAs have been adopted.

As a Commissioner, Sutton could have voted to accept the proposed Master Plan, modify it, or

reject it and adopt a completely different plan. However, as will be shown, the draft Master Plan was prepared with the assistance of millions of dollars donated by the David and Lucile Packard Foundation (Packard Foundation) which is also the source of millions of dollars in income to his employer, the Aquarium. The Aquarium was in fact founded by David and Lucile Packard. In addition, two of his bosses at the Aquarium (both Packard daughters) are trustees of the Packard Foundation.[1] Another of his bosses is a member of the board of Resources Legacy Fund Foundation (RLFF), the entity through which the Packard Foundation's donations were channeled in order to help pay for the MLPA process, including the drafting of the Master Plan.

Perhaps most disturbing of all, another of his Aquarium bosses, Meg Caldwell, as a member of the MLPA Blue Ribbon Task Force (BRTF), played a substantial role in the drafting of the Master Plan and recommended its adoption. Moreover, the draft Master Plan gave considerable additional power to the BRTF. Thus, in casting his vote on February 7, 2008, Commr. Sutton was in the position of deciding whether to reject the recommendations of his boss. Had Commr. Sutton voted to reject or substantially amend the draft Master Plan in any of several ways, such as creating a more onerous procedure for the establishment of marine reserves, limiting scientific extraction in marine reserves, requiring review of MPAs every year after the adoption of the Master Plan or removing MPAs previously adopted for the Central Coast, his vote would have (1) hindered the very policies which his employer pays him to achieve; (2) meant that a great deal of the money contributed by his employer's chief benefactor had been spent for nothing; (3) been contrary to the recommendation of his boss, Meg Caldwell. Any disinterested person looking at these facts would have to conclude that Commr. Sutton could not have kept his job at the Aquarium if he had taken such action. Furthermore, by casting his vote as he did, Commr. Sutton advanced the interests and policies of the Aquarium, thus enhancing its prestige and reputation for effectiveness in achieving its stated policies, thereby increasing its fundraising ability.

If Commr. Sutton was receiving a salary from a large fish-canning organization, if the organization's stated policy was to defeat efforts to establish MPAs, if his job at the organization required him to advance that policy, if the founder of his employer had contributed millions of dollars to pay for the process established to determine whether to adopt MPAs, where they should be located and what form they should take, if one of the fish-canning organization's directors was a member of the task force making recommendations regarding the adoption of a Master Plan she had helped draft, the cries for his resignation would be deafening. Objectively viewed, his actual situation is equally fraught with conflict.

Commr. Sutton also violated the PRA and the Commission's own conflict code by failing to disclose his employment with the Aquarium.

It is essential that the FPPC issue a Cease and Desist Order in this case, which, at a minimum, should direct Commr. Sutton to refrain from participating in or voting on any matter relating to MPAs, because he has a conflict of interest with regard to *any* decision which affects MPAs. CCFCC's position is that a Cease and Desist Order should cover any decision affecting fishing, because changes to fisheries regulations required in response to MPAs, would occur through existing systems established in fisheries management plans and other regulatory frameworks. This matter is urgent because the Commission is expected to vote in June 2009 on the adoption of MPAs for the North Central Coast, including the BRTF's recommended Preferred Alternative.

II. THE FACTS

A. The Fish and Game Commission

Commr. Sutton was appointed to the Commission by Governor Schwarzenegger on May 4, 2007. The Commission promulgates fishing regulations in California and the regulations are enforced

by the California Department of Fish and Game (Department). The Commission independently establishes the policies the Department must follow in administering programs and enforcing laws pertaining to fish, wildlife, and natural resources of the state. Among the Commission's responsibilities is the adoption of a Marine Life Protection Program pursuant to the Marine Life Protection Act (MLPA) (*Fish & Game Code* §§ 2850-2863), which requires California to reevaluate all existing marine protected areas[2] (MPAs) and potentially design new MPAs that function as a statewide network. (*F&G Code* §2853(b)) The Commission also has discretion as to which, if any, types of MPAs to adopt. Of the types of MPAs available, the most drastic, with the most devastating effects on recreational fishermen, are marine life reserves, in which all extractive activities, including the taking of marine species, are forbidden. (*F&G Code* §2852(d).) However, the regulations adopted pursuant to the MLPA make an exception for extraction for scientific purposes. (14 *Cal. Code Regs.* § 632 (a)(1)(A))

The MLPA also directs the Commission to “adopt a master plan that guides the adoption and implementation of the Marine Life Protection Program . . . and decisions regarding the siting of new MPAs and major modifications of existing MPAs.” (*F&G Code* § 2855(a))

For the purpose of the MLPA, the State is divided into five regions, with implementation to take place in stages. In April 2007 (before Commr. Sutton's appointment) the Commission adopted a final package of MPAs for the Central Coast, from Pigeon Point in San Mateo County to Point Conception in Santa Barbara County, and these went into effect on September 22, 2007. The Commission is currently considering adoption of MPAs proposed along the North Central Coast region (Phase II.) Phase III will apply to the South Coast.

B. Commr. Sutton's Employment

As vice president and founding director of the of the Aquarium's Center For the Future of the Oceans, Commr. Sutton receives a salary and benefits. He has been employed by the Aquarium since 2004. In 2007, his annual salary was \$152,750.00 together with benefits totaling \$32,608.00 (2007 Aquarium Federal Tax Return. (Exhibit B))[3] No doubt it is now considerably higher. The Aquarium is a 501(c)(3) nonprofit organization, and was founded in 1978 by David and Lucile Packard. The couple donated \$55 million to build the aquarium. Their daughter, Julie Packard, is executive director of the Aquarium. (Exhibit C, p.1) In 2008, the Packard Foundation gave \$1,650,000.00 to the Aquarium and \$37,300,000.00 to the Aquarium's sister organization, the Monterey Bay Aquarium Research Institute. (Exhibit D, p.3)

The Aquarium's website describes the function of its Center For the Future of The Oceans as follows: “Through the Center, we aim to ... influence policy and contribute to the protection of the oceans for future generations.” The Aquarium then lists “key areas that build on our current efforts and offer new ways to assure a future with healthy oceans.” First on the list of these “key areas” is:

“1. Marine Protected Areas: We support efforts to create a new network of marine protected areas in California and offshore waters, including fully protected marine reserves.” (Exhibit C, p.2). (Emphasis added.)

Thus, Commr. Sutton's function, through the Center For the Future of the Oceans, is to influence policy to create a new network of MPAs, including marine reserves, which, while prohibiting all fishing, will allow the Aquarium to continue to “extract” marine creatures and plants for its exhibits. As a Commissioner, he must vote whether to adopt new MPAs or keep the existing ones and, if he votes for MPAs, must vote on whether any or all of them should be marine reserves, as his employer desires. As expressed by the Aquarium, this policy applies to the entire State, not merely the Central Coast.

Commr. Sutton cannot contend that his employer's mission (and his duty, as vice president of the Center For the Future of the Oceans) is merely a broad-based policy of ocean conservation. While the Aquarium does phrase its mission in broad terms, its policy, as previously shown, is also specifically directed to the adoption of MPAs and the creation of marine reserves, and it attempts to influence policy in that specific area. Any doubts on this issue are dispelled upon reading the Aquarium's triumphant boast, in its 2007 tax return that "The aquarium and its Center for the Future of the Oceans accomplished great things in 2007. In September, after a four-year effort *in which we played a significant part*, California formally established the nation's largest network of marine protected areas on the central California coast" (Aquarium 2007 Federal tax return, general explanation attachment, Exhibit B, p.3) (Emphasis added.)

This policy has not changed since Commr. Sutton was appointed to the Commission, as shown by the Aquarium's statements currently on its website, quoted above. Furthermore, in its 2007 Annual Review, prepared after Commr. Sutton became a Commissioner, [4]the Aquarium refers to the adoption of the Central Coast MPA's and then vows:

"In the year ahead, we'll continue to work with colleagues to secure a network spanning the entire California coast, creating a national model for marine ecosystem protection". (Aquarium 2007 Annual Review p.3 (Exhibit C, p.4).)

Furthermore, the Aquarium's website lists, among the priorities of the Center for the Future of the Oceans, the following: "Create a Statewide Network of Marine Protected Areas" and exhorts the public: "Decision-makers like Governor Arnold Schwarzeneger and the Fish and Game Commission must hear that protecting marine wildlife and habitats are important to you and your family." (Emphasis added.)(Exhibit C, p.5)

C. A Web of Conflicts

Commr. Sutton's conflicts do not derive solely from the mere fact that he is a salaried employee of the Aquarium. He is in fact closely connected to many of the key players involved in the process of implementing the MLPA and these connections create conflicts under the PRA. These players, and their roles, are identified below and shown on the chart attached as Exhibit A. To fully understand the implications of Commr. Sutton's relationships, it is first necessary to briefly describe their involvement in the MLPA process.

The MLPA imposes various obligations on the Department including the preparation of a draft Master Plan for review by the Commission. (*F&G Code* §2855 (b)(1). To this end, the Department was required to convene a master plan team to advise and assist in the preparation of the master plan, or hire a contractor to assist in convening such a team. The Department, however, did not have the funds to comply with these responsibilities.

Enter RLFF, a private nonprofit organization, which arranged funding to implement the MLPA. This arrangement (The MLPA Initiative) was formalized in a memorandum of understanding (MOU) dated August 27, 2004, between the California Resources Agency (which supervises the Department), the Department, and RLFF under the terms of which RLFF agreed to use its best efforts to obtain, coordinate and administer philanthropic investments to fulfil the objectives of the MOU through December 31, 2006. (MOU, p.6) The original MOU covered the preparation of the draft Master Plan Framework and proposed network of MPAs for the Central Coast for submission to the Commission. (Phase I) The MOU was amended on January I, 2007 (Phase II) and amended and extended on July 25, 2008. (Phase III) with further commitments by RLFF to attempt to obtain

funding. Copies of the original and the 2007 MOU's and the 2008 Extension can be viewed on the Department's website (www.dfg.ca.gov) and will be provided on request.

It is important to note that RLFF did not provide its own funds, but instead raised money from other nonprofit organizations which were then funneled through RLFF to the Department. One of the organizations which provided funding was the Packard Foundation, which contributed \$6 million to RLFF, apparently all for the purpose of the MLPA Initiative, in 2007 and a further \$6 million in 2008. (Exhibit D, pp. 4-7) The Department's website lists the Packard Foundation as one of the funders of the MLPA Initiative. (www.dfg.ca.gov/mlpa/pdfs/scpublicworkshops22.pdf - 2008-08-08)

According to documents available on the Internet, Commr. Sutton's bosses at the Aquarium are very closely linked to the Packard Foundation and the RLFF.

- Aquarium trustee **Julie Packard** (who also serves on the board of the Monterey Bay Aquarium Research Institute) is vice chair of the Packard Foundation. (Exhibit C, p.1; Exhibit D, p.2)
- Her sister and fellow Aquarium trustee, **Susan Packard Orr**, also serves as chair of the Board of Trustees of the Packard Foundation. (Id.)
- Aquarium trustee **Gordon R. Smith** also serves on the governing board of RLFF. (Exhibit C, p.1; Exhibit E, p.2)
- Aquarium Trustee **Michael Mantell** is the founder of the Resources Law group, of which both RLFF and the Packard Foundation are clients. (Exhibit C, p.1; Exhibit F, pp.2,6)

The conflicts do not end there, however. The MOU requires the Secretary of the Agency to establish and appoint members of "a California MLPA Blue Ribbon Task Force" and to charge them with, inter alia, overseeing the Department's preparation of the draft Master Plan, and preparing a comprehensive strategy for long-term funding of planning, management and enforcement of MPA's. The Phase II MOU lists, among the BRTF's duties, the following: "guide the development of alternative MPA proposals, modify proposals presented to the Task Force by the Regional Stakeholders Group as the Task Force deems appropriate and craft alternative MPA proposals for presentation to the Fish and Game Commission" and "recommend to the Fish and Game Commission a range of alternative proposals and a preferred MPA alternative proposal for the next phase of the MLPA Initiative process." (MOU Phase II, Article 3.2.) This was formalized in the Master Plan which Commr. Sutton voted to adopt. During the MPA process for the Central Coast, the *Department* reviewed the alternative proposals for MPA's and recommended a preferred alternative to the Commission. Under the Master Plan, the BRTF selects the preferred alternative and forwards it, along with other alternatives, to the Commission, indicating which is its preferred alternative.

Commr. Sutton's boss, Meg Caldwell was a member of the BRTF for Phase I, and is a member of the BRTF for Phase II and Phase III. (Exhibit G, pp2,4; Exhibit C, p.1).

III. LEGAL ARGUMENT

CCFCC contends that by participating in and voting on the adoption of the Master Plan, Commr. Sutton violated the conflict of interest provisions of the Political Reform Act of 1974 (*Government Code*, sections 87100-87103) and that by failing to disclose his income from the Aquarium, he violated the Commission's conflict of interest code adopted pursuant to section 87300 et seq. of the *Government Code*. [5] CCFCC further contends that his participation in any Commission decision relating to MPAs or to the establishment of limitations on fishing is prohibited

under the PRA and that a cease and desist order should be issued restraining Commr. Sutton from participating in such decisions.

A. The Political Reform Act of 1974

The policies underlying the PRA include that “State and local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth” and that “[p]ublic officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them” (*Gov. Code* §§ 81001(a), (b).) In furtherance of these policies, Government Code Section 87100 provides:

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

Commr. Sutton is a “public official” as that term is defined in *Gov. Code* 82048(a) (“Public official’ means every member, officer, employee or consultant of a state or local government agency.”) A public official “makes a governmental decision” when the official, acting within the authority of his office or position, votes on a matter or obligates or commits his or her agency to any course of action. (*2 Cal Code Regs* §§18702.1(a) (1), (3)).

“Financial interest” is defined in *Gov. Code* section 87103, which provides that an official has such an interest if 1) it is reasonably foreseeable that the decision 2) will have a material financial effect which 4) is distinguishable from its effect on the public generally 3) upon the official, a member of his or her immediate family or on any of four specified pecuniary interests, one of which is:

“Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.” *Gov. Code* §87103(c)

Since Commr. Sutton is paid a salary by the Aquarium, the Aquarium is a “source of income” to him as specified in section 87103(c). This provision was similarly construed in *Witt v. Morrow* (1977) 70 Cal.App.3d 817, which upheld the disqualification of a city councilman from participating in decisions having a material financial effect on a trust of which the beneficiary was a nonprofit corporation which paid him a \$550 per month salary. The court determined that such a salary from the nonprofit corporation constituted a “source of income” within the meaning of section 87103(c). (70 Cal App 3d. at pp. 822-823)

Therefore, if it was reasonably foreseeable that the decision made by the Commission regarding the revised Master Plan would have a material financial effect on Commr. Sutton himself or on the Aquarium, he was prohibited from participating in the decision.

1. It Was Reasonably Foreseeable That The Decision Regarding Adoption of the Revised Master Plan Would Have a Material Financial Effect on Commr. Sutton’s Personal Finances

A governmental decision has an effect on the economic interest of an official in his personal finances if the decision will result in the income of the official increasing or decreasing. (*2 Cal. Code*

Regs. 18703.5) When a personal financial effect on the finances of the official or a member of the official's immediate family is involved, it is only required that the effect be at least \$250 in a 12-month period in order to be considered "material" and require the official to refrain from participating in the decision. (2 Cal. Code Regs. §§ 18705(a)(5), 18705.5(a).)

Whether Commr. Sutton in fact derived a financial benefit is irrelevant. As the court explained in *People v Honig* (1996) 48 Cal App 4th 289: "[A]n impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." [citation] Consequently, our conflict-of-interest statutes are concerned with what might have happened rather than merely what actually happened. . . . Their objective 'is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision" (*Id.* at p. 314)

In casting his vote on the revised Master Plan presented to the Commission on January 2008, Commr. Sutton was not limited to accepting or adopting the revised Master Plan. The court in *Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal. App. 4th 1183 made this clear:

"[T]he MLPA does not delegate power *to adopt rules* even to the [Resources] Agency or the [Department], let alone to any entity with which the [Department] may contract. . . . [T]he power to adopt a Marine Life Protection Program and a final master plan that guides the adoption and implementation of that Program is given by the MLPA *solely* to the Commission, an independent constitutional body consisting of five members appointed by the Governor and approved by the Senate, to which '[t]he Legislature may delegate . . . such powers relating to the protection and propagation of fish and game as the Legislature sees fit.' (Cal. Const., art. IV, § 20.) The Commission is not required to adopt the draft master plan proposed to it by the [Department], and may accept the proposed plan, modify it, or reject it and adopt a completely different plan." (158 Cal App 4th at p. 1207) (Italics in original; underlining added.)

It follows that Commr. Sutton could have voted to modify the draft Master Plan or to reject it and instead adopt a different plan establishing, for example, a more stringent procedure for the designation of marine reserves, or giving regional stakeholders groups (which includes fishermen and others dependant on the fishing industry), instead of the BRTF, the power to select and recommend a Preferred Alternative. As more fully argued in the next section, he could have voted to include a mechanism for revisions to MPAs whenever satisfactory evidence was presented of significant positive changes in populations of species or habitats or even of severe adverse socioeconomic effects. Of course, he took none of these actions because any of them would have been incompatible with his position as head of the Aquarium's Center for the Future of the Oceans and it was reasonably foreseeable that had he cast his vote in any of these or a myriad of other ways, his position at the Aquarium would have been untenable and his employment would have been terminated. Had he voted to make the establishment of MPAs or, in particular, marine reserves, more difficult, his actions would have been directly contrary to the stated policies of his employer, and directly contrary to the stated goals and priorities of the Aquarium's Center for the Future of the Oceans, policies which he is paid to achieve.[6]

Had he voted to amend the existing MPA for the Central Coast (which are included in the Master Plan), he would have been voting to gut or weaken a system of MPAs in which, his employer exults, the Center for the Future of the Oceans, under his stewardship, played a "key role" in having adopted. Had he voted to reject the draft Master Plan entirely, his vote would have meant that a large

part of the millions of dollars given by the Packard Foundation to pay for the preparation of the draft Master Plan, were spent for nothing.

Had he taken any of these actions, he would have been an embarrassment to the Aquarium. His bosses, Julie Packard and Susan Packard Orr, would have been displeased, to put it mildly. Another of his bosses, Meg Caldwell, having participated in the preparation of the draft Master Plan, would not have been happy. Nor would such a vote have been likely to endear him to Aquarium trustee Gordon R. Smith, who is on the board of RLFF, which solicited and provided the funding for the MLPA Initiative. Nor would Aquarium Trustee Michael Mantell have been overjoyed at such a slight to clients of the Resources Law Group.

Anyone looking at these facts would have to conclude that had he taken any of the actions described, Commr. Sutton could not have continued in his high-level and high-profile position at the Aquarium.

2. It Was Reasonably Foreseeable that Commr. Sutton's Decision Regarding The Revised Master Plan would have a Material Financial Effect on his Source of Income, the Aquarium.

FPPC regulations apply a special materiality standard when, as is the case here, a public official is paid by a private entity to accomplish some action that is within the official's public decision-making authority. When there is such a nexus between the official's public office and his duties to his employer, any financial effect is presumed material. The "nexus test" is set forth at 2 Cal. Code Regs. §18705.3(c):

"(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision." (Emphasis added.)

The word "any" is meant literally; thus, if it is reasonably foreseeable that a decision will have a financial effect, *even one penny's worth*, on the official's employer, the official cannot participate in the decision. (FPPC Advice Letter No. A-04-166 (Conner.)) The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced or hindered by what he or she does as a public official, it is presumed that the employer is benefiting from the actions of the employee in his or her official capacity. (See, FPPC Advice Letter No. A-00-161 (Yarnell.)) As explained previously, that is the case here.

According to the Aquarium's consolidated statements of activities and changes in net assets (available on its website), its income in 2007 (excluding investment income) was \$55,337,000, of which \$29,265,000 came from admissions, \$9,741,000 from contributions and grants and \$7,866,000 from memberships. (Exhibit C, p.6) The website states that the Aquarium has received more than four stars from CharityNavigator more than four years in a row. Memberships and donations are solicited not with a plea to help improve exhibits, but with the enticing entreaty, "Help save the Oceans for future generations. Become a member online." Donors, obviously, prefer to put their money where it will be used effectively and the Aquarium, as previously noted, points to its "key role" in having the Central Coast MPAs adopted and promises to continue this work "with your help." It was certainly reasonably foreseeable that votes damaging to the achievement of the Aquarium's stated policies, particularly when made by the vice president and founding director of the Center For the Future of the Oceans, would also damage the Aquarium's prestige and goodwill, leading to a loss of donations,

memberships and grants.

A financial interest can include increases in value derived from publicity, prestige and goodwill. For example, the Attorney General's Office, in one opinion, concluded that a city council could not enter into a contract with a law firm, of which a city council member was a partner, to represent the city in a lawsuit, even if the law firm would receive no fees from the city for the services and would agree to turn over to the city any attorney fees that might be awarded in the litigation. This conclusion was based, *inter alia*, upon a finding that the firm "might well reap prestige, publicity, and goodwill associated with any success in the lawsuit [and] would be in a better position to compete for future clients and to recruit qualified staff due to its enhanced goodwill". Thus, the court found, success in the litigation could be financially advantageous to the law firm and the potential for such marketing advantages, coupled with the potential losses should the lawsuit prove unsuccessful, would cause the council member to have a financial interest in the proposed contract preventing him from exercising "absolute loyalty and undivided allegiance." (86 Ops. Cal. Atty. Gen. 138.) Although the Opinion was rendered in the context of *Govt. Code* §1090, not the PRA, the same logic would apply in determining whether a decision has a material financial effect on a source of income.

The Master Plan which was adopted in February 2008 contained a provision that was of particular importance in ensuring that MPAs, once adopted, would remain in place for a very long time. *F & G Code* § 2861(a) provides:

"The commission shall, *annually until the master plan is adopted and thereafter at least every three years*, receive, consider, and promptly act upon petitions from any interested party, to add, delete, or modify MPAs, favoring those petitions that are compatible with the goals and guidelines of this chapter." (Emphasis added.)

This provision gave comfort to fishermen in that it caused them to believe they could petition for changes in MPAs at least every three years after adoption of the Master Plan. However, the Master Plan states:

" at a minimum, a triennial review of MPAs adopted by the Commission must occur. It is, however, likely that biological changes in response to the establishment of MPAs will take longer than three years to initially occur and to subsequently change (see discussion in Section 6). Additionally, it is important to consider monitoring on an ongoing basis, to ensure Commission concerns, scientific needs, and stakeholder input are being incorporated into ongoing planning. The following schedule of review and decision-making in regards to monitoring and adaptive management are recommended:

. . . .

- Triennial MPA proposal hearings should be scheduled by the Commission no later than three years subsequent to the completion of the statewide MLPA implementation process and every third year thereafter." (Emphasis added.) (Exhibit H)

The completion of the statewide MLPA implementation process is not scheduled to occur until 2011 at the earliest. Therefore, persons affected by the Central Coast MPAs will not be able to insist upon consideration of petitions for modification of the MPAS until 2014, seven years after they were adopted and six years after the Master Plan was adopted. The decision to adopt a Master Plan incorporating this provision was and is likely to have a material effect on the Aquarium's fundraising. It means that the Central Coast MPAs, which the Aquarium says it played a key role in having adopted, will remain in effect for at least seven years. The Commission could have voted to amend the draft Master Plan to allow review one year after the adoption of the Master Plan (which would have been consistent with of *F & G Code* § 2861(a)) and, in that event, fishermen and others would have been able to seek removal or modifications to MPAs in February of this year. Of course,

the Aquarium's boast of its achievement would incite scorn rather than admiration if the MPAs were so short-lived. In addition, such an outcome would mean that the Packard Foundation had received very little for its money. Thus, the decision regarding adoption of the Master Plan was also substantially likely to have a material financial effect (and certainly more than one penny)[7] on grants to the Aquarium from the Packard Foundation as well as donations from the public.

Finally, it may be observed that the greater the number of state marine reserves that are established prohibiting not merely all fishing but "other activities that upset the natural ecological functions of the area," the fewer opportunities the general public will have to observe ocean life, making it likely that they will repair in far greater numbers to a location - the Aquarium - where they can do so.

B. The Commission's Conflict of Interest Code

The Fish and Game Commission has adopted, as its conflict code, the standard conflict of interest code contained in 2 *Cal Code Regs* §18703, and has designated which employees are subject to the reporting requirements and the types of interests which must be disclosed. As a Commissioner, Commr. Sutton is in Disclosure Category I under the Commission's conflict of interest code. As such, he must disclose income from specified areas including:

"Mining firms and/or firms using the aquatic and/or terrestrial environment, including firms which hold interests in firms utilizing the aquatic and/or terrestrial environment (i.e salt mining, oil, nuclear power, logging, dredging, land development, etc.)" (Category 7)

Category 7 applies here because the Aquarium utilizes the aquatic environment by pumping in, circulating and discharging ocean salt water for its display tanks. This sea water also provides a "natural diet" for the creatures on display. In addition, the Aquarium "utilizes" the aquatic environment when it obtains plants and marine creatures from the ocean.[8] The Aquarium also offers (for a fee) sailing trips in Monterey Bay, which is certainly a use of the ocean. According to the Aquarium's website, visitors on these trips work alongside aquarium naturalists gathering plankton, observe sea-floor animals and learn about the intricate Monterey Bay ecosystem. (Exhibit C, p.8)

These sailing adventures, along with the Aquarium's advertised "for-fee" diving program which includes scuba equipment also come within category 5 ("Outdoor recreation, such as rental outlets, gear rental, guide services, dog rental, private charters, etc.")

Commr. Sutton has not disclosed his income from the Aquarium on the Forms 700 which were filed with the FPPC. He apparently believes it is not reportable. This conclusion is not only contrary to the terms of the Commission's disclosure requirements, it is also counter-intuitive. If he is correct, the anomalous and wholly unjust result is that while income from a small pet shop which sells fish and sea creatures is required to be disclosed, income from the Aquarium, which reaps enormous profits from putting such creatures on display and charging the public a fee to see them, can remain secret.

III. CONCLUSION

In *Coastside Fishing Club v. California Resources Agency, supra*, 158 Cal. App. 4th 1183, the Court based its decision that the MLPA Initiative was not an unconstitutional delegation of rule-making authority on its finding that there were adequate safeguards to prevent abuses of the powers delegated. The primary safeguard identified by the Court was the Fish and Game Commission's independence and its power to reject or change any Master Plan proposed by the Department and the

Department's contractors. This independence is seriously compromised by Commissioner Sutton's inclusion on the Commission.

However impressed one may be by the Aquarium's philanthropic efforts, its wealth and good deeds do not entitle the Aquarium to have someone who is on its payroll making decisions, as a public officer, on matters that will affect it financially. Never was the aphorism "no man can serve two masters" more apt.

Respectfully submitted.

Dated: May_ 2009

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By:

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1. A chart showing these relationships is attached as Exhibit A.
2. MPAs are separate geographic marine or estuarine areas that have been designated by law, administrative action, or voter initiative to protect or conserve marine life and habitat. (F&G Code §2852(c).)
3. As this document is voluminous, only the cover page and relevant extracts are attached. The complete document will be provided on request.
4. Page 8 of the 2007 Annual Review refers to the final passage of the Central Coast MPAs "in September". They were passed in September 2007.
5. CCFCC also believes that Commr. Sutton has violated the common law rule prohibiting conflicts of interest but as the FPPC only investigates violations of the PRA, that issue is not addressed herein.
6. "Forbidden financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of financial losses, as well as the prospect of pecuniary gain." (86 Ops.Cal.Atty.Gen. 138, 140 (2003))
7. Because the "Nexus" test applies, it is unnecessary to show that the materiality standards for sources of income that are nonprofit entities, set forth in 2 Cal Code Regs 18705.3(b)(2)(A)-(F), have been met. Nevertheless, CCFCC contends, that given the level of funds received by the Aquarium from fundraising, and from the Packard Foundation, the financial effect is substantially likely to exceed the \$ 200,000 established by 2 Cal Code Regs §18705.3 (b)(2)(C)(i) for an entity whose gross annual receipts are more than \$ 10,000,000, but less than or equal to \$ 100,000,000.
8. In the Q and A section of its website, the question "How are animals and plants collected and brought to the Aquarium?" is answered: "Divers catch some of our animals using hand nets or plastic bags. For other species, we may use hook and line, special trawl nets or traps. Commerical fishermen bring us some of our fishes, octopuses [sic] and other animals."

